Approved: 1-26-99
Date

MINUTES OF THE SENATE ELECTIONS AND LOCAL GOVERNMENT.

The meeting was called to order by Chairman Senator Janice Hardenburger at 1:30 p.m. on January19, 1999 in Room 529-S of the Capitol.

All members were present

Committee staff present: Dennis Hodgins, Legislative Research Department
Mike Heim, Legislative Research Department
Ken Wilke, Revisor of Statutes
Graceanna Wood, Committee Secretary

Conferees appearing before the committee: None

Others attending: See attached list

Chairman Hardenburger opened the meeting requesting the approval of January 13 and January 14, 1999 minutes.

Senator Steineger moved that the minutes of January 13 and January 14 be approved as written, seconded by Senator Huelskamp. Motion carried.

Chairman Hardenburger asked for introduction of bills. Legislative staff briefed the Committee on the interim study on campaign finance reform. The study was requested by the Kansas Governmental Ethics Commission based upon its belief that more disclosure should be made by those individuals who make expenditures which directly or indirectly influence the nomination or election of a candidate for state or local office. Also the Commission requested studying the aspects and impact of soft money on Kansas elections. (Attachment #1). (Attachment #2)

The Chairman requested the Ethics Commission to update the Committee on the status of the lawsuit (Kansans for Life v. Diane Gaede). The Committee discussed the possibility of a time frame for this. Vera Gannaway, Legal Counsel of the KGEC advised the Committee the litigation before the 10th District Federal Courts is in its preliminary stages.

Chairman Hardenburger advised tomorrow the Committee will be looking at a **HRC 1601** which would amend the State Constitution.

Meeting was adjourned at 2:05 p.m. Next meeting scheduled for January 20, 1999.

ELECTIONS & LOCAL GOVERNMENT COMMITTEE
GUEST LIST

DATE: JANUARY 19, 1999

NAME	REPRESENTING
Brad Bryant	Sec. of State
Jim Edwards	KCCI
Bryan Cardwell	HeelsKan.)
Carl Willems	GEC
(Vera Gannaway)	GEC
Bruce Dimmitt	Kansans for Life
Harriet Lange	Ks Assn B'Casters

SOFT MONEY CONTRIBUTIONS AND INDEPENDENT EXPENDITURES IN KANSAS ELECTIONS

CONCLUSIONS AND RECOMMENDATIONS

The Committee makes no recommendations concerning independent expenditures because of pending litigation on this issue (*Kansans For Life, Inc. v. Diane Gaede, et al.* (98-4192, RDR)). The Committee thinks that the influence of soft money is not a significant issue in Kansas elections and makes no recommendation at this time.

BACKGROUND

The study was requested by the Kansas Governmental Ethics Commission based upon its belief that more disclosure should be made by those individuals who make expenditures that directly or indirectly influence the nomination or election of a candidate for state or local office. In addition, the Commission recommends studying the aspects and impact of soft money on Kansas elections.

The following is a brief description of terms and statutes that apply to soft money contributions and independent expenditures.

Soft Money Contributions

Soft money includes moneys contributed to, and expended by, political parties from unions, individuals, corporations, and trade associations that are exempt from the Federal Election Campaign Act's (FECA) contribution and expenditure limits and reporting and disclosure requirements. Soft money contributions were originally intended to be used for such expenditures as party building activities that were not coordinated with a candidate's campaign and did not expressly advocate the election or defeat of a clearly identified candidate. This money generally is contributed to a national party committee and then, in return, given to a state party committee. Because the Federal Election Commission (FEC) did not define party building activities, this money found its way into advertisements for campaigns at the national level. A national party committee is required to disclose how much money it raised, but it does not have to report who and how much was contributed to the committee. Due to inadequate disclosure requirements, tracking soft money from the national party committee to the state party committee level is a difficult task.

Independent Expenditures

Independent expenditures are moneys spent on communications to the public that directly advocates the nomination, election or defeat of a clearly identified candidate. Often the communications contain the "magic" words such as: "vote for" or "vote against." The communications are made without the coordination or consultation with the candidate. Independent expenditures, similar to issue ads, are not subject to candidate contribution limits, but unlike issue ads, these expenditures are required to disclose how they spend their money. This form of advertising is often referred to as express advocacy. Independent expenditures are becoming more prevalent in state campaigns. K.S.A. 25-4150 requires any person who makes an independent expenditure in an amount of $100 or more to disclose the amount and source of that expenditure.

Issue Advocacy or Issue Advertising

Issue advocacy or issue advertising is communication for the purpose of addressing a particular policy or idea. These ads may address a candidate indirectly, but do not expressly advocate that candidate's nomination, election, or defeat. Traditionally, issue advertising has been done by

third parties and organizations other than political action committees (PACs).

