The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 7, 1996

George C. Leventis, General Counsel
Department of Education
402 Rutledge Building
1429 Senate Street
Columbia, South Carolina 29201

Re: Informal Opinion

Dear Mr. Leventis:

You have asked our review of proposed legislation for its constitutionality. You state as follows:

> I have been requested to seek an opinion of the Attorney General regarding the constitutionality of the "South Carolina School Accountability Act of 1996", lines 31 thru 38. Several legislators have suggested that this section may violate a constitutional right of free speech.

The provision in question reads:

> (c) Candidates for the office of trustee for the boards of trustees for the school districts of this State are prohibited from soliciting or accepting a contribution, gift, loan, or any other thing of value from a certified political party or from any person or entity acting for or on behalf of a certified political party. No candidate, candidate's committee, or person or entity acting for or on behalf of a candidate or candidate's committee, may publish or distribute campaign

literature which in any way states, implies or suggests party affiliation.

Law / Analysis

Of course, the South Carolina General Assembly has full power to enact any law not inconsistent with the constitution. Riley v. Martin, 274 S.C. 106, 262 S.E.2d 404 (1980). If this provision were to be enacted by the General Assembly, the presumption of constitutionality would attach. In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

The intent of the first sentence of the proposed legislation is obviously one of prohibiting campaign contributions being made by certified political parties to candidates for trustee of school boards, a typically non partisan office. While the proposed provision does not so state, it is evident that the General Assembly desires to preclude political parties from becoming involved financially in these nonpartisan elections through their financial support. And while the provision is written in terms of banning the solicitation and acceptance of contributions by the candidate, its effect is obviously to bar also certified political parties from making such contributions. Unlike those provisions which preclude the "personal" solicitation by the candidate himself, see, In Re Fadeley, 802 P.2d 31 (Or. 1990), this provision appears to prohibit outright both the solicitation and acceptance by the candidate or anyone on his behalf. The issue here is whether such a prohibition, as so construed, contravenes the First Amendment and Art. I, Section 2 of the South Carolina Constitution which is virtually identical thereto. City of Rock Hill v. Henry, 244 S.C. 74, 76, 135 S.E.2d 718 (1963).

The seminal decision in this important area of First Amendment law is Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). In Buckley, the United States Supreme Court addressed the constitutionality of various provisions of the Federal Election Campaign Act of 1971. The Court set forth the following general overview of the relationship of the First Amendment to campaign regulation:

[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment

> activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484, 1 L.Ed.2d 1498, 77 S.Ct. 1304, 14 Ohio Ops 2d 331 (1957). Although First Amendment protections are not confined to the "exposition of ideas," Winters v. New York, 333 U.S. 507, 510, 92 L.Ed. 840, 68 S.Ct. 665 (1948), "there is practically universal agreement that a major purpose of th[e] Amendment was to protect the free discussion of governmental affairs ... of course includ[ing] discussions of candidates ... ." Mills v. Alabama, 384 U.S. 214, 218, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966).

46 L.Ed.2d at 685. Buckley further acknowledged that a campaign contribution serves "as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." Elaborating, the Court described a campaign contribution this way:

> [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor. (emphasis added).

Id. at 689. Notwithstanding this recognition by the Court of the significant differences between limitations upon expenditures and limitations upon the size of campaign contributions, Buckley agreed that contribution limitations themselves served to infringe speech and impinged "protected associational freedoms." The Court noted that "[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate." Id.

