79-3014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL ELECTION COMMISSION,

Plaintiff,

-against-

CENTRAL LONG ISLAND TAX REFORM IMMEDIATELY COMMITTEE, et al.,

Defendants.

BRIEF SUBMITTED BY DEFENDANTS
EDWARD COZZETTE AND CLITRIM

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STATUTORY PROVISIONS

2 U.S.C. Section 434(e) provides as follows:

(e) Contributions or expenditures by person other than political committee or candidate.
(1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year shall file with the Commission, on a form prepared by the Commission, a statement containing the information required of a person who makes a contribution in excess of $100 to a candidate or political committee and the information required of a candidate or political committee receiving such a contribution.
(2) Statements required by this subsection shall be filed on the dates on which reports by political committees are filed. Such statements shall include (A) the information required by subsection (b)(9), stated in a manner indicating whether the contribution or independent expenditure is in support of, or opposition to, the candidate; and (B) under penalty of perjury, a certification whether such independent expenditure is made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate. Any independent expenditure, including those described in subsection (b)(13), of $1,000 or more made after the 15th day, but more than 24 hours, before any election shall be reported within 24 hours of such independent expenditure.
(3) The Commission shall be responsible for expeditiously preparing indices which set forth, on a candidate-by-candidate basis, all expenditures separately, including those reported under subsection (b)(13), made with respect to each candidate, as reported under this subsection, and for periodically issuing such indices on a timely pre-election basis.

2 U.S.C. Section 441d provides as follows:

Publication or distribution of political statements.

> Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication
> (1) if authorized by a candidate, his authorized political committees or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication has been authorized; or
> (2) if not authorized by a candidate, his authorized political committees, or their agents, shall clearly and conspicuously, in accordance with regulations prescribed by the Commission, state that the communication is not authorized by any candidate, and state the name of the person who made or financed the expenditure for the communication, including, in the case of a political committee, the name of any affiliated or connected organization required to be disclosed under section 433(b)(2).

ISSUES PRESENTED FOR REVIEW

I. The United States District Court for the Eastern District of New York, pursuant to the provisions of 2 U.S.C. Section 437h, certified the following constitutional questions to this Court:

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

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

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

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

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

6. Are the enforcement attempts by the FEC unconstitutional:

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

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

(c) Generally, because there are inadequate statutory standards to guide or limit the FEC in commencing an investigation whose effect may be to chill defendants' and intervenor's First Amendment rights? */

*/ Although the matters are encompassed within the broad questions phrased by the District Court, particularly issues 1 and 2, the defendants CLITRIM and Cozzette requested the District Court to certify specific issues of overbreadth and as-applied invalidity of the two relevant statutory provisions. In a proposed Statement of Constitutional Issues, submitted prior to the evidentiary hearing, the defendants identified, inter alia, the following constitutional issues:

> "4. Whether the application of Sections 434(e) and 441d to groups or individuals engaged in controversial advocacy violates the constitutional right of associational privacy.
>
> "5. Whether 2 U.S.C. Section 434(e) is facially unconstitutional because the monetary threshholds that trigger the reporting and disclosure requirements are so low that they lack a substantial connection with any compelling governmental interests.
>
> "6. Whether 2 U.S.C. Section 441d is facially unconstitutional because it contains no monetary threshhold whatsoever to trigger its applicability and thereby lacks a substantial connection to any compelling governmental interest."

II. In addition, the District Court identified the following two statutory issues presented by this case:

1. Does the Fall, 1976 CLITRIM bulletin, "expressly advocate" the election or defeat of Congressman Ambro?

2. Are TRIM bulletins exempt from compliance with the FECA by 2 U.S.C. §431 (f)(4) or 11 CFR. §100.7(b)(3) [which exempt from statutory coverage "any news story, commentary, or editorial" of a "broadcasting station, newspaper, magazine or other publication."]?*/

*/ Although the District Court felt constrained by this Court's orders not to decide those statutory issues, the District stated that, were it empowered to determine the issue, "it would hold that the Fall 1976 CLITRIM bulletin did not expressly advocate Congressman Ambro's election or defeat."

STATEMENT OF THE CASE

This case is before the Court pursuant to the extraordinary statutory judicial review provisions of 2 U.S.C. Section 437h and following certification, fact-finding, and identification of constitutional and statutory issues by the United States District Court for the Eastern District of New York (Pratt, J.).

On August 1, 1978 the Federal Election Commission (FEC) filed a complaint against three defendants: Central Long Island Tax Reform Immediately Committee ("CLITRIM", an unincorporated association now defunct), Edward Cozzette (the one-time chairman of CLITRIM), and Tax Reform Immediately ("TRIM", the national organization of which local TRIM committees, such as CLITRIM, are a part).

The complaint alleged that a TRIM Bulletin, distributed by CLITRIM in October 1976, and containing a chart describing Congressman Jerome Ambro's votes on certain issues, constituted "a communication expressly advocating the election or defeat of a clearly identified candidate." The complaint further alleged that the defendants had violated the Federal Election Campaign Act (FECA), specifically 2 USC §§441d and 434(e) and 11 CFR. Part 109, because the bulletin cost more than one hundred dollars, because it did not contain a statement of authorization or non-authorization, and because the defendants did not file reports relating to expenditures. The FEC's complaint

sought both civil penalties of up to $5,000 against each of the defendants and declaratory and injunctive relief. */

On November 6, 1978 TRIM answered the complaint, denying the FEC's charges, and counterclaiming that the FECA was unconstitutional on its face and as applied. Defendants CLITRIM and Cozzette did not answer the complaint. Instead, by motion filed December 6, 1978, they moved to dismiss the complaint or for summary judgment. That motion was based on a number of procedural and substantive grounds. The procedural claims included insufficiency of service of process on CLITRIM; lack of CLITRIM's capacity to be sued; failure of personal jurisdiction over CLITRIM; and failure to state a claim for injunctive relief in that CLITRIM was defunct at the time suit was filed. The substantive bases for defendant's motion were the failure to state a claim in that the bulletin did not come within the FECA's statutory regulation of communications "expressly advocating" the election or defeat of a federal candidate; and violation of First Amendment principles if the bulletin were deemed to be within the reach of the statute. (CLITRIM App., ____).

John Robbins, director of TRIM, filed a petition for leave to intervene on December 26, 1978. Robbins sought the same declaratory relief against the allegedly

*/ The claim for civil penalties was dropped by the FEC pursuant to a stipulation filed on May 15, 1979.

unconstitutional statute as was set forth in TRIM's counterclaim.

After the filing of CLITRIM's motion to dismiss and/or for summary judgment and Robbins' motion to intervene, the District Court, sua sponte, and pursuant to 2 USC §437h, certified to this Court certain questions concerning the constitutionality of relevant provisions of the FECA. Decision on CLITRIM's motion to dismiss or for summary judgment was reserved by the District Court pending action by this Court.

There ensued a series of procedural motions, some addressed to the District Court and some to this Court. They culminated in orders by this Court dated, respectively, April 23, 1979 and May 2, 1979, granting Robbins' motion to intervene as a counterclaiming defendant and noting that the Circuit Court's jurisdiction "is properly invoked pursuant to 2 USC §437h by Robbins' counterclaim." Determining that it therefore had jurisdiction to decide the constitutional challenges asserted in this case, this Court remanded the proceedings to the District Court to:

> (1) Identify constitutional and fact issues raised in this case.
>
> (2) Direct the entrance of stipulations and take whatever evidence the court finds necessary to a decision of those issues.
>
> (3) Make findings of fact.
>
> (4) Certify to this court, as soon as reasonably possible, the record and constitutional questions arising therefrom. . . . (TRIM App.103).

Following this Court's remand, discovery was conducted by the parties, and several conferences were held among Court and counsel to expedite discovery, encourage stipulations and prepare for a hearing on those evidentiary matters that could not be stipulated. On June 25, 26, 27, and 28, 1979, the District Court heard testimony and took evidence on the various issues in the case. Pre-trial and post-trial memoranda both on the law and the facts, together with proposed findings of fact and statements of the constitutional issues presented, were submitted by all parties.

Although defendants CLITRIM and Cozzette have yet to answer the complaint, they participated in the hearings and periodically renewed their pending motions to dismiss or for summary judgment. The District Court has adhered to the view that, following its January 25, 1979 Order certifying constitutional issues pursuant to section 437h, the action was no longer pending in that Court, but had become a Court of Appeals case, albeit subsequently remanded to the District Court only for the specific purposes set forth in this Court's order of April 23, 1979. Consequently, no ruling has yet been made on CLITRIM's or Cozzette's motions for judgment, which involve questions of statutory interpretation that were not included in this Court's remand. The District Court felt restrained from ruling on those statutory questions because of the nature of the procedural framework established by Section 437h and this Court's remand orders pursuant thereto. The District Court did indicate

however, that in order to assist this Court's resolution of any statutory interpretation questions that it might reach, that the Court would express its views on such issues. The Court did so by stating that, in its view, the October, 1976 TRIM bulletin at issue in this case did not constitute a communication "expressly advocating" the election or defeat of Congressman Ambro. Accordingly, the District Court further indicated that, were it free to dispose of this case in the normal manner, it would have dismissed the entire FEC enforcement proceeding.

Finally, on August 22, 1979, in compliance with this Court's orders, the District Court identified the constitutional--and statutory--issues presented, made elaborate findings of fact, assembled the extensive record, and certified the entire matter to this Court for its decision.

STATEMENT OF FACTS

A. Mr. Cozzette and CLITRIM

Defendant Edward Cozzette, a long-time resident of Long Island, resides in Huntington Station, New York, and is employed as an engineer. (FF, IV, ¶1, TRIM App., 126)*/ Mr. Cozzette is a political conservative who believes that it is necessary to reduce "Big Government" and government spending and thereby lower taxes. To that end, over the past several years, Mr. Cozzette has engaged in a variety of First Amendment activity with respect to such issues. He has joined organizations seeking to reduce government spending and to lower taxes, associated with other individuals sharing those views, and he has distributed leaflets and other materials dealing with such issues. (FF, IV, ¶2, TRIM App., 126).

In the summer of 1976, he and a handful of other like-minded individuals, who wished to do more to express their views on such issues, agreed to form a committee known as the Central Long Island Tax Reform Immediately Committee (hereinafter "CLITRIM") CLITRIM was to be a non-profit, unincorporated association whose purpose was to inform and educate residents of Central Long Island of the need for lowering taxes through less government.

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*/ The designation FF, hereinafter, refers to Judge Pratt's Findings of Fact. Those findings are organized by Sections, which are designated by roman numerals, and by paragraphs, which are designated by arabic numerals.