Buckley v. Valeo 424 U.S. 1 (1976)

The United States Supreme Court in *Buckley v. Valeo* 424 U.S. 1 (1976) considered the constitutionality of FECA which, among other things, placed contribution and expenditure limits for candidates and individuals or political groups that supported candidates. FECA also imposed reporting and disclosure requirements on candidates, political committees, and individual contributors.

The central premise of *Buckley* is that campaign contributions and expenditures are themselves a form of political speech, which lies at the core of the protections of the First Amendment. The Court recognized that contributions could be limited to prevent government contentions of the appearance of "*quid pro quo*" corruption. The *Buckley* decision tried to clearly distinguish a "bright-line" test between "issue advocacy" and "express advocacy" advertisements so that advertising solely engaged in issue advocacy would not be subject to reporting and disclosure requirements. The Court ruled that any limitation of independent expenditures uncoordinated with a candidate is a violation of First Amendment rights. This case allowed unlimited spending independent of the candidate.

COMMITTEE ACTIVITIES

A one-day meeting was held in October where eight conferees testified on the topic. A second meeting day was held in November to discuss the constitutional interpretation of Substitute for H. B. 2662 (H.B. 2662) and S.B. 432. H.B. 2662 was enacted into law during the 1998 Session. The Committee heard from three University of Kansas professors: two from the Department of Political Science and one from the School of Law, the Kansas Governmental Ethics Commission, Kansans For Life, the Christian Coalition, the *Kansas Lawyer*, and the Kansas Alliance for Campaign Finance Reform.

The two professors from the Department of Political Science explained the concepts of soft money and independent expenditures as they applied to federal and state campaigns. Both professors favored the idea of strengthening reporting and disclosure laws; however, they cautioned the Legislature that these laws would have to be carefully crafted to avoid being declared unconstitutional. They testified that further reducing expenditure limits may be ruled unconstitutional because the courts could construe that as an infringement on free speech. They thought that Kansas elections are relatively free of, or clean, in respect to the inflow of soft money into campaigns because soft money is more of a federal issue rather than a state issue. They felt that the national trend of soft money expenditures in campaigns eventually will trickle down to the state level considering the high costs of campaigns.

They both agreed that special interest groups are spending more money to advocate the defeat or election of a candidate, and as a result, independent expenditures have become more prevalent in state elections. They thought that special interest groups can dictate the issues in a campaign, so that a campaign may become more special interest-controlled rather than candidate-controlled. As a result, candidates have to spend their time and money defending themselves against these independent advertisements and have less time to devote to the issues. They said that PACs have become vendors for special interest groups, because interest groups give large contributions to PACs who in turn make decisions where the money will be spent, with full knowledge of what the special interest groups want.

They reported that the influx of soft money and independent expenditures are a way to circumvent the limitations imposed by the state Campaign Finance Act.

The professor from the KU School of Law clarified the permissible parameters of campaign finance reform under the *Buckley v. Valeo* decision and subsequent U.S. Supreme Court and lower court decisions. He testified that restric-

tions and limitations on independent expenditures were ruled unconstitutional under the *Buckley* decision because the Court ruled that it was an infringement on free speech. He suggested that the Legislature should not place limits on independent expenditures, unless it can show a compelling interest for disclosure to prevent *quid pro quo* corruption or it should be prepared to challenge the *Buckley* decision to the U.S. Supreme Court. He stated that another problem arises in imposing disclosure requirements in some cases where, if the contributor was known, then some kind of retaliation may occur. The courts have ruled that disclosure requirements in these circumstances are unconstitutional.

He testified that the *Buckley* decision tried to clearly distinguish a "bright line" test between issue advocacy and express advocacy advertisements by stating that reporting and disclosure requirements could not be applied to groups solely engaged in issue advocacy, but groups that engaged in expressly advocating the nomination, election, or defeat of a clearly identified candidate, could be made subject to these requirements. He said the Court ruled that expenditure for express advocacy could be subject to disclosure requirements only if it included magic words such as "vote for" or "vote against." He stated that several lower court cases have relied on the Supreme Court's "bright line" test to determine the constitutionality of the imposition of reporting and disclosure requirements. The court decisions have varied as to agreement with the *Buckley* decision and there has been pressure exerted by some lower courts for the U.S. Supreme Court to reconsider its decision.

The law professor testified on the constitutionality of H.B. 2662 which was enacted by the 1998 Legislature and S.B. 432 which was proposed by the Governor but not enacted. He said that some provisions in H.B. 2662 were problematic because contribution limits that apply to individuals, political and party committees making only independent expenditures that are not coordinated with a candidate, are subjected to reporting and disclosure requirements under state laws. The *Buckley* decision and its progeny (*FEC v. National Conservative Political Action Committee*) ruled this type of regulation was unconstitutional.. Also, he said that although the definition of "expenditure" in H.B. 2662 brings the language of the statute closer in line with the *Buckley* decision, the bill presents problems because the definition of express advocacy goes beyond the "magic" words by including language which states that express advocacy advertisements are not limited to the magic words. The professor said that, as a result, persons who advocate are unclear if their communications will be subject to the reporting and disclosure laws since they cannot be sure if the words they use may be interpreted as expressly advocating.

