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NO.
STATE OF NEBRASKA
OFFICIAL
NOV 4 1992
DEPT. OF JUSTICE

DATE: November 3, 1992

SUBJECT: Campaign Finance Limitation Act

REQUESTED BY: Dannie Trautwein, Executive Director
Nebraska Accountability and Disclosure Commission

WRITTEN BY: Don Stenberg, Attorney General
Linda L. Willard, Assistant Attorney General

You have asked several questions regarding the constitutionality of LB 556 passed during the 1992 legislative session which is also known as the Campaign Finance Limitation Act. LB 556 becomes operative as of January 1, 1993, and the Nebraska Accountability and Disclosure Commission has certain responsibilities in connection with enforcement of the Act.

As set out in your request and for the purpose of your request, the Campaign Finance Limitation Act does the following:

1. It encourages candidates for the specified office of Governor, Lieutenant Governor, State Treasurer, Secretary of State, Attorney General, Auditor of Public Accounts, the Legislature, the Public Service Commission, the Board of Regents, and the State Board of Education to limit campaign spending to amounts specified in the CFLA.

2. It provides public funding to candidates for the specified offices who participate by agreeing to limit campaign spending and meet other requirements.

3. It puts limits on aggregate contributions which candidates for the specified offices may receive

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> from political committees, corporations, unions, industry, trade, and professional associations.

Your first question concerns Section 4(4) of LB 556 which requires that any candidate who does not file a written declaration to abide by the spending limitations must file an affidavit to that effect and include a reasonable estimate of his/her maximum campaign expenditures. Section 7(4) of LB 556 states that a candidate who willfully, knowingly, or intentionally underestimates his/her expenditures by 5 percent or more could be charged with a misdemeanor offense. Any candidate who swears to the truth of an affidavit filed pursuant to the statute when the candidate knows or should have known that the affidavit contains a material element which is false could be charged with a Class IV Felony.

Your specific question is whether this would have a chilling effect on either spending or speech by a nonparticipating candidate such that it violates either the First Amendment to the United States Constitution or the Constitution of the State of Nebraska. Specifically, we have looked at the issue of how a prohibition on spending or a requirement to report contributions or expenditures might act as a chilling effect on the freedom of speech.

In Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the United States Supreme Court addressed the potential infringement on First Amendment rights caused by requirements that candidates and committees disclose contributions and expenditures. The Supreme Court noted that "[w]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64, 96 S.Ct. at 656, 46 L.Ed.2d at 713. Further, in Riley v. National Federation of the Blind, 487 U.S. 781, 796-797, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669, 689 (1988), the United States Supreme Court stated:

> There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees "freedom of speech," a term necessarily comprising the decision of both what to say and what *not* to say.

(Emphasis in original.)

In Riley, the Supreme Court reviewed a North Carolina Act mandating financial disclosure by fund-raisers to potential donors as a content-based regulation of speech. Since the Act mandated the speaker to provide speech which he would not ordinarily make, it necessarily altered the content of the speech.

Similarly, the campaign reporting laws reviewed by the Supreme Court in Buckley required candidates and campaign committees to provide speech which they might not ordinarily make. The Supreme Court in Buckley noted that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate government interest. However, the Court acknowledged "that there are government interests sufficiently important to outweigh the possibility of infringement, particularly when the `free functioning of our national institutions' is involved." (Citations omitted.) 424 U.S. at 66, 96 S.Ct. at 657, 46 L.Ed.2d at 714. The Court determined that disclosure of contributions and expenditures in the Federal Election Campaign Act (FECA) involved government interests in three categories.

> First, disclosure provides the electorate with information `as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interest to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. . . .
>
> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.
>
> The disclosure requirements, as a general matter, directly serve substantial governmental interests. . . .
>
> [W]e note and agree with appellants' concession that disclosure requirements--certainly in most applications--appear to be the least restrictive means of curbing the

> evils of campaign ignorance and corruption that Congress found to exist. . . .

424 U.S. at 67-68, 96 S.Ct. 657-658, 46 L.Ed.2d at 715. The Court noted that it is necessary to look at the extent the requirements place a burden on an individual to determine if the governmental interests are sufficient. It was the Court's determination in Buckley that the governmental interests were sufficient to outweigh First Amendment rights in the area of direct disclosure of amounts which an individual or group contributes or spends.

It is possible to argue that the governmental interests involved in LB 556 are somewhat different than those supporting the FECA in Buckley. On the other hand, there are governmental interests at stake in LB 556. While the Accountability and Disclosure Act has previously required candidates raising or spending in excess of $2,000 in a year to form a committee to handle funds and report all contributions and expenditures, LB 556 has amended the Accountability and Disclosure Act to require that candidates disclose not only actual contributions and expenditures but also estimates of those amounts as well. Therefore, while arguments may exist concerning the constitutionality of Section 4(4) of LB 556, we cannot say that the bill is clearly unconstitutional, particularly in light of the Supreme Court's opinion in Buckley regarding the substantial governmental interests in reporting contributions and expenditures.

Further, in Buckley v. Valeo, supra, the United States Supreme Court held that the First Amendment protection of freedom of speech prohibits governmental limitations on campaign expenditures except as a condition of granting public funds for a political campaign. The statutory provision which you have quoted in your request does not restrict expenditures by a candidate. However, it may be argued that the threat of criminal prosecution for spending in excess of an amount submitted as a "reasonable estimate" would have a chilling effect on a candidate's freedom to use those funds to support his/her campaign.