The designation "TRIM App.___" refers to the Appendix prepared by the co-defendant, TRIM, which contains the District Court's Findings of Fact. The designation "CLITRIM App.___" refers to the Separate Appendix submitted by the defendants, CLITRIM and Cozzette and containing, inter alia, the bulk of the exhibits tendered by these defendants and admitted into evidence.

(FF, IV, ¶¶ 3, 5, 11, TRIM App., 126). Mr. Cozzette learned about the possibility of forming CLITRIM by reading an announcement that appeared in a late 1975 issue of the monthly bulletin of the John Birch Society, of which he had been a member for seven years. The announcement revealed that a nationwide non-partisan organization entitled TRIM ("Tax Reform Immediately") was sponsoring and assisting the formation of local committees, at a grass-roots level. Mr. Cozzette understood that the TRIM organization was affiliated with the John Birch Society, which he also understood, based upon its literature and policies, to be a wholly non-partisan, educational organization that never supported or opposed candidates for elective office. (FF, IV, ¶¶ 4, 5, 6, TRIM App., 126-127).

Accordingly, CLITRIM was formally organized in August 1976, and to achieve its issue-oriented educational objectives it planned to hold meetings, show films, present speakers, solicit members, distribute literature and raise funds for these activities from other members of the public. (FF, IV, ¶¶ 10, 11, TRIM App., 127).

Among the items of literature the organization intended to distribute was a leaflet entitled the TRIM Bulletin. This leaflet would typically contain general discussion and information about the evils of big government and would include as part of this discussion a description of the voting record of the local congressman, who in this instance was Jerome Ambro, with respect to specific legislative issues involving government spending.

With his associates, Mr. Cozzette envisioned that CLITRIM would function on a year-round basis and that it would devote approximately 25% of its time and activity to preparation and circulation of the Bulletin. The bulk of the organization's activities, however, were to involve other forms of public education, membership solicitation, and fundraising. (FF, IV, ¶¶ 12, 13, TRIM App., 128).

During its existence, the CLITRIM group met approximately five times, on a monthly basis, and held at least one public meeting at the Huntington Library, where a film on the dangers of higher taxes was shown and a talk on that issue was given. The public meeting was held on November 11, 1976, after the 1976 general election, and copies of the TRIM Bulletin and other literature were available and distributed at that meeting. The guest speaker was Lee Hayes, an employee of TRIM. Approximately three or four members of the public attended. The meeting at the Library was the last formal meeting the Committee held. (FF, IV, ¶14, TRIM App., 128). The Committee went out of existence in the spring of 1977.

In approximately September, 1976 the members of the organization, numbering five, raised approximately $300, of which $135 was used to pay for the printing of the Fall, 1976 issue of the TRIM Bulletin. Each of the five members contributed $20 toward that amount.

General research and writing of the Bulletin was done by the national office of the TRIM organization. The local committee received from TRIM camera-ready copy of the TRIM

Bulletin, as well as information indicating the voting record of all members of Congress on twenty-five economic and tax issues. The local committee members then determined Representative Ambro's record and prepared that information for inclusion in the Bulletin. In addition, the CLITRIM members secured the address of the Congressman's district offices and his photograph to add to the Bulletin. Finally, CLITRIM included information about itself, its members, sponsors, and mailing address. It then arranged and paid to have the Bulletin printed. (FF, IV ¶¶16, 17, TRIM App., 129-130).

The Fall 1976 issue of the TRIM Bulletin (see Exhibit A to Ct. Exhibit 1, CLITRIM App., A22), consisted of one sheet divided into four pages. The lead article in the pamphlet was entitled "Put Big Government on a Diet!" The inside portion of the leaflet comprised two components. The bulk of the text set forth and described TRIM's views on specific economic issues under the categories "Government Regulation," "Government Jobs," "Welfare," "Revenue Sharing," "Foreign Aid," "Defense," "Congressional Pay Raises" and "Federal Debt Increase." The other portion of the inside text, under the general title, "How does your representative vote?" stated and described the legislative voting record of their Congressman, Jerome A. Ambro, of the Third Congressional District on Long Island, on those economic and tax issues. This "box score" listed and identified twenty-five legislative measures, stated how much each measure would cost the average household and then listed the Congressman's votes under two headings: "Voted for Lower Taxes and Less Government, " or, "Voted for Higher Taxes and More Government." Twenty-one of the twenty-four votes reported cast by

Congressman Ambro were characterized as for "Higher Taxes and More Government," and three were characterized as for "Lower Taxes and Less Government." The inside page also contained a photograph of Congressman Ambro, and the addresses and telephone numbers of his two district offices. The leaflet urged citizens to keep informed about how their Representative voted on such issues, and to communicate with their Congressman and let him know how they felt about his votes on those issues. (FF, IV, ¶19, TRIM App., 130).

The leaflet was wholly non-partisan. It did not refer to any federal election, did not mention Congressman Ambro's political affiliation or his candidacy for elective office, and did not advocate in any express or implied terms the election or defeat of Congressman Ambro or any other candidate for federal offices. Finally, the Bulletin listed the names of the officers and sponsors of the Committee and its mailing address, and invited members of the public to join CLITRIM. (FF, IV ¶¶20, 21, TRIM App., 131).

The CLITRIM committee printed approximately five to ten thousand copies of the Fall 1976 Bulletin. At a Committee meeting, the leaflets were passed out to five or six CLITRIM members. In October 1976, the members individually handed out the leaflets at different locations on approximately five or six occasions. No other literature was handed out with the Bulletin. On one occasion, leaflets were handed out at the Long Island Railroad Station in Huntington Station. On one or two occasions, leaflets were handed out at shopping center parking lots. On another occasion, two Committee members handed out the leaflets at a public meeting at which Congressman Ambro was speaking. On one or two occasions, leaflets were handed out to fellow employees

at work. Mr. Cozzette mailed a copy of the leaflet to Congressman Ambro. The distribution of the Bulletin was met with a general public disinterest and lack of enthusiasm, and the leafletting was discontinued. (FF, IV, ¶¶22, 24; TRIM App., 131).

Thereafter, in the Spring of 1977, the CLITRIM organization was disbanded for lack of interest by members of the public. (FF, IV, ¶¶25, 27; TRIM App., 132-134) (Attachment A-1 to Ct. Ex. 1; CLITRIM App., A26).

Throughout this period of time, Mr. Cozzette had not ever heard of the requirements of the Federal Election Campaign Act or of the Federal Election Commission. (FF, VI, ¶1; TRIM App. 146) That was soon to change.

In June 1977, Mr. Cozzette received a formal letter from the General Counsel of the Federal Election Commission (FEC). That letter notified him that the Commission had "found reason to believe that the chart rating Representative Ambro's votes on certain issues may constitute an expenditure expressly advocating the defeat of a clearly identified candidate, in violation" of the Federal Election Campaign Act. The letter then set forth eleven detailed interrogatories, which Mr. Cozzette was instructed to answer under oath. (FF, VI ¶2; Ex. B to Ct. Ex. 1; TRIM App., 146; CLITRIM App.,A29)

Mr. Cozzette promptly wrote to the Commission stating that the Bulletin "contains nothing that could be construed to support or oppose any candidate," that the text of the leaflet was nothing more than a "restatement of conservative economics," and that he had in no way violated federal election law. (FF, VI ¶3; Ex.C to Ct.Ex.1; TRIM App., 147; CLITRIM App., A32). By letter dated July 14, 1977, the Commission advised Cozzette that the information he had provided was insufficient to close the matter and it again requested that he provide specific factual answers in affidavit form to the questions posed by the Commission. (FF, VI, ¶4; Ex.C-1 to Ct.Ex.1; TRIM App., 147; CLITRIM App., A33).

On August 23, 1977, the Commission's General Counsel again wrote to Mr. Cozzette informing him that it had found "reasonable cause to believe" that the Committee had violated the law. The letter also instructed Mr. Cozzette that the Commission had issued an order requiring him to answer the previous interrogatories. (FF, VI, ¶5; Ex.D to Ct.Ex.1; TRIM App., 147; CLITRIM App., A34) Mr. Cozzette responded, answering the proposed questions under protest, and objecting that the Commission's actions violated his rights under the First and Fifth Amendments. (FF, VI, ¶6; Ex.D-1 to Ct.Ex.1; TRIM App., 147; CLITRIM App., A35) Undaunted, the Commission pressed forward and by letter of October 23, 1977, Mr. Cozzette was further informed that the FEC had determined that it had "reasonable cause to believe" that CLITRIM had additionally violated the Act's reporting requirement, 2 U.S.C. §434(e), on the ground that since the leaflet "contained an analysis of Representative Ambro's voting record," it constituted "a communication which expressly advocated his defeat." Enclosed with that letter was a

conciliation agreement that the FEC proposed Mr. Cozzette enter. The agreement required him, inter alia, to: (1) admit that he had violated the law, (2) agree to testify in any proceeding at the Commission's behest, (3) agree to comply in all respects with the Act, and (4) pay a civil penalty of $100. (FF, VI, ¶7; Ex. E to Ct. Ex. 1; TRIM App., 148; CLITRIM App., A36). Mr. Cozzette viewed this conciliation agreement as the equivalent of a "confession" that he was being asked to sign. (FF, VI, ¶12, TRIM App., 149).