The particular federal campaign restrictions reviewed by Buckley involved a limit of one thousand dollars upon any "person". In upholding the validity of this specific limitation, the Court noted that even a "significant interference" with protected rights of speech and association is constitutionally sustainable if the state "demonstrates a sufficient important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." Id at 691. See also, Austin v. Mich. Chamber of Commerce, ____ U.S. ____, 110 S.Ct. 1391, 1396, 108 L.Ed.2d 652 (1990). The primary purpose of the federal Act in question was "to limit the actuality and appearance of corruption resulting from large individual financial contributions ...". The Buckley Court found these interests - "the danger of actual quid pro quo arrangement" - as well as the "impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions ...", to be compelling. According to the Court, what in that instance served to uphold the contribution limitation was the fact that

> [t]he Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions -- the narrow aspect of political associations where the actuality and potential for corruption have been identified - while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited, but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contributions limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates and political parties. (emphasis added)

46 L.Ed.2d at 693.

Since Buckley, the Court has made a number of other pertinent observations in the context of specific limitations placed upon campaign contributions. In Citizens Against

Rent Control v. Berkeley, 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981), for example, the Court struck down a limitation of $250 on contributions to committees found to support or oppose ballot measures. The Court stated that "[t]o place a Spartan limit - or indeed any limit - on individuals wishing to band together to advance their views on a ballot measure while placing none on individuals acting alone, is clearly a restraint on the right of association." Noting that "Section 602 does not seek to mute the voice of one individual", the Court concluded that the statute "cannot be allowed to hobble the collective expressions of a group." 70 L.Ed.2d at 499. Buckley, said the Court, had identified a single exception to the rule that "limits on political activity were contrary to the First Amendment" - such exception was the "perception of undue influence of large contributors to a candidate ... ." Id.

And in FEC v. National Conservative PAC, 470 U.S. 480, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985), the Court invalidated the Presidential Election Campaign Fund Act's provision limiting an independent "political committee" from spending more than $1,000 to further a major presidential candidate's election. Relying upon Buckley and Rent Control, the Court stated:

> [w]e held in Buckley and reaffirmed in Citizens Against Rent Control that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances ... .
>
> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate.

105 S.Ct. at 1468

Then, in Eu v. San Francisco Cty. v. Dem. Central Committee, 489 U.S. 226, 109 S.Ct. 1013 (1989), the Court declared unconstitutional a provision of the California Election Code which made it a misdemeanor for any candidate in a primary to claim official party endorsement. The Court observed that

> [f]reedom of association means not only that an individual voter has the right to associate with the political party of her choice ... but also that a political party has a right to "'identify the people who constitute the association ...'"
>
> ... and to select a "standard who best represents the party's ideologies and preferences." ...
>
> Depriving a political party of the power to endorse suffocates this right.

The Supreme Court has recognized time and again the important role political parties play in our democratic society and the protections which the First Amendment afford political parties to express the beliefs of their members. For example, in Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed. 260, 266, in striking down a provision which prohibited a voter from voting in the primary election of a political party if he had voted in the primary of another party in the preceding twenty-three months, the Court stated that "the right to associate with the political party of one's choice is an integral part of this constitutional freedom" of association protected by the First Amendment. The Court further noted that "[a] prime objective of most voters in associating themselves with a particular party must surely be to gain a voice" in the selection of candidates. Id. at 267. Moreover, as the Court reemphasized in Tashjian v. Republican Party of Connecticut, 479 U.S. 16, 107 S.Ct. 544, 549 (1986) any

> interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. [Quoting Democratic Party of United States v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 122, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981) and Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311 (1957)].

Lower courts have infrequently interpreted Buckley as it applies to restrictions imposed solely upon political parties. However, where courts have addressed the issue, they have generally struck down provisions aimed only at parties. In Geary v. Renne, 911 F.2d 280 (9th Cir. 1990) vac. on other grounds, 501 U.S. 312, 115 L.Ed.2d 288 (1991), the Ninth Circuit Court of Appeals struck down California's prohibition upon political parties endorsing candidates in nonpartisan elections. The majority found that "§ 6(b)'s prohibitions do impair appellees' first amendment rights" and thus "the burden is on the government to show a compelling state interest justifying the regulation." The State attempted to justify its prohibition on the basis that it is

> ... essential to preserving the nonpartisan nature of California's system of electing local and judicial officials and ... [thus] the State's interest in the "fair and impartial administration of government" is compelling enough to warrant § 6(b)'s ban on partisan endorsements.

