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Critics Resort to Baseless Constitutional Arguments in Effort to Discredit Executive Order to Require Disclosure from Government Contractors: Remarks of Tara Malloy, Campaign Legal Center Associate Legal Counsel

If history teaches us one thing, it is that secret money spent to influence the election of candidates rarely improves the integrity of our democracy. Unsurprisingly, the U.S. Supreme Court has shown very little tolerance for the argument that the First Amendment requires that campaign contributions and expenditures remain anonymous. Nevertheless, opponents of President Obama's April 13th draft executive order, apparently lacking any objections to the order on its merits, have resorted to attacking its constitutionality. But in so arguing, they disregard the Supreme Court's longstanding and consistent support for campaign finance disclosure both as a means to combat political corruption and to ensure a well-informed electorate.

A. The Supreme Court Has Consistently Supported Campaign Finance Disclosure Laws.

Beginning as far back as the 1910 Corrupt Practices Act, Congress has required disclosure in connection to the financing of campaigns for federal office, and the Supreme Court has repeatedly approved these efforts. To provide a quick review:

- In 1976, the Supreme Court upheld the disclosure requirements of the Federal Election Campaign Act in *Buckley v. Valeo*. The Act required disclosure of the contributions to, and the expenditures by, candidates, political parties and political committees, as well as disclosure of "independent expenditures" to influence federal elections.
- In 2003, the Supreme Court upheld the expanded disclosure requirements of the 2002 McCain-Feingold Act in *McConnell v. FEC*. McCain-Feingold expanded the forms of independent spending subject to disclosure beyond express advocacy to include sham issue ads, or "electioneering communications."
- Finally, in the *Citizens United* decision itself, the Supreme Court again upheld the electioneering communications disclosure requirements by an 8-1 margin. In a ringing endorsement of campaign disclosure, eight Justices stated that "The First

Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”

B. Opponents’ Constitutional Attack on the Executive Order Is Based on a Distortion of Supreme Court Precedent.

So, one may ask, given this history, on what possible basis can opponents attack the constitutionality of an order clearly designed to improve campaign finance disclosure? In short, opponents rest their case on legal assertions that have little or no support in Supreme Court case law.

- Assertion of an Absolute Right to Anonymous Speech. Opponents of disclosure like to claim that there is an absolute right to anonymous political speech, and often base this claim upon the Supreme Court’s 1995 decision in *McIntyre v. Ohio Elections Commission* to invalidate a state law requiring disclaimers on ballot measure literature. But *McIntyre* dealt with a ballot referendum, not a candidate election – or otherwise put, with issue advocacy, not campaign advocacy. The Supreme Court has distinguished ballot measure elections from candidate elections on grounds that the former, obviously, involves no candidates that could be corrupted by campaign support. The invalidity of a ballot measure disclaimer law thus in no way calls into question the constitutionality of a campaign finance disclosure law. Further, the *McIntyre* case concerned the speech of a single private citizen, Mrs. McIntyre, not the campaign spending of a deep-pocketed special interest group. In effect, multi-million dollar governmental contractors are attempting to justify their wish to make anonymous expenditures by comparing themselves to a lone pamphleteer who spent virtually no money at all.
- Unfounded Claims of Harassment and Reprisals. Opponents of the executive order also invoke a 1958 case, *NAACP v. Alabama*, to argue that the order is unconstitutional because it will chill the speech of prospective government contractors or subject them to governmental reprisals. But the *NAACP* case concerned the compelled disclosure of the names and address of members of the Alabama branch of the NAACP during the civil rights era. Again, opponents of the order are making a ridiculous analogy. In an attempt to keep their campaign contributions and expenditures secret, corporations seeking government contracts are comparing themselves to civil rights activists in the 1950’s Deep South who had well-justified fears of very serious reprisals.¹

¹ The Court’s decision in *NAACP* was based in part upon the NAACP’s “uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

Moreover, the Supreme Court has already formulated a remedy for any group who can in fact demonstrate a legitimate fear of harassment from campaign finance disclosure. In *Buckley*, it held that a specific group could request an “as-applied” exemption to a campaign disclosure law if it presented evidence showing “a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” Indeed, several years after *Buckley*, the Supreme Court recognized that the Socialist Workers Party was entitled to such an exemption.² So if there is indeed evidence of harassment or reprisals, the Court has already fashioned a remedy.

But the *Buckley* Court resoundingly rejected the proposition that general allegations of potential harassment like those offered by opponents here would render a campaign disclosure law facially unconstitutional. In the words of the Court, “*NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.”

C. Opponents’ Legal Arguments Against the Executive Order Are Based on a Distortion of Existing Campaign Finance Law.

In addition to their constitutional arguments, opponents also attack the order by mischaracterizing its objectives and its relation to existing campaign finance law.