By letter of November 23, 1977, Mr. Cozzette, now represented by counsel, detailed his objections to the FEC's threatened enforcement on three grounds: (1) that the Bulletin was protected by the First Amendment against regulation or punishment; (2) that the content of the leaflet placed it wholly beyond the scope of the cited statutory provisions; and (3) since the purpose of Congress in enacting the Act was to deal with the abuses of political corruption associated with Watergate, enforcement of the Act against Mr. Cozzette was wholly inappropriate. The FEC's General Counsel's response, by letter dated January 27, 1978, rejected these objections, stating that the FEC "not only was justified but compelled" to seek compliance in this case. Thereafter, this suit was filed in August, 1978. (FF, VI, ¶¶8, 9; Exs. F and G to Ct. Ex. 1; TRIM App., 148) (CLITRIM App., A43)

The experience of being accused by a government agency of wrongdoing, as a result of engaging in the classic speech activity at issue here, has been a frightening and disillusioning one for Mr. Cozzette. It has deeply discouraged him from engaging in such activity in the future. As the District Court found,

"even if he is cleared of all charges, the experience of being sued by the government for what he did has discouraged him from any similar activity." (FF, VI, ¶15; TRIM App., 149)

B. The John Birch Society and TRIM

The record demonstrates and the District Court found that the John Birch Society is a non-partisan, issue-oriented, educational organization and that TRIM is a committee established by the Society operating through local affiliated committees across the country. The District Court further found that association with the John Birch Society is controversial in many parts of the country, that members have been the targets of harassment, and that a significant number of persons refrai from publicly identifying themselves with the Society and TRIM. (FF, I, ¶¶7-14; TRIM App., 110-112)

C. Non-Partisan, Issue-Oriented Groups Generally

The record powerfully demonstrates that the leafletting activity undertaken by CLITRIM, which is the target of the instant action by the FEC, is similar to educational grass-roots activity commonly undertaken by a broad range of organizations including Public Citizen, the United Church of Christ, the American Civil Liberties Union, and the U.S. Chamber of Commerce, all of whom publish and disseminate congressional voting records. Extensive evidence of such similar First Amendment activity was introduced at the hearing before Judge Pratt and he made extensive specific findings on this subject. His ultimate conclusion was that FECA regulation would impede and deter such activity:

> All such activity represents traditional non-partisan speech where no express advocacy of particular electoral candidates is undertaken. Moreover, such expression constitutes a long-standing form of public disclosure [discourse]

> in this country which substantially advances the exchange of ideas about social and political issues. Such expression would be significantly impeded and deterred if the Federal Election Campaign Act were held to impose regulatory restrictions upon such activity. (FF, VII, subsection G; TRIM App., 179)

1. The ACLU.

For example, the ACLU and its New York State affiliate, the NYCLU, are non-partisan, issue-oriented organizations, barred by the ACLU Constitution from endorsing or opposing any candidate for public office. Nevertheless, in their organizational newsletters, they periodically rate the civil liberties performance of elected officials (FF, VII, A, ¶¶2, 8; TRIM App., 151). The purpose of publishing congressional voting records on civil liberties issues it not to influence the election or defeat of any specific candidate. Rather, such activities are intended to inform and educate, although the information may influence citizens' attitudes toward elected officials and thus influence the way citizens vote in an election.

Publication of such information also influences the actions of legislators. (FF, VII A, ¶12; TRIM App.153). The use of "box score" or voting records information by issue-oriented groups enhances the ability of those groups to influence the official conduct of the elected officials whose record is rated. The reason for this is that such officials are more responsive to issue group arguments if the officials know that their voting records will be set forth by the issue group at the conclusion of the legislative session. (FF, VII A, ¶22; TRIM App.156). Moreover, the use of "box scores" or voting records by issue-oriented groups such as the ACLU enhances the ability

of these groups to inject their issues into political campaigns, at the time when public interest in those issues is most intense, and increases the likelihood that the candidates and the public will focus upon these issues. (FF, VII, A ¶¶ 21, 22; TRIM App.,156).

Accordingly, over the years, the ACLU has published a number of newspaper advertisements, articles and reports rating and evaluating the performance of elected public officials:

(a) In 1971, it published two full-page advertisements in The New York Times, sharply critical of the activities of former Vice President Nelson Rockefeller, the then-Governor of New York, and the state legislature. (Exhibits AA and BB to Ct. Ex. 1; CLITRIM App., A56-A58).

(b) In October, 1972--a month before the nationwide federal elections--it published an advertisement in The New York Times sharply criticizing President Nixon's "anti-busing" stand. The advertisement contained an "Honor Roll" of approximately 100 members of Congress who had opposed the President on that issue, and urged public support for those Representatives. (Exhibit CC to Ct. Ex. 1; CLITRIM App., A59.

In 1973, in litigation arising out of that advertisement, a three-judge court ruled that the ACLU and NYCLU could not, on the basis of such advertisements, be subjected to FECA regulation. (ACLU v. Jennings, 366 F. Supp. 1041, 1057).

(c) In the fall of 1973, the ACLU sponsored a series of full-page advertisements in The New York Times urging the impeachment of President Nixon, for violation of civil liberties. (Exhibit DD to Ct. Ex. 1; CLITRIM App.,A61).

(d) In September, 1974, the ACLU published a similar advertisement in The New York Times sharply criticizing President Ford's pardon of Richard Nixon, characterizing it as a "sneak attack" on the Constitution. (Exhibit EE to Ct. Ex. 1; CLITRIM App.,A64).

(e) The New York affiliate of the ACLU periodically publishes a newsletter in which it discusses the actions of federal and state legislative leaders on key civil liberties issues, lists the voting

records of all legislators on those issues and contains a separate "Honor Roll" of those legislators who scored highest. (Exhibits FF, GG to Ct. Ex. 1; CLITRIM App. A65).

(f) The ACLU Washington legislative office periodically publishes a newsletter, Civil Liberties Alert, containing a "box score" of the civil rights and civil liberties voting records of all members of Congress, indicating whether they voted "in favor of" or "contrary to" the ACLU position on specific proposed legislation involving selected issues. (Exhibit HH to Ct. Ex. 1; CLITRIM App., A75).

All such activities cost in excess of $100.

If the ACLU and its affiliates had to comply with the requirements imposed by 2 U.S.C. Section 434(e), because of their "box scores" on elected officials, they could not do so because the ACLU is a controversial organization, which has a firm policy against disclosure of members and contributors. Moreover, compliance with such requirements would also pose severe record-keeping and accounting burdens upon the ACLU. (VII A, ¶8; TRIM App., 152). As a consequence, the ACLU would be compelled to refrain from engaging in any activities which would bring those requirements into effect. (VII A, ¶17; VII B, ¶¶6, 7; TRIM App., 155) */

In Mr. Glasser's expert opinion, as a general matter, the burden of record-keeping, reporting and certification and the

*/ Ira Glasser, Executive Director of the ACLU, testified that the ACLU could not avoid these problems by setting up a political fund or "political committee" in order to continue to engage in its voting records, "box score" activity and similar activity. Establishing such an entity would violate the ACLU's Constitution and by-laws which prohibit partisan activity, would seriously jeopardize the ACLU's tax status and would undermine the ACLU's reputation and standing as a non-partisan group. (FF, VII, A ¶24; TRIM App., 157).

prospect of compliance with disclosure requirements of 2 USC Sections 434(e) and 441d would deter and chill members of volunteer committees and chapters from engaging in activity which would bring those requirements into play, particularly in the case of unpopular, controversial or "pariah" organizations. People involved in grass roots activity do not want to register and file forms with the government or disclose their names to the government in order to engage in free speech activity because of principle, fear, or inconvenience. (FF,VII, A, ¶¶13, 15, 16; TRIM, App., 153-154).

The ACLU has gone to court on three occasions to resist the possibility of such disclosure of the names of its members and contributors which might be required by campaign reform legislation. ACLU v. Jennings, 366 F. Supp. 1041 (D.D.C. 1973); Buckley v. Valeo, 519 F. 2d 821 (D.C. Cir. 1975) (en banc); NYCLU v. Acito, 459 F. Supp. 75 (S.D.N.Y. 1978). The ACLU, which has repeatedly litigated to insure that campaign finance controls will not reach non-partisan, issue-oriented groups, now considers itself at risk of enforcement by virtue of the FEC position in this case. (FF, VII, A, ¶¶26, 27; TRIM App., 159).

2. The Chamber of Commerce

Non-partisan, educational activity, in the form of rating of voting records, is also undertaken by the U.S. Chamber of Commerce. In 1976, the FEC informed the Chamber that public distribution of a booklet entitled "How They Voted" to non-members of the Chamber would violate the ban on corporate political activity contained in 2 U.S.C. Section 441b. (Ex. LL, to Ct. Ex. 1, FEC Opinion Request No. O/R 790 CLITRIM

App.,A200). The booklet "rated" the votes of all members of Congress, whether or not they were candidates for re-election, listing the votes as either "right" or "wrong" on a number of major policy issues, in accordance with the Chamber's position on such issues. The booklet made no reference to any campaigns or federal elections, and did not advocate the election or defeat of any candidate. (FF, VII C, ¶¶ 1, 2, 3; TRIM App., 161).

In 1978, the Chamber asked the FEC whether it could distribute to members of Congress the identical 1978 version of "How They Voted." The FEC, in an Advisory Opinion (AO-1978-18), ruled that although the distribution to members of Congress would not violate the Act, "...distribution of the publication, by or on behalf of the Chamber, to other persons who are non-members of Chamber or its State or local affiliates would be unlawful under 2 U.S.C. §441b...." (Ex. KK to Ct. Ex. 1; CLITRIM App.,A164). Joan D. Aikens, Vice-Chairman of the Federal Election Commission, filed a dissenting opinion, in that matter, in which she stated:

> The Commission is doing that which Congress would not dare do itself. By approving this Advisory Opinion, this Commission is successfully insulating elected representatives from the sometimes uncomfortable experience of having their positions on issues, as manifested by their votes in Congress, compared to the positions of various public organizations. The Commission has done this by construing §441b in such a sweeping manner that the section may now encompass virtually any communication by a union or corporation (including corporations without capital stock) which can be interpreted as criticism of a Congressman's vote. If Congress had expressly articulated such an intended result, there, I think, would have been a significant and justified public outcry. The total absence within the legislative history of §441b (and its predecessor 18 U.S.C. §610) of any Congressional desire to regulate this type of speech

> seems to indicate a healthy respect for the political dangers of advocating such legislation as well as an appreciation of the enormous constitutional questions it would raise.

Commissioner Aikens' opinion further stated that under the FEC's interpretation of §441b, "...it would be a violation of the Act for the ACLU to finance a communication directed at the general public which states its views on any votes by elected federal officers on legislation involving questions of civil liberties. But see ACLU [v. Jennings] supra." (FF, VII, C, ¶¶ 4, 5, 6; TRIM App., 162-163).

3. The United Church of Christ.

At trial, evidence was also introduced with respect to the First Amendment activity undertaken by the United Church of Christ, a major Protestant fellowship which was formed in 1957. It is presently composed of some six thousand local congregations, having a membership of approximately two million persons. (FF, VII, D, ¶ 1; Ex. II & JJ to Ct. Ex. 1; TR 332, 369; TRIM App., 163; CLITRIM App., A150, A156)

The mission of the Church includes a recognized responsibility "at home and abroad for mission, aid and service, ecumenical relations, interchurch relations and Christian unity, education, publication, the ministry, ministerial pensions and relief, evangelism, stewardship, social action, health and welfare, and any other appropriate area of need or concern" (Church Constitution - Article VIII). In all these efforts and others there is a recognition that the creation of a just society also requires witness and advocacy to the sources of political power which shape the public policy of the United

States and the world. Thus, a system of monitoring and communicating to members and to the general public, administrative, legislative and judicial developments that affect the Church's mission is an essential component of the Church's ministry. It is also an important vehicle for the exchange of ideas about social and governmental issues. The Office for Church in Society ("OCIS") monitors and reports on governmental affairs, with a particular focus on the manner and degree to which governmental activities assist or retard the cause of peace, the eradication of hunger, the relief of the poor, and the general social welfare of the nation. (FF, VII, D, ¶¶ 2, 3, 4; TRIM App., 164).