911 F.2d at 283.

The Court distinguished other cases involving limitations upon campaign contributions and spending. Citing Austin v. Michigan Chamber of Commerce, supra, Geary noted that the Supreme Court in Austin had found the Michigan statute under review (which prohibited corporations from using general treasury funds for independent expenditures in connection with state candidate elections) to be

> a legitimate check upon "the corrosive and distorting effects of immense aggregations of wealth that one accumulated with the help of the [state-conferred] corporate forum and that have little or no correlation to the public's support for the corporations political ideas."

911 F.2d at 284. Continuing, the Court concluded that

> [t]he corruption found properly addressed by the Michigan statute was not of the kind decried by California here. Under the definition applied in past cases, "[c]orruption is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." [FEC v.] NCPAC [470 U.S. 480] at 497, 105 S.Ct. at 1468 ... .

Thus, said the Court "[t]he rationale underlying 'the long history of regulation of corporate political activity [is] ... simply not available as a justification for the complete suppression of speech by political parties, regardless of whether the elections in question are partisan or nonpartisan in nature." Referencing FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 256, 107 S.Ct. 616, 627, 93 L.Ed.2d 539 (1986), where the Court had exempted from prohibitions on corporate expenditures of treasury funds on behalf of federal candidates, a nonprofit organization dedicated to the rights of the unborn, the Geary Court found political parties to be no different. Geary concluded that the following description

from Massachusetts Citizens for Life "applies equally well to the political parties targeted by § 6(b):

> [such groups] do not pose any danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.

911 F.2d at 284.

Moreover, Geary recognized that "political parties as well as party adherents possess rights of expression and association under the first amendment ...." Further, the Court noted that Austin and other cases had cautioned against cutting off political expression altogether. Wrote the Geary majority,

> [i]n Austin for example, the Court found the Michigan enactment at issue to be "precisely targeted" to achieve its aims because it does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds." 110 S.Ct. at 1398 (emphasis in original). Similarly in MCFL, the Court emphasized that the FECA limitations on corporate political expenditures upheld in previous cases were "of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the State referendum context in First Natl. Bank of Boston v. Bellotti, 435 U.S. 765 [98 S.Ct. 1407, 55 L.Ed.2d 707] (1978)." 479 U.S. at 259 n. 12, 107 S.Ct. at 628 n. 12 (emphasis added).

Since § 6(b) "imposes a total ban on any partisan gesture of support for or opposition to a candidate", the Court in Geary struck down the provision.

As noted above, the Geary decision was subsequently vacated on other grounds. However, in California Dem. Party v. Lungren, 860 F.Supp. 718 (N.D. Cal. 1994), the Court there also concluded that California's Section 6(b) was likely unconstitutional. Referencing the separate opinion of Justice Marshall in Renne v. Geary, supra, the Court stated:

> [a]s Justice Marshall recognized, the corruption that the Attorney General argues section 6(b) prevents occurs only because voters are genuinely interested in hearing the opinions of the political party to which they belong. Unlike the corruption wrought by huge corporate campaign contributions through which a corporation may succeed in securing a politician's support for positions that the public at large does not support, the only reason that a political party's endorsement is valuable is because a candidate knows that the party's position on issues necessarily corresponds with the views held by its membership. As Justice Marshall succinctly put it, "the prospect that voters might be persuaded by party endorsements is not a corruption of the democratic political process; it is the democratic political process." Id. at 349, 111 S.Ct. at 2353-54 (emphasis in original).

Of course, neither Geary or Lungren involved a statute which prohibited campaign contributions to a nonpartisan election, but instead foreclosed endorsements by the parties altogether. However, both Buckley as well as other cases have recognized the significant difference between a contribution limitation and one which severely curtails expression or which prohibits any contribution, no matter how minuscule. Buckley recognized quite clearly that the "expression rests solely on the undifferentiated, symbolic act of contributing."