- The Order Does Not Radically Extend Federal Disclosure Law. Some opponents suggest that the executive order represents a radical – and chilling – expansion of federal campaign finance disclosure. This statement reflects at best a misunderstanding of existing law, and worst, an outright distortion of the law. To a large extent, the information required by the order regarding contractors’ political contributions and spending is already publicly available – albeit in a number of scattered and disaggregated campaign finance reports filed with the FEC. The innovation of the order is to require contractor information to be aggregated in a centralized, searchable database for easy public access.

² The inadequacy of opponents’ arguments is also brought into relief by a review of the evidence of injury offered by the Ohio Socialist Workers Party (“SWP”) in *Brown v. Socialist Workers ’74 Campaign Committee*, 459 U.S. 87 (1982), where an exemption to disclosure was granted. In *Socialist Workers*, the SWP brought an as-applied challenge to the constitutionality of Ohio’s state political disclosure law. The SWP had introduced proof of specific incidents of private and government hostility toward the SWP and its members within the four years preceding the trial, including threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members’ property, police harassment of a party candidate, and the firing of shots at an SWP office. *Id.* at 99. In the year before trial, four Ohio SWP members were fired because of their party membership. *Id.* The District Court also found a past history of government harassment, including FBI surveillance of both the national party and the Ohio SWP, and interference with their political activities. *Id.* at 99-100. The Supreme Court concluded that in light of the “substantial evidence of past and present hostility from private persons and government officials against the SWP,” Ohio’s disclosure law could not be constitutionally applied to the SWP.

For instance, government contractors are already required to disclose the campaign contributions and expenditures made by their PACs, as well as their direct spending for “independent expenditures” and “electioneering communications.” Any campaign contributions from the contracting entity, or its officers and directors, will also be disclosed by the recipient political committees.

The only significant expansion of disclosure represented by the executive order is its requirement that regulated parties disclose their campaign contributions to a third-party group intended to support that group’s “independent expenditures” and “electioneering communications.” But even this information would have been subject to disclosure under the McCain-Feingold Act had the Federal Election Commission not gutted the law in a 2007 rulemaking. The statutory electioneering communications disclosure requirements – twice upheld by the Supreme Court – required groups making electioneering communications of over \$10,000 to report all their donors.³ It was only the indefensible actions of the FEC to narrow this law that led to the explosion of secret spending in the 2010 elections. Thus, at most, the executive order can be described as an attempt to restore the federal campaign disclosure laws to their original state.

- The Order Is Narrower than the DISCLOSE Act. Opponents also claim that the order subverts the will of Congress by allegedly resurrecting parts of the DISCLOSE Act that narrowly failed to pass in the last Congress. But the draft executive order requires only disclosure from businesses bidding for federal contracts, as well as from their directors, officers, and subsidiaries and affiliated organizations.⁴ The DISCLOSE Act, on the other hand, would have directly banned government contractors from making either independent expenditures or electioneering communications in federal elections. Attempts to equate the executive order with the DISCLOSE Act is comparing apples to oranges.
- The Order Does Not Inject Politics into Contracting. Finally, opponents attack the executive order by suggesting that there is something untoward about creating disclosure requirements specific to prospective contractors. But multiple courts have recognized that the governmental contracting process is a particular locus of potential *quid pro quo* corruption in light of the individualized benefits that a winning contractor obtains from the state. For this reason, much tougher “pay-to-play” laws restricting campaign contributions from government contractors and

³ If a group expends more than \$10,000 in a calendar year on ECs, the law established two options for reporting. If the electioneering communication was financed from funds in a segregated bank account, the group sponsoring the ad is required only to disclose contributors of \$1,000 or more to the account. If the EC was financed from the group’s general treasury, however, the group is required to report all contributors of \$1,000 or more. 2 U.S.C. § 434(f)(1)-(2).

⁴ Under the draft executive order, prospective contractors, their directors and officers, and their subsidiaries and affiliated organizations, must disclose (1) their contributions and expenditures to or on behalf of federal candidates, parties and political committees, and (2) their contributions to third-party groups for the purpose of funding the group’s “independent expenditures” and “electioneering communications.”

prospective contractors have been upheld by the lower courts. Among such laws is the existing federal restriction on campaign contributions for governmental contractors during the negotiation and performance of a contract. Thus opponents' claim that government contracting is somehow insulated from political pressures runs counter to the weight of judicial authority on this subject and the history of scandals, kickbacks and bribes in the contracting process at both the state and federal level.

Opponents of the draft executive order assert an absolute right to spend secret money to influence candidate elections. But no such right has been recognized by the Supreme Court. The constitutional and legal attack on the executive order therefore has no merit, and runs directly counter to decades of Supreme Court precedent approving campaign finance disclosure measures.