The mandate of OCIS is stated in paragraph 221 of the Church By-Laws:

> "The Office for Church in Society shall study the content of the Gospel in its bearing on people in society, provide and publish information and literature on social issues...and formulate and promote a program of social education and action for the United Church of Christ." (emphasis added). (CLITRIM Ex. C; TR 335).

To further these goals, OCIS advocates policy positions adopted by the Church's general synod, before a variety of agencies and institutions including congressional committees. And it engages in a program of "constituency action" on social change issues at the local level. And it coordinates social action within the entire United Church of Christ denomination. (FF, VII D, ¶7; TRIM App., 167).

As part of this work, OCIS publishes position papers, "fact-sheets" and a variety of other documents, which are distributed to church members, to legislators and to other interested persons. Members of the staff of OCIS also appear on radio and television programs in order to discuss issues of interest to the church. And the OCIS also publishes and distributes a monthly newsletter, now entitled "UCC Network" and formerly entitled "Washington Report," which gives its readers information about what is happening, principally in Washington, on critical legislative issues for example world hunger or the draft or international affairs. (FF, VII, D, ¶7; TRIM App., 167)

Annually, the Church Newsletter includes a congressional voting chart. The voting chart within the "Washington Report," now "UCC Network," has typically been used by members of the church who receive the publication as a principal source of information on important public issues. Some church members use the publication in Sunday School classes where they are discussing social issues. Others use the publication as a way to decide what issues to discuss in letters to or conversations with legislators. The publication is also used "by...local people as a kind of test [of] whether they, and the OCIS in partnership, have been successful in promoting the advocacy efforts of the denomination." The cost of publishing the annual congressional voting chart exceeds a thousand dollars. (FF, VII, D, ¶¶9, 10, 11, 12; TRIM App., 167-169).

The Office for Church in Society has never registered with the Federal Election Commission as a political committee.

The OCIS and the Church have never endorsed, contributed to, or advocated the election or defeat of any candidate for public office. The newsletter of OCIS and the voting record that appears in it do not refer to any federal election, and do not mention any member's candidacy for elective office. (FF, VII, D, ¶¶13, 14, 15; TRIM App.,169).

If forced to stop publishing the congressional voting chart, a vital and important vehicle for adhering to the mandate of the Church would be lost. As described by Reverend Barry Lynn, an official with OCIS: "This [voting chart] has proven to be, in the past, a very important piece of information for use at all levels of the church...this [publication] is a document that is part of the ministry of the United Church of Christ....Now, if we cannot publish it, then we violate not only the sense of what the Constitution and By-Laws of the United Church of Christ provide, but I think we violate the mandate of the Gospel itself, which involves us and calls us to be serious interpreters of social issues and calls us to be involved with the government in a serious way." (FF, VII, D, ¶17; TRIM App., 170).

The discontinuance of a publication such as the OCIS congressional voting chart would also have a serious impact on public discourse of social and political issues. As Reverend Lynn observed: "Some [legislative] decisions are very complicated. Motions are hidden in huge appropriations bills. The most important thing in a bill might be an amendment to the bill that never gets reported at all in the newspapers. If [our members] are going to be informed people making informed

issue-decisions, then I think they need publications like this; and many of our members are not members of the National Taxpayers Union, or the ACLU, or Common Cause or anybody else. This is the way that they get information on public policy issues, and this is the way they get information on the votes taken by members of the Congress, so that they can have healthy dialogue at any time of the year that they have a chance to talk to their elected officials." (FF, VII, D ¶ 18; TRIM. App.171).

4. Public Citizen.

Similar testimony was elicited at trial with respect to Public Citizen, a grass-roots organization established by Ralph Nader to promote and publicize issues of importance and interest to consumers. Public Citizen does not have a political action committee, does not endorse particular candidates, and does not advocate the election or defeat of any candidate. Rather, its activities, which include litigation, lobbying, and various educational projects, are limited to the advocacy of its views on specific consumer issues. Congress Watch is the lobbying arm of Public Citizen. Each year, Congress Watch prepares a Voting Index covering all members of Congress. The Index lists a certain number of votes in each House on issues of importance to Public Citizen, compares each member's votes with Public Citizen's position, and summarizes this comparison by calculating the percentage of votes that each member cast in favor of Public Citizen's position. (FF, VII, E, ¶¶1, 2; TRIM App.,172).

Public Citizen's Voting Index is distributed to members of Congress and the general public, and it is accompanied by

press releases in order to draw public and media attention to the issues contained in the Index. Public Citizen also distributes and publicizes its Voting Indexes in selected congressional districts for the same purpose. (FF, VII, E, ¶¶ 3, 4; TRIM App., 172-173).

Consistent with Public Citizen's policies, no Voting Index or press release contains any statement advocating the election or defeat of any candidate. The Indexes are published because analysis of Congressional voting performance is inseparable from Congress Watch's efforts to promote its legislative program through public education of consumers and elected officials. (FF, VII, E, ¶¶5, 6; TRIM App., 173).

In 1978, Congress Watch also prepared detailed "profiles" of twelve members of Congress who were in either their first or second terms. The profiles discussed the selected members' activities in detail, focusing on their performance, electoral history, voting patterns, congressional relationships, and views on issues of concern to Public Citizen. The profiles also typically contained a chart describing how the subject of the profile has been evaluated by other interest groups, including the American Conservative Union, Chamber of Commerce, National Associated Businessman, National Taxpayers Union, National Council of Senior Citizens, Americans for Democratic Action, AFL-CIO Committee on Political Education, League of Conservative Voters, Consumer Federation of America. (FF, VII, E, ¶ 8; TRIM App., 174). The Congress Watch Profile that was prepared with respect to Abner Mikva (Court's Exhibit 1,

Ex. HH-1; CLITRIM App. A123), is typical of the congressional profiles that were prepared by Congress Watch. (FF, VII, E, ¶ 9) (TRIM App., A91).

The members of Congress profiled span the political spectrum; Democrats and Republicans were included, as were those with high Public Citizen ratings, moderate ratings and low ratings. Some of the members who were the subjects of profiles faced close electoral races, while others had little or no electoral competition. No profile advocated the election or rejection of any candidate. Rather, they evaluated certain members from Public Citizen's perspective and with respect to issues that were of concern to Public Citizen in order to inform the citizens of these twelve districts how their representatives were performing. (FF, VII, E, ¶¶10, 11, 12; TRIM App., 175). The annual Public Citizen Voting Index costs well over one thousand dollars to prepare, publish and distribute each year.

If Public Citizen and Congress Watch were required to register as political committees in order to publish their voting index and profiles, they would not register and would, instead, discontinue publication of the voting index and of the profiles. Moreover, if Congress Watch and Public Citizen were to decide not to publish the voting index and Congressional profiles, their educational and advocacy efforts would be hampered. As Mr. Gene Karpinski, an official with Congress Watch stated: "...[I]f members [of Congress] feel more insulated [from scrutiny] and are aware that their performance might not be recorded as frequently or offered at all [to] the district... they would not have to be responsive to what we suggested

[regarding] how to vote on pro-consumer legislation." Also, "[it] would hamper the ability of our consumer activists around the country to learn about their members and respond to what their members do." (FF, VII, E, ¶17, 18; TRIM App., 177).

Congress Watch, thus, regards publication of the voting indexes and profiles as an essential element of Public Citizen's program of advocacy and educational efforts on behalf of consumers, because citizens need ready access to detailed information on the performance of their legislators. Congress Watch's publications are designed to provide such information, without advocating the election or defeat of any candidate. (FF, VII, E, ¶19; TRIM App., 178).*/

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This record vividly and broadly demonstrates the wide variety of non-partisan, issue-oriented speech activity which informs the public discourse on critical issues of our time. With equal force, it demonstrates the great extent to which such public speech would be hampered if subject to the kinds of controls sought to be enforced by the FEC in this case.

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*/ These matters concerning the activity of Congress Watch were brought before the FEC in an Advisory Opinion Request (AOR 1978-62) filed in mid-1978 to determine whether these Congress Watch activities come within the reach of the relevant provisions of the FECA. Approximately one year later the Commission declined to issue an advisory opinion, in a letter indicating that the Congressman who made the request had no standing to seek such a ruling.

ARGUMENT

I. THE JUDICIAL AND LEGISLATIVE BACKGROUND DIRECTLY BEARING ON THE ISSUES IN THIS CASE CONCLUSIVELY DEMONSTRATES THAT THE TRIM BULLETIN CANNOT BE SUBJECTED TO GOVERNMENT REGULATION AND CONTROL OF THE SORT UNDERTAKEN HERE BY THE FEC.

The central issue in this case is whether the distribution of literature containing wholly non-partisan, issue-oriented speech, describing and commenting on the voting record of a member of Congress on public issues of concern to the defendants, can validly be subject to governmental control, regulation or punishment. That issue, in turn, involves two questions, first, whether the leaflet at issue comes within the statutory regulation of "communications expressly advocating the election or defeat of a clearly identified candidate," and is thereby subject to the registration, reporting, disclosure, record-keeping and disclaimer requirements of the Federal Election Campaign Act; and second, if so, whether such regulation offends the First Amendment. We will show that the relevant statutory provisions do not cover the leaflet at issue here, but that if they can be applied so broadly, the very reach of the provisions manifestly demonstrates their vagueness, overbreadth and impermissibility under the First Amendment.

The Court is not writing on a clean slate in this case. In the past few years, there have been several litigative and legislative efforts to delineate the contours of appropriate campaign finance regulation. One major theme has emerged with clarity and consistency from these efforts: speech and discussion addressed to public issues which do not expressly advocate a partisan electoral outcome cannot be subject to governmental

regulation even if political candidates or governmental officials are identified, criticized or praised as part of such discussion. The rationale for this theme has been that government regulation of issue-oriented speech - even where the speech is about officials who are candidates for elective office - is too treacherous and open-ended an invitation to repression, too broad a restriction on the great and imperative variety of public issue speech in our democratic society, and serves too attenuated a set of asserted countervailing interests to be permissible under the First Amendment.

A. First Amendment Principles

The well-settled principles which form the background against which this case must be decided demonstrate that the First Amendment prohibits government from seeking to regulate and punish the kind of speech at issue here which is at the very core of First Amendment concerns:

> Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated and all such matters relating to political processes. Mills v. Alabama, 384 U.S. 214, 218-219 (1966).