The recent Eighth Circuit decision of Carver v. Nixon, 72 F.3d 633 (8th Cir. 1995) is enlightening because it dealt with the question of setting contribution limits so low that such limits unconstitutionally curtail association and expression. A voter initiative limited contributions to candidates in districts with fewer than 100,000 residents to $100; candidates in districts of greater than 100,000 residents could receive contributions of $200 per person; and statewide candidates were allowed to receive a contribution no greater than $300 per person.

The district court upheld the statute as in accord with Buckley. The lower court noted that in Buckley, the Supreme Court had recognized that governments possess a compelling interest in preventing corruption that may result from individuals making large contributions to candidates and that the statute was "tailored narrowly enough to help the state meet its goals of eliminating some of the means of corruption and avoiding the appearance of corruption." 887 F.Supp. at 906.

The Eighth Circuit reversed. At the outset, the Court recounted that Buckley "recognized that 'contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy.'" The Carver Court noted also that Buckley had cautioned that if "the contribution limits were too low, the limits could be unconstitutional." 72 F.3d at 637.

The real issue, said the Eighth Circuit, was whether the legislation and the contribution limits "are narrowly tailored to address the reality or appearance of corruption associated with large contributions." The plaintiff, Carver, argued that the limits imposed were so restrictive as to "violate his right to associate as a contributor." 72 F.3d at 640. A contribution restriction could become so invasive, concluded the Court, that a difference in "degree" could become a difference "in kind".

Relying upon its earlier opinion, in Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), cert den., ____ U.S. ____, 115 S.Ct. 936, 130 L.Ed.2d 881 (1995), which had invalidated a Minnesota statute imposing a $100 limit on contributions to political committees because the limits were "too low to allow meaningful participation in protected political speech and association", the Carver Court reached the identical conclusion with respect to the Missouri statute as it related to contributions to candidates. Concluded the Court,

> [t]he State made no showing as to why it was necessary to adopt the lowest contribution limits in the nation and restrict the First Amendment rights of so many contributors in order to prevent corruption or the appearance of corruption associated with large campaign contributions. Proposition A substantially limits Carver's ability to contribute to candidates and will have a considerable impact on many contributors besides Carver. The State simply argues that limits which are nearly four times as restrictive as the limits approved in Buckley are narrowly tailored. The State argues we may not fine tune the specific dollar amount of the limits, but fails to demonstrate that the Proposition A limits are not a "difference in kind." ... We hold that the Proposition A limits amount to a difference in kind from the limits in Buckley. The limits are not closely drawn to reduce corruption or the appearance of corruption associated with large campaign contributions. Thus, the State has failed to carry its burden of demonstrating that Proposition A will alleviate the harms in a direct and material way, Turner Broadcasting System [v. Federal

> Communications Comm.], _____ U.S. at _____, 114 S.Ct. at 2470, or is closely drawn to avoid unnecessary abridgement or associational freedoms, Buckley, 424 U.S. at 25, 96 S.Ct. at 637-38. Accordingly, we conclude that the Proposition A contribution limits unconstitutionally burden the First Amendment rights of association and expression.

72 F.3d at 644.

A number of other decisions have drawn a bright line between limitations upon campaign contributions to avoid the appearance of corruption and the outright prohibition of contributions. In Fed. Elec. Comm. v. Colo. Repub. Fed. Campaign Com., 59 F.3d 1015 (10th Cir. 1995), the Court upheld as constitutional the federal Election Campaign Act's caps upon campaign contributions by political parties. But the Court specifically noted there is a difference between limiting speech and completely curtailing it:

> [b]y treating coordinated expenditures as contributions, the FECA effectively precludes political committees from literally or in appearance, "secur[ing] a political quid pro quo from current and potential office holders." [Buckley v. Valeo] Id. at 26-27, 96 S.Ct. at 638. Contribution limits regulate the quantity of political speech, but do not foreclose speech or political association. We do not see this monetary cap as content based; it is rather a consequence of the funding source. We uphold as constitutional against the Committee's First Amendment challenge, the spending limits in § 441a(d)(3).