He questioned the expanded disclosure requirements in H.B. 2662 requiring all political materials in excess of a threshold amount to be identified as advertisements and include the identity of the group or individual providing the advertisement. These requirements of "self-identification" has been ruled by the Supreme Court (*McIntyre v. Ohio Election Commission*) to be more burdensome than reporting requirements and the Court has invalidated a ban on anonymous political pamphlets. Some lower courts, however, have upheld self-identification requirements as applied to paid political ads involving express advocacy.

The professor said that S.B. 432 would avoid most of the obvious problems under the *Buckley* decision because it establishes contribution and expenditure limitations within a specified time frame before an election. It also would require a communication that expressly advocates the nomination, election, or defeat of a clearly identified candidate (defined as "influencing or attempting to influence") be reported. He stated that it would be difficult to envision pure issue advocacy advertisement which identified a particular candidate during the campaign season. He felt that the bill was problematic because it would extend reporting and disclosure requirements beyond the traditional magic words of express advocacy, but does not stipulate what words constitute express advocacy. In addition, he thought that requiring a person to file a statement at least seven days prior to a contribution or an expenditure may be construed as an impermissible burden on that

person's right of free speech. The professor said that there is no case law on this issue and it is difficult to predict how the courts would rule, but he thinks there would be a good chance that the provision would be struck down.

A representative of the Kansas Governmental Ethics Commission felt that the problem of soft money was not germane to Kansas elections. She said the Commission had to interpret the new law (H.B. 2662) as it might apply to several public advertisements during the Kansas primary elections and determine if the advertisements met the express advocacy definition in the bill. She testified that in Opinion No. 98-22, the Commission opined that a political advertisement issued by Kansans For Life was subject to the reporting and disclosure requirements specified in the bill because it was "[a] communication which, when viewed as a whole, leads an ordinary person to believe that he or she is being urged to vote for or against a particular candidate for office," and therefore, is deemed to expressly advocate.

The professor from the KU School of Law stated that the statute which the Ethics Commission's opinion is based upon does not contain a "bright line" test for the definition of express advocacy as required by the *Buckley* decision and the Commission's ruling does little to clarify the statute. He testified that he is not certain how the court would rule on the Commission's interpretation, but he felt that it would be a good idea to supplement the definition in some way, so as to avoid potential constitutional problems.

Representatives from Kansans For Life, the Kansas Christian Coalition, and a publisher of the *Kansas Lawyer* felt that they should not be subjected to reporting and disclosure requirements for issue advocacy advertisements by their organizations. They stated that their advertisements were protected under the Constitution by the First Amendment and their organizations were protected by the right of association. The Kansans For Life have filed a lawsuit against the Kansas Governmental Ethics Commission based upon the Commission Opinion No. 98-22 (*Kansans For Life, Inc. v. Diane Gaede et al.*).

A representative for the Alliance for Campaign Finance Reform felt that an alternative to the influx of large amounts of independent and soft money into Kansas elections would be the implementation of public financing.

CONCLUSIONS AND RECOMMENDATIONS

The Committee does not make any recommendations concerning independent expenditures because of pending litigation on this issue (*Kansans For Life, Inc. v. Diane Gaede et al.* (98-4192, RDR)).

The Committee does not think that soft money has a significant impact on Kansas elections and therefore, makes no recommendations at this time.

Senate Elections & Local Government
Attachment: # 1-4
Date: 1-19-99

KFL/MILLER
:60 Radio

Have you ever had someone try to trick you?

You know, twist the truth the truth to make you think one thing instead of another?

Children are quite good at this.

Unfortunately, Governor Bill Graves is trying to do the same thing, telling you he is pro-life, when in fact he is a strong supporter of legal abortion in Kansas.

During his last campaign, Governor Bill Graves held a rally for his supporters.

Dr. George Tiller, the infamous late term abortionist was in attendance to support Bill Graves.

We know Bill Graves props the abortion industry, because we are Kansans for Life.

It's our job to know who is pro-life and who is pro-abortion.

Yet there are political ads trying to deceive you which this radio station is required by law to run.

The truth is, David Miller, who is challenging Bill Graves for Governor, is pro-life.

David Miller has always been pro-life.

David Miller will not change, or try to fool you, just because it is an election year.

Now you know the truth.

Paid for by Kansans for Life.

Senate Elections & Local Government
Attachment: # 2 -1
Date: 1-19-99