Accord Buckley v. Valeo, 424 U.S. 1, 14 (1976); First National Bank v. Bellotti, 435 U.S. 765, 775-778 (1978); American Civil Liberties Union v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973). The kind of speech set forth in the TRIM Bulletin - this is how your Representative voted on economic and tax issues - is "...more than self-expression, it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 75 (1964). Attempts, such as the one

here, to regulate, burden and penalize any such exercise in self-government come to any court bearing the heaviest burden of justification.

Moreover, these principles apply regardless of whether the burden on core First Amendment rights takes the form of "regulation" or formal prohibition. While the statutory controls sought to be imposed here - registration, record-keeping, reporting and disclosure, disclaimers and identification - do not formally prohibit the First Amendment activity outright, the tests for judging the validity of such inhibitions are no less rigorous. See Thomas v. Collins, 323 U.S. 516 (1945) (invalidating simple registration and disclosure requirement imposed on union speech); Lamont v. Postmaster General, 381 U.S. 301 (1965); Hynes v. Oradell, 425 U.S. 610 (1976) (invalidating, on vagueness grounds, requirement that political door-to-door canvassers register with local police department); Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("...compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment").

Finally, the ultimate flaw in the FEC's theory is that the government seeks to regulate and burden speech in an area constitutionally immune from any such regulation, namely, public speech on public issues, containing absolutely no express partisan content, wholly independent of the partisan political process, and completely removed from the cause of any partisan candidate. Whatever may be said about governmental power to regulate the activities of candidates and their supporters, no decision has sanctioned the kind of sweeping regulation of issue-oriented speech

in question here. Indeed, the courts have made clear, time and again, that campaign legislation reaching beyond the direct partisan process is presumptively unconstitutional. United States v. CIO, 335 U.S. 106 (1948); United States v. Painters Local 481, 172 F.2d 854 (2d Cir. 1949); United States v. National Committee for Impeachment, 469 F 2d 1135 (2nd Cir. 1972); Schwartz v. Romnes, 495 F. 2d 844 (2d Cir. 1974); ACLU v. Jennings, supra; see generally, Buckley v. Valeo, supra.

B. The Judicial and Legislative Background

This is a case where a page of history is truly worth a volume of logic. Recent judicial and legislative actions on the relevant FECA provisions point to one clear conclusion: the leafletting activity involved here was not intended to be subjected to regulation precisely in order to avoid the grave constitutional defects that such regulation would entail. That background decisively and overwhelmingly rejects - on constitutional and statutory grounds - the validity of what the FEC is seeking to do here. Briefly, what the background shows is the following:

(1) This Circuit, in the very first interpretation of the provisions of the Act, expressly held that the Act could not be applied to issue-oriented speech even though that speech relates to a public official who is a candidate for election. United States v. National Committee for Impeachment, supra; accord: ACLU v. Jennings, supra.

(2) Notwithstanding these limiting interpretations of the Act, Congress in its major 1974 Amendments

included a new section designed solely to regulate the kind of speech at issue here, by imposing requirements on any group who "publishes...any material...setting forth the candidate's position on any public issue, his voting record, or other official acts." 2 U.S.C. Section 437a.

(3) In Buckley v. Valeo, supra, the major challenge to the 1974 Amendments, the en banc United States Court of Appeals, though upholding the constitutionality of every other challenged provision, unanimously ruled that Section 437a was unconstitutional on its face for seeking to regulate the activities of non-partisan, issue-oriented groups that publish "box scores" of the voting records of elected officials. 519 F.2d at 874-78. That ruling was never appealed by the Commission, and Congress subsequently repealed the section.

(4) In Buckley v. Valeo, supra, the Supreme Court applied the same constitutional principles in limiting the application of Section 434(e), the predecessor of the section sought to be enforced here, and construed it to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Otherwise, the section would be "impermissibly broad." 424 U.S. at 80.

(5) In response to the Buckley ruling, the Congress, in the 1976 Amendments, revised and narrowed Section 434(e), as well as Section 441d, to track the Supreme Court's language, almost in haec verba, so that they now only cover independent expenditures or communications "expressly advocating the election or defeat of a clearly identified candidate."

(6) The courts have, without exception, limited the reach of the FECA to speech that is directly and expressly partisan of an electoral result. See, e.g., Federal Election Commission v. AFSCME, 471 F.Supp. 315 (D.D.C. 1979).

(7) The courts have ruled that campaign controls cannot be imposed on non-partisan committees or organizations which discuss public officials as part of their speech on public issues:

(a) even though those officials are candidates for elective office; and

(b) even where the public issue speech occurs during an election season, National Committee for Impeachment, supra; ACLU v. Jennings; Buckley v. Valeo; and

(c) regardless of whether the issue organization is ongoing (ACLU v. Jennings) or ad hoc (Impeachment Committee).

Despite the clear import of this background, the FEC is seeking to regulate activity which both the courts and Congress

have expressly sought to place outside the Commission's reach. In so doing, the Commission is seeking to erase constitutionally mandated and painstakingly established distinctions.

We will now detail that background to show how improper the Commission's action really is and why this latest assault by the FEC must again be rebuffed.

1. The Impeachment Committee Case

After years of public concern about campaign finance reform, Congress passed the Federal Election Campaign Act of 1971. The primary thrust of that Act was to attempt to bring meaningful disclosure of the sources and methods of funding federal election campaigns.*/ Ironically, the first use of the new law was not against a well-heeled political candidate or committee, but against an ad hoc group of citizens who had placed an advertisement in the New York Times calling for the impeachment of Richard Nixon. The government sought to enjoin that group from such activity on the ground that the expression of opinion in the advertisement rendered the group a "political committee" subject to the Act's requirements of filing statements and reports regarding its contributions and expenditures before it could print the advertisement. The operative statutory language defined a "political committee" in terms of whether funds had been received or expended "for the purpose of influencing the nomination for election, or election, of any person to federal office...."

This Court held that the Impeachment Committee could not

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*/ The legislative history of the 1971 Act is described in this Court's opinion in National Committee for Impeachment.

be deemed a "political committee," and, if it were, then the Act would raise "serious constitutional issues." United States v. National Committee for Impeachment, 469 F.2d 1135, 1140 (2d Cir. 1972). Noting the critical distinction between independent speech on public issues and partisan speech advocating the election or defeat of particular candidates, this Court narrowly interpreted the statutory language and held that the Act did not encompass the impeachment advertisement because the expenditures were not "made for the purpose of influencing" the choice of a particular candidate. The Circuit reached that result by ruling that the only legitimate area of campaign regulation was of (1) groups acting with the consent of the candidate, or (2) groups soliciting contributions or making expenditures "the major purpose of which is the nomination or election of candidates." Id. at 1141. Finding that neither test was met, the court ruled that advertisements and communications whose major purpose was to speak on public issues could not be regulated. Otherwise, the statute would have "intolerable" consequences of "regulating the expression of opinion on fundamental issues of the day." 469 F.2d at 1142. This reasoning is applicable in this case as well.

2. ACLU v. Jennings

This Circuit's approach was followed in ACLU v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973) (three-judge court), vacated as moot sub nom. Staats v. ACLU, 422 U.S. 1030 (1975). There, the American Civil Liberties Union sought, shortly before the 1972 elections, to place a newspaper advertisement, discussing and criticizing President Nixon's anti-busing policies, and including an "Honor Roll" of members of Congress who had resisted

those policies. The ACLU filed suit for a declaration that such issue-oriented speech would not render the ACLU a "political committee" within the meaning of the Act.

The three-judge court, in order to avoid the "acknowledged serious constitutional questions" which would be posed by regulating independent, issue-oriented organizations or groups engaged in the advocacy of views on campaign issues, adopted this Court's dual statutory test restricting the reach of the Act's disclosure and reporting requirements, 366 F.Supp. at 1057. The court held that the constitutional problems would thereby be eliminated:

> We are satisfied that by so constricting the reaches of Title III the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing their associational rights will not be encroached upon. 366 F.Supp. at 1057.

Notwithstanding the assurances contained in these two unanimous rulings, Congress, in the major 1974 Amendments, enacted a section intentionally designed to reach and regulate groups engaged in the kind of public issue speech which National Committee for Impeachment and ACLU v. Jennings had held to be immune from regulation. That section, in part, provided as follows:

> Any person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate (by name, description or other reference) advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts (in the case of a candidate who holds or has held Federal office), or otherwise designed to influence individuals to cast their votes for or against such candidate or to withhold their

votes from such candidate shall file reports with the Commission as if such person were a political committee. 2 U.S.C. Section 437a.

The kind of activity covered by Section 437a is identical to the activity engaged in by Mr. Cozzette and the Committee, namely, "setting forth the candidate's position of any public issue, his voting record, or other official acts...."

3. Buckley v. Valeo - D.C. Circuit

Section 437a was challenged in Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975) (en banc). This time, unlike the previous two cases, the constitutional issue could not be avoided and was squarely addressed by the en banc Court of Appeals. Even though that court upheld the broad disclosure requirements imposed on candidates and their campaign committees, the Court of Appeals unanimously held that Section 437a, reaching beyond regulation of the partisan area and into the process of debate on public issues, was flatly unconstitutional.

First, the court noted the extremely broad reach of the section, "susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely non-partisan public discussion of issues of public importance." 519 F.2d at 870. Thus, the section would reach non-partisan groups like the ACLU that "publicize in newsletters and other publications the civil liberties voting records, positions and actions of elected public officials some of whom are candidates for federal office." Id. at 871. The court further observed the validity of this Court's concerns that such regulation "extending from one end of the spectrum of public-issue discussion to the other," would result in "an enormous interception of groups

and activities." Id. at 871.

After describing the reach of the section and comparing it to the valid regulation of candidates and their committees, the Court then identified the constitutional doctrine to be applied in holding the section facially unconstitutional:

> Section 437a, however, seeks to impose the same [disclosure] demands where the nexus may be far more tenuous. As we have said, it may undertake to compel disclosure by groups that do no more than discuss issues of public interest on a wholly non-partisan basis. To be sure, any discussion of important public questions can possibly exert some influence on the outcome of an election preceding which they were campaign issues. But unlike contributions and expenditures made solely with a view to influencing the nomination or election of a candidate,...issue discussions unwedded to the cause of a particular candidate hardly threaten the purity of elections. Moreover, and very importantly, such discussions are vital and indispensable to a free society and an informed electorate. Thus the interest of a group engaging in nonpartisan discussion ascends to a high plane, while the governmental interest in disclosure correspondingly diminishes.
>
> The Supreme Court has indicated quite plainly that groups seeking only to advance discussion of public issues or to influence public opinion cannot be equated to groups whose relation to political processes is direct and intimate. 519 F.2d at 872.