59 F.3d at 1024. (emphasis added).

Likewise, in Fair Political Practices Commission v. Sup. Ct. of Los Angeles County, 157 Cal.Reptr. 855, 599 P.2d 46 (1979), the California Supreme Court struck down a total ban on lobbyists making campaign contributions. In banning any contribution by a lobbyist whatsoever, the statute swept far too broadly, concluded the Court:

> [f]irst, the prohibition applies to contributions to any and all candidates even though the lobbyist may never have occasion to lobby the candidate. Secondly, the definition of lobbyist is extremely broad, to include persons who appear regularly before administrative agencies seeking to influence

> administrative determinations in favor of their clients. Thirdly, the statute does not discriminate between small and large but prohibits all contributions. Thus, it is not narrowly directed to the aspects of political association where potential corruption might be identified.

599 P.2d at 53. (emphasis added).

Similarly, in Barker v. State of Wisconsin Ethics Bd., 841 F.Supp. 255 (W.D. Wis. 1993), the Court invalidated a Wisconsin statute which prohibited lobbyists from furnishing to a candidate "any other thing of pecuniary value" aside from specified monetary contributions. The phrase "any other thing of pecuniary value" was deemed to include the delivering of campaign literature door to door, stuffing envelopes, constructing yard signs, telephoning citizens on a candidate's behalf and other similar campaign tasks. The Court's analysis centered on the fact that

> [w]hereas Buckley endorsed limits on financial contributions in the context of unregulated volunteering, the Wisconsin statute prohibits all contributions of volunteer services in the context of financial contribution limits ... . [D]efendants have not established that a blanket prohibition against volunteering personal services to campaigns is a necessary corollary to the law's other provisions.

841 F.Supp. at 263.

SECOND SENTENCE OF PROPOSED LEGISLATION

With respect to the second sentence of the proposed legislation, likewise, I believe there to be constitutional problems. This provision prohibits a candidate for school trustee or anyone acting on behalf of a candidate from publishing or distributing campaign literature which in any way states, implies or suggests party affiliation.

In Buckley, the Court noted that "[t]he candidate no less than any other person has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election." Moreover, as the Court concluded in Buckley v. Ill. Jud. Inquiry Bd., 997 F.2d 224, 227 (7th Cir. 1993), candidates for public office "should be free to express their views on all matters of interest to the electorate."

Of course, courts have also recognized the importance of the State's interest in keeping politics out of the election to certain positions. It has been stated that keeping certain local elections nonpartisan "permit[s] voters to analyze local issues independently on their merits and to focus on the intelligence and experience of the candidates themselves rather than their political affiliations." Northrup, "Local Nonpartisan Elections, Political Parties and the First Amendment", 89 Cola. Law Review, 1677, 1679 (1987). See also, Moon v. Halverson, 206 Minn. 331, 288 N.W. 579, 580 (1939).

Accordingly, it has been held that a statute prohibiting the placement of party affiliation on a judicial election ballot, does not violate the First Amendment. Haffey v. Taft, 803 F.Supp. 121 (S.D. Ohio 1992). Likewise, the Supreme Court has held that the Hatch Act's ban upon federal employees campaigning is constitutional under the First Amendment. U.S. Civ. Serv. Comm. v. Nat. Assoc. of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). And a requirement that a judge must resign before campaigning for a non-judicial office has been held to be in accord with the principles of free speech and association. Morial v. Jud. Comm., 565 F.2d 295 (5th Cir. 1977). Similarly, a mandate that certain officials of a political party are ineligible for a position on a school board is also not deemed to be in conflict with the First Amendment. Fletcher v. Marino, 882 F.2d 605 (2d Cir. 1989).