Next, the court tried narrowing the section to groups that engaged in public activities with a "purpose" or "design" to "influence" the outcome of the election. The effect of so limiting the section, however, was to render it unconstitutionally vague because such criteria:

> ...leave the disclosure requirement open to application for protected exercises of speech and to deterrence of expression deemed close to the line. Public discussion of issues which are also campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally

> and inexorably to exert some influence on voting at elections. In this milieu where do "purpose" and "design" "to influence" draw the line? .... And while we have continued our struggle for an interpretation of section 437a which might bypass its vagueness and overbreadth difficulties, we have been unable to do so. Id. at 875 (emphasis added).

In a final attempt to save the section, the Court of Appeals tried to use this Court's limiting approach of confining Section 437a to groups or activities whose "major purpose" was the nomination or election of candidates. Such a narrow reading, however, would render the section duplicative of the primary candidate and campaign committee disclosure sections, and would also fly in the face of the then-existing legislative intent to reach and regulate wholly non-partisan, issue-oriented groups that publish box scores and voting records. Accordingly, the Court exercised its responsibility and held the section unconstitutional. Neither the FEC nor the government appealed from that ruling.

These three decisions alone require holding that the FEC cannot regulate the TRIM Bulletin.

4. Buckley v. Valeo - Supreme Court

Section 434(e) provides for regulation of groups and individuals that make "contributions or independent expenditures expressly advocating the election or defeat" of a candidate, where the activity is not authorized or controlled by any candidate. The validity of the predecessor section was considered in Buckley and the Supreme Court held that regulation of such independent, expressly partisan political activity could only be valid if limited to communications that in "express terms advocate" the election or defeat of a candidate. 424 U.S. at 44.

The issue arose in two ways because the 1974 Amendments had limited the amount of independent political expenditures that any person could make, 18 U.S.C. Section 608(e), and also required disclosure of such expenditures. 2 U.S.C. Section 434(e). With respect to the expenditure limitations issue, the Supreme Court, noting that the Court of Appeals had construed the section as reaching only expenditures, "advocating the election or defeat of" a candidate, ruled that "while such a construction refocuses the vagueness question," it did not eliminate the problem completely:

> For the distinction between discussion of issues and candidates the advocacy of election or defeat of candidates may often dissolve in practical applications. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their position on various public issues, but campaigns themselves generate issues of public interest .... "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion." [Thomas v. Collins, 323 U.S. 516, 535]. 424 U.S. at 42-43 (emphasis added).*/

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*/ The D.C. Circuit's limiting formulation, held unacceptable by the Supreme Court, would have permitted controls of communications referring to a candidate and accompanied "by a message advocating election or defeat...." 519 F.2d at 853 (emphasis added). That defective formulation by the D.C. Circuit, rejected by the Supreme Court as a solution for vagueness problems, has been resurrected in the FEC's 1977 regulations which define "expressly advocating" to include:

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

The Commission's regulations transparently codify the Court of Appeals' language and ignore the Supreme Court's ruling rejecting that approach.

Accordingly, the Court ruled, that "constitutional deficiency" could be avoided "only by reading Section 608(e) as limited to communications that include explicit words of advocacy of election or defeat of a candidate...." The Court then stated:

> ...we agree that in order to preserve the provision against invalidation on vagueness grounds, §608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office. 424 U.S. at 44.

And in a footnote the Court further amplified its views on this matter:

> This construction would restrict the application of §608(e)(1) to communications containing express words of advocacy of election or defeat, such as, "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "Vote against," "defeat," "reject." 424 U.S. at 44 n.52.

But the Court held that, even as thus narrowed, Section 608(e)(1) was unconstitutional under the First Amendment as a direct restriction on political speech. Id. at 44-51.

The Court had to deal with similar problems in ruling upon the facial validity of Section 434(e)'s requirements of disclosure of independent contributions or expenditures, the predecessor of the statute at issue here.

First, the Court found that the purpose of the disclosure requirement was to deter corruption and undue influence resulting from efforts to avoid disclosure "by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." 424 U.S. at 76. But, second, the Court recognized that the section - defining coverage in terms of independent contributions or expenditures made "for the purpose of influencing" an election - raised "serious problems of vagueness, particularly treacherous where, as here, the violation of its

terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." Id. at 76-77. This concern was magnified by the problem that the "purpose of influencing" language "shares the same potential for encompassing both issue discussion and advocacy of political result." Id. at 79. Although the general regulation of political committees might be limited along the lines suggested by Impeachment Committee and ACLU v. Jennings,*/ "when the maker of the expenditures is not within these categories - when it is an individual other than a candidate or a group other than a 'political committee' - the relation of the information sought to the purposes of the Act may be too remote." Id. at 79-80. Accordingly, the Court held that §434(e) had to be limited:

> To ensure that the reach of §434(e) is not impermissibly broad, we construe "expenditure" for purpose of that section in the same way that we construed the terms of §608(e) - to reach only funds used for communications that expressly advocate[108/] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate. Id. at 80.
>
> 108/ See n.52, supra. [Referring to express words of advocacy, such as "vote for."]

Reassured that, as so narrowed, the section "does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result," the Court held that that version of Section 434(e) was not facially unconstitutional. But the Court made it crystal clear that such

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*/ It should be noted that there was no allegation or proof in this case that the National Committee criteria - i.e., (1) candidate control, or (2) primary partisan purpose - exist in this case.

controls could only be imposed on those engaging in communications "expressly advocating the election or defeat" of a specific candidate.

5. The 1976 Amendments

When Congress enacted the post-Buckley 1976 Amendments to the FECA, the message finally seemed to have gotten through. See S.Rep. No. 94-677, 1976 U.S. Code Cong. & Admin. News [hereinafter "U.S. Code"], pp. 929-46; House Conf. Rep. No. 94-1057, 1976 U.S. Code, pp. 946-85.

For present purposes, the 1976 Amendments made three significant changes. First, Congress repealed Section 437a, which had been unanimously invalidated by the D.C. Circuit. Second, Congress narrowed the definition and regulation of independent political expenditure to conform to the Supreme Court's teachings:

> Contributions or expenditures by person other than political committee or candidate.
> (1) Every person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 during a calendar year shall file .... 2 U.S.C. §434(e)(1) (emphasis added).

This change almost exactly tracks the Supreme Court language as to the permissible reach of the requirement, and the legislative history indicates that it was so intended. S.Rep. No. 94-677, 1976 U.S. Code, supra, at p.933; H. Conf.Rep. No. 94-1057, 1976 U.S. Code, supra, at p. 954.*/

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*/ Thus, the Senate Report states that the definition of "independent expenditure" "reflect[s] the definition of that term in the Supreme Court decision in Buckley v. Valeo." U.S. Code at 933. And the House Conference Report, describing the conference

Finally, the 1976 Amendments also made significant changes in enacting the other provision invoked by the FEC in this case, 2 U.S.C. Section 441d, which requires identification and disclaimers on political statements. The predecessor section, 18 U.S.C. Section 612, made it criminal to publish, distribute mail or transport political statements "relating to or concerning" any federal candidate and not containing the identification of the sponsor. Responding to Buckley, the Congress rewrote that section to require identification and disclaimers only where "any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate...." 2 U.S.C. §441d (emphasis added). The other significant change made relates to the kind of medium or form which the covered communication takes. The identification requirements in the former section reached the publication, distribution, mailing or transportation of "any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning..." a federal candidate (emphasis added). The new current version, however, eliminates that list of media of communications and substitutes the following:

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substitute for the Senate bill, notes that the definition of the term "independent expenditure" in the conference substitute, "...is intended to be consistent with the discussion of independent political expenditures which was included in Buckley v. Valeo." U.S. Code at 954. That conference report subsequently notes that the purpose of the relevant amendment was "to conform the independent expenditure reporting requirement...to the requirements of the Constitution set forth in Buckley v. Valeo, with respect to express advocacy of election or defeat of clearly identified candidates." U.S. Code at 955.

"communications expressly advocating the election or defeat of a clearly identified candidate through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising...." (emphasis added).

6. The A.F.S.C.M.E. Decision

Finally, a recent example of the teachings of the judicial and legislative background we have been describing is supplied by the decision in FEC v. AFSCME, 471 F.Supp. 315 (D.D.C. 1979). That case involved a Commission enforcement suit against a union that circulated a "Nixon-Ford" poster to its members during the 1976 elections. The poster depicted President Ford wearing a button reading "Pardon Me" and embracing former President Nixon. It also contained a quote from a 1974 President Ford speech: "I can say from the bottom of my heart - the President of the U.S. is innocent, and he is right." The union, claiming that the poster did not constitute a "communication expressly advocating the election or defeat of a clearly identified candidate" within the meaning of 2 U.S.C. §431(f)(4)(C), governing union communications to members, moved to dismiss the complaint for failure to state a claim. The district court, reviewing the background we have just surveyed, and seeking to avoid constitutional infirmity, held that the poster involved no express advocacy and dismissed the complaint.

> To avoid constitutional infirmity this Court will consider §431(f)(4)(C) in light of the evil sought to be remedied and the standards laid down in Buckley v. Valeo, supra. The statute at issue seeks to focus attention on the sources of express, though independent advocacy, so that those making

> independent expenditures which are the equivalent of direct contributions to the candidate's campaign would be identified. See, Buckley v. Valeo, supra at 81, 96 S.Ct. 612. The Nixon-Ford poster involves no such express advocacy as that term was described in Buckley, nor is there any indication that Congress intended the term "express advocacy" to include the communication at issue here. See, United States v. National Committee for Impeachment, 469 F.2d 1135 (2 Cir. 1972). In addition, although the poster includes a clearly identified candidate and may have tended to influence voting, it contains communication on a public issue widely debated during the campaign. As such, it is the type of political speech which is protected from regulation under 2 U.S.C. § 431, et seq.
>
> In view of the fact that plaintiff has failed to allege a violation of § 431(f)(4)(C), defendant's motion to dismiss is granted. 471 F.Supp. at 317.

That is precisely how this case should have been handled and resolved.

* * *

The teachings of this judicial and legislative background are clear: regulation can only be imposed on express partisan advocacy of a specific electoral result; statutory provisions must be construed as so limited; where they cannot be so narrowly construed, they must be struck down. These teachings point to two conclusions here: (1) the statutory provisions should not be construed to reach the TRIM Bulletin, and (2) if they do reach the TRIM Bulletin, then they violate the First Amendment.

II. THE STATUTORY PROVISIONS, UNDER WHICH THE FEC IS PROCEEDING, REACH ONLY "EXPRESS ADVOCACY" OF THE "ELECTION OR DEFEAT" OF A CANDIDATE. THE FINDINGS OF THE DISTRICT COURT MAKE IT PLAIN THAT DEFENDANTS COZZETTE AND CLITRIM ENGAGED IN NO SUCH EXPRESS ADVOCACY.

A. "Expressly Advocating Election or Defeat"

We have rehearsed, at such length, the recent judicial and legislative history relating to issue-oriented communications because that background so clearly informs the ultimate disposition of this case. As noted above, the Federal Election Campaign Act was amended in the wake of the Buckley case and in response to the constitutional and statutory interpretations that emerged from the Buckley litigation. See Senate Report No. 94-677, discussing the Senate version of the 1976 Amendments to the Federal Election Campaign Act. Indeed, it is not often that a legislature acts so self-consciously and intentionally to recast statutory provisions to bring them into line with constitutional requirements.

Thus, the two provisions which the FEC has sought to enforce in the instant case [2 U.S.C. Sections 434(e) and 441d)], by their own terms, reach only expenditures or communications "expressly advocating the election or defeat of a clearly identified candidate." A comparison of this basic statutory language with that set forth in the Buckley opinion demonstrates beyond

peradventure that the two provisions were based upon the general constitutional imperatives as understood by Congress and that the statutory language is more specifically derivative from the precise language of the Supreme Court's Buckley opinion. In Buckley, the Court held that speech not emanating from a candidate or campaign committee could be regulated only to the extent that the communications "include explicit words of advocacy of election or defeat of a candidate." Buckley v. Valeo, supra at 43. And the Buckley court listed the express words of electoral advocacy it had in mind, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." 424 U.S. at 52.

In the instant case, Judge Pratt specifically found that the TRIM Bulletin at issue here (Cts Exhibit 1, Exhibit A; CLITRI App.A22) contained no such express words of electoral advocacy. (FF, II, ¶31; TRIM App. 122.) Indeed, as Judge Pratt noted, "the leaflet did not refer to or mention any federal election, did not refer to or mention Representative Ambro's political affiliation or candidacy for elective office, and did not refer to or mention any electoral opponent of the [Congressman]." (FF, IV, ¶20; TRIM App. 131).

Accordingly, the District Judge expressed the ultimate opinion that since the Fall 1976 CLITRIM "Bulletin did not 'expressly advocate' the Congressman's election or defeat within the meaning of the statute," the enforcement proceeding against all three defendants should be dismissed." (See Judge Pratt's Statement of Statutory Questions, pp. 9-10; TRIM App. 106-107.

It is thus clear that the statutory provisions at issue here apply only to express advocacy, and that the defendants have engaged in no express advocacy as contemplated by Congress or by the Supreme Court in Buckley. The FEC, nevertheless, urges that despite the clear language in the statute, and even though no express words of advocacy appear on the face of the instant CLITRIM leaflet, defendants' advocacy can be implied or inferred from other circumstances. In this regard, the FEC position stands in stark ignorance of a long-standing distinction in the law between "express" and "implied" conduct. Distinctions between "express" and "implied" conduct abound in a variety of legal contexts, and those distinctions are significant. Thus, the law of agency distinguishes between express and implied authority. The law of contracts distinguishes between express and implied contracts as well as express and implied warranties. There is similarly an important distinction between express and implied covenants as there is between express and implied consent. In all these instances, implied conduct must be inferred from circumstantial contexts. Express conduct is recited in formal and definite terms. The position of the FEC ignores this important traditional distinction in our law and reads the statutory provisions at issue here as though no requirement of "express" advocacy had been set forth in the statute or, conversely, as though the statute read "expressly or impliedly advocates" election or defeat.

The FEC's position also ignores the notion that statutes must be construed in light of the evil sought to be remedied and in a manner that will avoid constitutional infirmity. Buckley v.

Valeo, supra; Schwartz v. Romnes, 495 F.2d 844 (2d Cir. 1979). Here, Congress sought to focus attention on the sources of express, though independent, partisan advocacy, so that those making independent expenditures which were the equivalent of direct contributions to the candidate's campaign would be identified. The defendants activity here involved no such advocacy. The statute must be limited to its language and its purpose, and both squarely exclude the TRIM Bulletin.

What we have said so far demonstrates that the Bulletin is not within the definitional reach of either of the two FECA provisions sought to be enforced. This was simply not speech or communication "expressly advocating the election or defeat" of Congressman Ambro or anyone else. That should be dispositive of the case. But there are additional reasons, unique to each of the two statutory sections here invoked, which point to the same conclusion.

B. Section 434(e)

The very structure of Section 434(e)'s requirements demonstrates that it was not designed to cover the issue-oriented, "box score" presentation of voting records of elected officials.

Where Section 434(e) applies, the "person" making the contribution or expenditure must file a report with the FEC stating, inter alia, "whether the contribution or independent expenditure is in support of, or opposition to, the candidate...." Section 434(e)(2). Apart from the fact that the use of comparable language - "on behalf of," "supports," "opposes," a federal candidate - to trigger statutory coverage was held unconstitutionally vague and overbroad in ACLU v. Jennings, supra, 366 F.Supp. at 1048-54, the

use of such language here demonstrates that the kind of "box score" in the Bulletin was not what Congress was trying to regulate. Indeed, whether describing a Congressman's vote on an issue as being for "lower taxes and less government" or "higher taxes and more government," could be deemed "support" or "opposition" depends on the views of the listener as much as the speaker. In the hands of a welfare recipient or a federal government employee, was the Bulletin in "support" of or "opposition" to Congressman Ambro? And if "support" or "opposition" could be construed from the voting record, what of the three votes "for lower taxes and less government"? How are they to be reported? And what if the Congressman's voting record had been 13 for "more government" and 12 for "less government"?

Of course, the same difficulties would inhere in any issue group's description of an elected official's voting record on the issuesof interest to that group. It is precisely to avoid these problems that the Supreme Court held that regulation must be limited to "communications that expressly advocate the election or defeat" of a candidate, and thus directed "precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80 (emphasis added).

Thus limited, the section covers the paradigm case of a group of individuals, independent of a candidate, who finance communications such as "Vote for Smith" or "Vote Against Jones." So understood, the rest of the Section 434(e) mechanisms and requirements make sense. The anomalous incongruity of their attempted application here, by contrast, reflects that critical discussion of voting records and box scores was not what Congress had in mind or sought to regulate.

C. Section 441d

The FEC also charges a violation of Section 441d.*/ That section makes it a crime to make any expenditure for certain political communications "expressly advocating..." without "clearly and conspicuously" identifying the source of the expenditure and stating whether it has been authorized by a candidate. As with Section 434(e), the principal reason why Section 441d does not encompass the TRIM Bulletin is because the leaflet was not a communication "expressly advocating the election or defeat of a clearly identified candidate...." That alone should conclude the inquiry.

But there is an additional reason why the Bulletin does not come within the reach of Section 441d. The identification and disclaimer requirements of that section apply only:

> Whenever a person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising....

The entire thrust of this section is aimed solely at political advertisements in mass communication media, not at pamphlets, flyers, brochures, leaflets, handbills or other media of expression like the kind involved in this case.**/ The former section

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*/ The predecessor of this section was 18 U.S.C. Section 612. In 1976, Congress amended it in ways critical to the issues here and made it part of Title 2.

**/ Although the Senate Report No. 94-677 indicates that this section was a "substantial revision of 18 U.S.C. Section 612" and "requires that any printed or broadcast communication" contain the required information, 1976 U.S. Code Cong. & Admin. News, p. 939, the House Conf. Report, No. 94-1057, description of the purpose of the section contains no such statement or a purpose to cover "any printed...communication" and merely paraphrases the coverage language of the new provisions. See id. at 980-81.

expressly included such forms of communications, covering anyone who:

> ...willfully publishes or distributes...any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning...[a candidate].... 18 U.S.C. §612 (emphasis added).

Those express terms were eliminated in the 1976 Amendments. If Congress' concern had been with more than mass communications media, it could easily have retained the Section 612 listing of methods of communications and added to it. That Congress did not do so is a powerful indication that "pamphlets," "circulars," "posters," and the like were no longer intended to be covered. Congress was presumably concerned with the impact of political advertisements in the mass media, and the ability of the viewer or reader readily and quickly to determine the sponsorship of the statement. Thus, Congress required the standard, "Paid for by Citizens for X Committee," statement in political advertisements in the mass media. Congress may very well have recognized that the impact of, and thus the need for instant identification on a leaflet is far less compelling.*/

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*/ These conclusions about the purpose of the 1976 Amendment's critical changes in the language of the section are reinforced by the one major decision interpreting former Section 612, handed down in 1974: United States v. Insco, 496 F.2d 204 (5th Cir. 1974). That was a prosecution of a 1972 Republican Congressional candidate for printing bumper strips stating simply, "McGovern-Gunter," and thereby linking his Democratic opponent's campaign with that of Senator McGovern's Presidential campaign. The bumper strip did not contain the requisite identification information. Bumper strips were not specifically included in the statutory list. The Fifth Circuit held that the words of the statute, and the practice under it, did not supply adequate notice that bumper strips would be covered. The statute which Congress repealed in 1976 expressly included pamphlets and circulars, and had at least once been applied to such a form of communication. See United States v. Scott, 195 F.Supp. 440 (D.N.D. 1961). More-

One final point reinforces the conclusion that §441d does not cover the Bulletin. The section contains no monetary threshold to trigger its coverage. It applies simply to "an expenditure" of the requisite kind. If the section is not read in the limited manner we urge, then its reach becomes extraordinarily broad. Thus, for example, if one citizen spent $5.00 to mimeograph a flyer expressly advocating Congressman Ambro's election or defeat, and handed them out on a street corner, he would be within such a broad reading of the statute and liable to prosecution by the FEC. The potentially broad reach of a similar New York statute was recently held unconstitutional in New York Civil Liberties Union v. Acito, 459 F.Supp. 75, (S.D.N.Y. 1978), because it potentially regulated similar campaign speech on referendum issues without a monetary threshold. These grave difficulties can be avoided by giving the section the focused reading that its words and history require, and thereby limiting it to political statements in the mass media or comparable forums.

D. Prudential and Jurisdictional Concerns

The defendants herein urge, with great conviction, that the issues in this case can properly - and narrowly - be resolved on the ground that the TRIM Bulletin did not constitute a commu-

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over, the Insco opinion had come down a year earlier instructing Congress to be explicit as to coverage of this particular statute. Nevertheless, in the 1976 revision of Section 612, Congress eliminated any specific term that could cover the Bulletin and inserted new statutory language focused solely on mass media-type political advertising. Given these factors, even Section 441d's inclusion of a catchall - "any other type of general public political advertising" - cannot be stretched to cover this case.

nication "expressly advocating..." within the meaning of the Act, properly construed. We submit that prudential concerns require this approach and that jurisdictional principles permit it.