On the other hand, courts have not been hesitant to strike down requirements which infringe upon the candidate's right to discuss issues with the electorate and to present truthful information to the voters. For example, several decisions have invalidated a statutory prohibition upon candidates for a judicial office presenting their views to the voting populace upon disputed legal or political issues. In JCJD v. RJCR, 803 S.W.2d 953 (Ky. 1991), the Court, in striking down the canon of judicial conduct, which proscribed such presentation or discussion, quoted with approval the following language in Am. Civ. Lib. Union of Fla. Inc. et al. v. Florida Bar, 744 F.Supp. 1094, 1097 (N.D. Fla. 1990), that

> a person does not ... surrender his constitutional right to freedom of speech when he becomes a candidate for judicial office. A state cannot require so much.

The Court in JCJD further noted that

> [w]here a regulation extends so far as to completely outlaw speech because of the subject matter of its content, there is a strong presumption of its unconstitutionality.

803 S.W.2d at 955.

JCJD also cited as analogous Peel v. Atty. Reg. & Discipl. Comm., _____ U.S. _____, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), a case in which the United States Supreme Court had declared unconstitutional a prohibition against attorneys advertising certification as a trial specialist by the National Board of Trial Advocacy. In Peel, the Court had noted that the State carries a "heavy burden" in "justifying a categorical prohibition against the dissemination of accurate factual information to the public." 110 S.Ct. at 2292. Invalidating the Canon, the Court in JCJD also quoted this passage from Peel:

> [t]he disclosure of truthful relevant information is more likely to make a positive contribution to decision making than is concealment of such information.

Other courts have reached the same conclusion as JCJD. Buckley v. Ill. Jud. Inquiry Bd., supra. Beshear v. Butt, 863 F.Supp. 913 (E.D. Ark. 1994); Am. Civ. Lib. Union of Fla., supra.

Most recently, in McIntyre v. Ohio Elections Comm., _____ U.S. _____, 131 L.Ed.2d 426 (1995), the Supreme Court declared unconstitutional a prohibition upon the distribution of campaign literature without the producer thereof identifying himself. McIntyre rejected the argument that the State's interest in preventing fraud and libel should render the Act valid. See also, Op. Atty. Gen., No. 87-62 (June 15, 1987) [bill requiring editorial writer to print his name with the editorial is likely unconstitutional.]

In Vanasco v. Schwartz, 401 F.Supp. 87 (S.D.N.Y. 1975), the Court struck down a New York statute which prohibited an attack on a candidate's background. Concluding that it would be a "retreat from reality" to find that voters do not consider background characteristics "when choosing political candidates", the Court concluded that speech, no matter how irritating or controversial, remained protected unless it fell into one of those "'well defined and narrowly limited classes'", such as "fighting words" or obscenity. Thus, said the Court, New York's "attempt to eliminate an entire segment of protected speech from the arena of public debate is clearly unconstitutional." 401 F.Supp. at 94. If offensive attacks on a candidate's background were deemed to be constitutionally protected, it would follow that the same result would ensue with respect to a candidate's own party affiliation. See also, State v. Perkins, 306 S.C. 353, 412 S.E.2d 385 (1991) [state may not punish criticism of police officer in absence of "fighting words"].

The provision in question directly bans in the distribution of literature the communication of the candidate's political party affiliation to the voters, not only by the

candidate himself, but by anyone acting on behalf of the candidate. This amounts to restraining speech based upon its content. The United States Supreme Court has held that regulations which are content-based by regulating specific subject matter are presumptively invalid. City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). In Haffey v. Taff, supra, in upholding a provision which prohibited the designation of candidates' party affiliation by their names on the ballot, the Court was careful to point out that the law left the candidate the ability to inform the electorate of his party affiliation -- in this case his nonaffiliation with any political party. In rejecting his argument that the requirement that no party affiliation be placed next to candidates' names on the ballot violated the First Amendment, the Court recognized that the candidate still had

> ... available to him the same means available to the party-affiliated candidates to inform the majority of the electorate of his non-affiliation; radio and television advertising, direct mailings, billboards, placards etc.

The Court distinguished the ballot as a "'vehicle only for putting candidates and laws to the electorate'", from other communications to the voters. 803 F.Supp. at 125.

A number of cases have held that content-based regulations involving campaign literature violate the First Amendment. In Shrink Missouri Govt. PAC v. Maupin, 892 F.Supp. 1246 (E.D. Mo. 1995), the Court struck down a requirement that if a candidate disseminated printed or broadcast matter which contains allegations about the other candidate, the literature must have contained a statement that the information in the advertisement had been "approved and authorized" by the candidate. The State's interest in deterring false statements was not deemed sufficient because the law required "a speaker to make statements or disclosures he could otherwise omit." 892 F.Supp. at 1255. See also, State v. Schirmer, 646 So.2d 890, 902 (La. 1994) [statute prohibiting all political speech within 600 feet of polling place on election day "significantly impinges First Amendment freedoms."]; Freeman v. Burson, 802 S.W.2d 210 (Tenn. 1990) [statute prohibiting solicitation of votes an display of campaign materials within 100 foot radius of polling place on election day, unconstitutional]; Daily Herald Co. v. Munro, 838 F.2d 380 (9th Cir. 1988) [statute banning exit polling within 300 feet of polling place on election day contravenes First Amendment.]

And in Buckley itself, the Court invalidated the limit of $1,000 upon expenditures on behalf of clearly identified candidates. The Court noted that the

> plain effect of § 608 (e) (1) is to prohibit all individuals, who are neither candidates nor owners of institutional press facilities and all groups, except political parties and campaign organizations, from voicing their views "relative to a clearly identified candidate" through means that entail aggregate expenditures of more the $1,000 during a calendar year. The provision, for example, would make it a federal criminal offense for a person or association to place a single one-quarter page advertisement "relative to a clearly identified candidate" in a major metropolitan newspaper.

Here, the prohibition goes directly to the communication of a particular message, i.e. the party affiliation of a candidate for trustee. While there is at least one case which has upheld a prohibition upon a candidate for the judiciary from communicating his party affiliation, In re Kaiser, 759 P.2d 392 (Wash. 1988), nevertheless, it is my opinion that this provision prohibiting candidates for trustee or anyone on their behalf from distributing literature containing the candidate's party affiliation is constitutionally suspect. As is stated by one commentator,

> [t]ypical nonpartisan election laws permit only the names of candidates without any party affiliation on the ballot. Generally, political parties may still, and often do, endorse and run the campaigns of nonpartisan candidates.

Chapman, "Judicial Roulette: Alternatives to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges To At-Large Judicial Elections", 48 S.M.U. Law Review, 457, 478. The State would have to show that keeping a candidate's party affiliation off literature disseminated to the voters is narrowly tailored to the State's interest in keeping partisanship out of the election process. While that may indeed be the provision's purpose, it would seem to me that this strikes at free expression rather then preserving the nonpartisan nature of school board elections. Just as the prohibition upon communicating a political party's endorsement or pledge support was struck down in Geary and Lungren, for many of the same reasons, it is my opinion that a ban on communicating ones party affiliation by a candidate or a person on behalf of a candidate would likely be deemed unconstitutional.

Conclusion

Based upon the foregoing, it is my opinion that, at the very least, the proposed legislation is of questionable constitutionality. While if enacted, the provision would be

entitled to a presumption of constitutionality, and only a court could declare the statute to be unconstitutional, the State still would have to demonstrate its compelling interest in enacting such an absolute and severe restriction as contained here, as well as to show that this restriction is narrowly tailored toward meeting its end. In my judgment, the State will have great difficulty meeting this test.