Since December 1978, when they filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted on the ground that the Bulletin did not constitute express advocacy, the defendants have strenuously sought disposition of the case on such grounds. They envisioned the kind of swift and decisive result reached in FEC v. AFSCME, supra. But, by virtue of the extraordinary judicial review provisions contained in 2 U.S.C. §437h, the constitutional claims interposed by intervening defendant Robbins, and the orders entered by the District Court and this Court interpreting the requirements of Section 437h, adjudication of constitutional issues has taken precedence over resolution of the potentially dispositive statutory construction issues. As a consequence, notwithstanding repeated renewals by the defendants of their motion to dismiss for failure to state a claim on statutory interpretation grounds, as well as a formal request for certification of that issue pursuant to 28 U.S.C. §1292b, the District Court felt it had no authority to pass upon those issues. The most Judge Pratt felt free to do was to identify the statutory question for the benefit of this Court, to express his opinion that "the Fall 1976 CLITRIM bulletin did not expressly advocate Congressman Ambro's election or defeat," and to observe that, in the normal case, he would thereby have dismissed the FEC complaint.

Few principles are as axiomatic or well-settled as the doctrine that courts "should not reach out to decide constitutional questions unnecessarily," Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975), and should address possible dispositive statutory issues before engaging in constitutional adjudication. See Ashwander v. T.V.A., 297 U.S. 288, 346-347 (1936) (Brandeis, J.); Buckley v. Valeo, supra; Elkins v. Moreno, 435 U.S. 647, 660-662 (1978); F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978); New York City Transit Authority v. Beazer, 99 S.Ct. 1355 (1979). These powerful prudential principles should counsel this Court to address and resolve the statutory issues first. Should the Court agree that, in light of the judicial and legislative background, the Bulletin was not "expressly advocating" an electoral result, then the Court would avoid the need to address the constitutionality of sections 434(e) and 441d on their face or as applied. Only if the Court concluded otherwise on the question of statutory coverage would constitutional issues have to be reached.

Moreover, nothing in 2 U.S.C. Section 437h suggests an intention to displace the normal application of these prudential principles. Section (a) of that provision confers standing on certain kinds of groups or individuals to institute actions "...to construe the constitutionality of any provision of this Act." The section then requires that district courts "immediately shall certify all questions of constitutionality of this Act..." to the relevant Court of Appeals, which shall hear the matter en banc. Whatever one's view of the precise purpose and applicability of the special review provisions, see Bread Political

Action Committee v. FEC, 591 F.2d 29 (7th Cir. 1979); Republican National Committee v. FEC, 461 F.Supp. 570 (S.D.N.Y. 1978),*/ they should be construed in light of both prudential principles and principles of ancillary and pendent jurisdiction.

A particularly apt analogy can be found in the procedures utilized in three-judge court actions challenging the constitutionality of state or federal statutes. It has long been well-settled that when a three-judge court obtains jurisdiction over an action because of a substantial constitutional claim, it likewise obtains pendent-type jurisdiction over any "statutory" claims; indeed, prudential considerations then require that the non-constitutional statutory claims be decided first. See e.g., Rosado v. Wyman, 397 U.S. 397 (1970); Hagans v. Lavine, 415 U.S. 528 (1974). Thus, by analogy, once this Court's special §437h jurisdiction over constitutional questions has attached, the Court has ancillary power to decide any related non-constitutional claims, and should decide those questions first. That procedure would simultaneously serve Congress' concerns for expeditious consideration of challenges to FECA provisions and prudential concerns for avoidance of unnecessary constitutional adjudication.

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*/ The defendants herein have repeatedly contended in motions in this Court and the District Court that the §437h mechanism should not be utilized when constitutional challenges are raised in the context of defenses to a 2 U.S.C. Section 437g enforcement suit.

III. IF APPLICABLE TO THE TRIM BULLETIN, SECTIONS 434(e) AND 441d ARE UNCONSTITUTIONAL ON THEIR FACE AND AS SO APPLIED.

We have suggested at length that the Court can and should dispose of this case on the ground that the defendants, in preparing and circulating the TRIM Bulletin, were not "expressly advocating" Congressman Ambro's election or defeat within the meaning of 2 U.S.C. Sections 434(e) and 441d. By so holding, the Court would avoid the need to reach the gravest constitutional isuses. See United States v. National Committee for Impeachment, supra. In the event, however, that the Court finds that the Bulletin does come within the reach of the statute, then those constitutional issues must be addressed and the statute must be held to be unconstitutional in that application, and on its face for vagueness and overbreadth.

The basis for our argument is set forth in point I, supra, in our discussion of the cases from National Committee for Impeachment through Buckley v. Valeo. We will not belabor that discussion. But we will highlight what those cases teach about the invalidity of governmental regulation of the type of speech at issue herein.

First, such speech is at the core of First Amendment concerns, and any attempt to regulate or restrict such speech is constitutionally suspect.

Second, the courts have been acutely concerned that regulation of the kind of speech here would be treacherously open-ended, and would impermissibly chill and deter the great variety of issue-oriented speech about public affairs, emanating from the myriad of groups and individuals in our society, that

is the very engine of our democratic system. If the Bulletin here can be subject to federal regulation and sanctions, then any group or individual that engages in any form of non-partisan speech about public issues, necessarily referring to and implicating elected officials who happen also to be candidates for office, can be subject to the same controls. To say that this would seriously stifle speech on public issues in our society is a gross understatement.

The courts have long guarded against vague and uncertain restrictions in the First Amendment area, because without precise guidelines individuals will "steer far wider of the unlawful zone," and protected speech will be deterred. Speiser v. Randall, 357 U.S. 513, 526 (1958). That is the destructive nature, the chilling effect, of vague laws that invokes the utmost judicial vigilance. In the apt words of Circuit Judge Timbers: "Particularly where First Amendment rights are involved, courts must be sensitive to the first whisper of a chilling wind - the whisper picked up first by the beeches before the pines." St. Martin's Press, Inc. v. Carey, ___ F.2d ___, ___ (2d Cir. 1979) (dissenting opinion). The FEC's theory here, which would make regulation of speech turn on a bewildering variety of factors extrinsic to the content of that speech, blows across the free speech landscape not as a whispering wind but with gale force.

That is precisely why the District of Columbia Circuit unanimously invalidated, on vagueness and overbreadth grounds, the FECA provision specifically intended to regulate the kind of issue speech contained in the TRIM Bulletin. Buckley v. Valeo, supra. The Court held that the government simply cannot, under

the First Amendment, subject to regulation every environmental, civil rights, economic or other issue group which, in the course of public discussion of their respective issues, rates, describes, comments on, praises or criticizes the conduct of elected public officials. The value of such speech is simply too great and the need for regulation simply too minimal to permit of such regulation. What the FEC seeks to do here is to utilize a tortured reading of the current statute to achieve exactly the result that the Buckley Court held to be unconstitutional under the predecessor statute.

Third, prior decisions have similarly been unanimous in the view that statutes like the one at issue here are no less vulnerable because they exact their restrictions in the form of registration, reporting, disclosure and identification, rather than through more direct prohibitions on the speech at issue. These cases all recognize that compelled identification, registration and disclosure can be as effective a restraint on group or individual advocacy as more heavy-handed direct prohibitions. See Buckley v. Valeo, 424 U.S. at 64-66; Talley v. California, 362 U.S. 60 (1960); NAACP v. Alabama, 357 U.S. 449 (1958). This is especially true where the group is engaged in advocacy on controversial issues, see ACLU v. Jennings, but the rule is not so limited. Buckley v. Valeo, supra; National Committee for Impeachment, supra. Thus, the courts have recognized - and the record and findings here specifically show - that many groups will simply cease to engage in the kind of issue-oriented speech involved here if the consequence is compelled identification and disclosure

of their members, contributors and supporters. The record also shows that other groups and individuals, particularly ad hoc groups of citizens as here, faced with the prospect of registering with the government, filing forms and reports, and submitting to disclaimer and identification requirements, will simply forego their speech rather than become enmeshed in such requirements. See Thomas v. Collins, 323 U.S. 516 (1945); Hynes v. Oradell, 425 U.S. 610 (1976). Either way, free speech on vital issues will be the loser.

The application of the statute necessarily sought by the FEC complaint dramatically illustrates these dangers. Every group which spends more than $100 to discuss any or all elected officials' stand on any issue would become subject to section 434(e)'s registration, reporting and disclosure requirements. Thus applied, the statute would cover the impeachment advertisement in National Committee for Impeachment, the busing advertisement in ACLU v. Jennings, and the "box score" ratings by non-partisan groups at issue in Buckley v. Valeo. Indeed, the record extensively describes the wide variety of groups that commonly use the "box score" device as part of this public issue speech, and the destructive effect that FECA regulation would have upon them. If section 441d is also applicable here, its reach is, if possible, even broader, since it contains absolutely no dollar threshold to trigger its application. Thus, under the FEC's complaint, a high school student who, as part of a civics course, spent $5.00 to print and distribute leaflets criticizing - or praising - Congressman Ambro's voting record on environmental issues or anything would have to comply with section 441d's identification and disclaimer requirements at the peril of civil

sanctions for failure to do so. The example may appear extreme, but only because the reach of the statute implicit in the FEC's theory of the case permits of such an absurd result.

In National Committee for Impeachment, supra, Circuit Judge Oakes most eloquently put these issues into their proper perspective, in rejecting the government's argument that there could be such regulation of issue-oriented speech critical of the President on a campaign issue:

> On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. . . . The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable. The suggestion in the Government's supporting affidavit and on oral argument is inconsistent with what Judge Learned Hand so eloquently described as "the spirit of liberty" and which he so beautifully defined as "the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest." L.Hand. The Spirit of Liberty 190 (I. Dilliard ed. 1952). We reject the suggestion for we believe Congress had no intention of regulating the expression of opinion on fundamental issues of the day. 469 F.2d at 1142.

With Judge Oakes, we believe this Court has sound and ample basis to conclude that the Congress, in regulating expenditures "expressly advocating the election or defeat of a clearly identified candidate," had no intention of reaching the kind of expression embodied in the TRIM Bulletin. Should the Court conclude otherwise, however, the Court must meet its responsibility and declare the two sections invalid under the First Amendment.

CONCLUSION

For these reasons, this Court should hold that the TRIM Bulletin does not fall within the relevant FECA provisions governing communications "expressly advocating" an electoral outcome. If necessary, the Court should hold 2 U.S.C. Sections 434(e) and 441d unconstitutional. In either case, the Court should remand the matter to the District Court with instructions to dismiss the complaint.

Respectfully submitted,

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