Presumably, the interest of the State here, as in Geary and Lungren is the avoidance of the appearance of political partisanship in school board elections. While indeed a worthwhile goal, to my mind, an absolute ban upon the acceptance of any contribution, gift or thing of value from a political party sweeps too broadly, however. As seen in the cases referenced above, absolute bans upon contributions, or even very low threshold limits, are deemed to be substantially different from limitations against large contributions. Such bans or low maximum amounts are seen by the courts as having very little to do with the control of the appearance or actuality of the corrupting influence which large campaign contributions provide. And thus far, control of the corrupting influence upon campaigns caused by large campaign donations is the only interest recognized by the Supreme Court as sufficient to overcome First Amendment infringements. In this instance, the State is prohibiting the symbolic act of contributing itself rather than controlling the influence of large contributions.

Moreover, prohibiting even nominal contributions or the giving of a thing of "value" while allowing everyone else to contribute to the maximum legal limit could well be deemed by a court as punishment for membership in or association with that political party. As Buckley recognized in upholding the federal campaign contribution limitation, "the Act applie[d] the same limitations on contributions to all candidates regardless of their present occupations, ideological views or party affiliations." Here, political parties and thus their members are treated differently in terms of contributing to school board elections, as well as in providing volunteer services on behalf of candidates, than everyone else. This is akin to the prohibition on endorsements or support struck down in Geary and Lungren and does not leave the parties "free ... to assist to a limited, but nonetheless substantial extent in supporting candidates with financial resources." Buckley, 46 L.Ed.2d supra at 693.

The provision also treats parties themselves differently there than in other nonpartisan or partisan contests. Under present South Carolina law, political parties are not prohibited from contributing to other candidacies, but only large contributions in excess of a certain amount are capped. See, S. C. Code Ann. Sec. 8-13-1316.

Clearly, the State has an important interest in keeping politics out of nonpartisan offices such as that of school trustee to the extent possible. Courts have stated that the

State undoubtedly has "the right to use a system of nonpartisan elections for filling local and judicial offices." Geary v. Renne, 911 F.2d, supra at 287 (Reinhardt and Kozinski, concurring). However, these same courts also hold that the State "may not suppress free speech" in the process. Id. Political parties have the same rights to speak on school board elections as everyone else.

Again, I have found no case which addressed the constitutional validity of a statute which absolutely bans contributions, gifts and things of "value" from being accepted by candidates for trustee from a political party. Although at least one commentator has concluded that "[r]estricting political parties to only independent expenditures on behalf of candidates in nonpartisan elections is consistent with Buckley," that same analysis conceded that it could certainly be argued that

> ... limiting contributions and requiring independent spending by parties would not further the state's interest in combating corruption and would thus unnecessarily burden the party's First Amendment rights. Because local elections are small, it may be unrealistic to suppose that political party spending could even be truly independent of candidates.

Northrup, supra at 1700, 1701, n. 147.

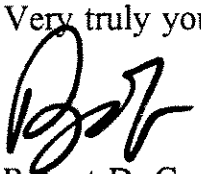
Thus, the decisions referenced herein certainly indicate that the provision which bans the acceptance of contributions, gifts, etc. from political parties by a candidate for school board trustee is of questionable constitutionality.

Likewise suspect is the provision in the proposed legislation which forbids candidates for school trustee or anyone on their behalf from publishing or distributing literature which identifies the candidate's political party affiliation. This could well be seen by a court as a direct restraint upon speech and expression as well as an infringement upon association. While it is true that the provision regulates only the outlet of literature, in local elections, literature is the heart and soul of informing the voter about a particular candidate. Based upon the case authorities cited, a court would likely deem that the State's interest in maintaining nonpartisan elections for trustee does not justify such restrictions upon free speech to inform the voters of a candidate's political party. That party affiliation cannot, nor should not, be hidden from the voters any more than any other aspect of a candidate's background which he wishes to bring to the voters attention. Just as parties have a right to voice to their preference, even as to candidates for office in nonpartisan elections, the voters have a right to know to which political party a candidate for school board belongs.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
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