In order to be found guilty of a crime under those sections of LB 556 noted above, it must be shown that the candidate spent 5 percent or more than the last reasonable estimate of expenditures submitted by the candidate and that the candidate knew or should have known that the estimate submitted contained a material element which was false. Thus, the element of a crime is not concerned primarily with the amount of money spent in a campaign but goes instead to the affidavit submitted regarding the proposed expenses and whether the candidate knew or should have known that it was incorrect when it was submitted.

It is our determination that the possibility of criminal prosecution in this instance should not have an unconstitutionally chilling effect on free speech. While scrutiny of campaign expenses is triggered by an expenditure of 5 percent or more over the last reasonable estimate submitted, the crime involved is attesting to information which the candidate knew or should have known was false at the time of the submission. Clearly, it would not be unconstitutional to prosecute an individual for swearing to a false statement when that individual knew or should have known that the information was false.

You next ask whether use of the term "reasonable estimate" renders the criminal provisions of LB 556 so vague and uncertain as to provide insufficient notice to an individual as to what conduct is prohibited thus making the criminal provision unconstitutionally vague. Criminal statutes must define criminal offenses with sufficient definiteness that ordinary people can understand what conduct is prohibited. Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Punishment cannot be imposed for conduct which is not "plainly and unmistakably" proscribed. Dunn V. United States, 442 U.S. 100, 112, 99 S.Ct. 2190, 2197, 75 L.Ed.2d 903 (1979).

In Fulmer v. Jensen, 221 Neb. 582, 585-586, 379 N.W.2d 736, 739-740 (1986), the appellant challenged the constitutionality of the statutory term "reasonable refusal" as being vague and ambiguous. In upholding the term as constitutional, the Nebraska Supreme Court stated:

> The constitutional requirement of reasonable certainty in statutory language "is satisfied by the use of ordinary terms [to express ideas] which find adequate interpretation in common usage and understanding."
>
> In Gleason v. Gleason, 218 Neb. 629, 633, 357 N.W.2d 465, 468 (1984), we recognized the difficulty inherent in determining "reasonable" alimony, due to the fact that "[t]he standard of reasonableness by its very nature defies clear and specific quantification inasmuch as the determination of reasonableness is directly tied to the virtually unique circumstances of each case." The same can be said of the reasonableness of refusal determination. This court has previously noted that "an attempt to give a specific meaning to the word `reasonable' is `trying to count what is not number, and measure what is not space.'"

(Citations omitted.)

A court of law with particular facts before it in an adversarial context is the appropriate forum for ultimate determination of whether the statute is sufficiently clear. The Legislature, of course, is free to enact appropriate legislation to further clarify the applicability of the statute to the situation. However, based on the Nebraska Supreme Court decision in Fulmer v. Jensen cited above, we do not believe that the term "reasonable estimate" is unconstitutionally vague.

Your next question is addressed to Section 7(2) of LB 556. You conclude that this section would apply whether or not public funding was available. You then ask if this would be constitutional under Buckley v. Valeo, supra. Section 7(2) begins "[a]ny candidate described in subsection (1) of this section." Subsection (1) is addressed to "any candidate who receives funds pursuant to section 6 of this act." Therefore, the penalties in subsection (2) would apply only to candidates who actually receive public funds and would not go to a candidate who qualifies for funds but receives none. The sanctions of Section 7(2) would apply only to candidates who voluntarily submit themselves to those conditions. Based on the decision in Buckley, we see no constitutional problems with this provision of the law.

Your next question concerns Section 8 of LB 556 which, in conjunction with Section 7(5), would make it a Class IV Misdemeanor to accept contributions in excess of prescribed amounts for various enumerated groups including "industrial, trade and professional associations." Your inquiry is whether the statute is void for vagueness since industrial, trade, and professional associations are not defined in the Act or in related statutes. Definitions for other terms used in this subsection are contained within LB 556 or within the Nebraska Political Accountability and Disclosure Act. As noted above, the Nebraska Supreme Court in Fulmer v. Jensen, 221 Neb. at 585-586, 379 N.W.2d at 739 (1986), "[t]he constitutional requirement of reasonable certainty in statutory language `is satisfied by the use of ordinary terms [to express ideas] which find adequate interpretation in common usage and understanding.'" (Citations omitted.)

Your final questions go to Neb.Rev.Stat. § 49-14,123(11) as amended by LB 556. You ask if this acts as a bar to the Commission acting except in concert with the appropriate county attorney. The subsection directs the Commission to act as the principal civil and criminal enforcement agency for violation of the Nebraska Accountability and Disclosure Act and directs the Commission to act concurrently with the appropriate county attorney in prosecuting criminal violations of the Campaign Finance Limitation Act.

The section cited sets out the duties of the Commission and is phrased in terms of "shall." Generally, in the construction of

statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion. State v. Stratton, 220 Neb. 854, 374 N.W.2d 31 (1985); Moyer v. Douglas & Lomason Co., 212 Neb. 680, 325 N.W.2d 648 (1982).

This section does not require that the Commission act concurrently with the county attorney or anyone else in enforcement of any actions other than criminal actions under the Campaign Finance Limitation Act. In criminal prosecutions, the Commission must work with the county attorney or, if the county attorney is unwilling or unable to prosecute, the Commission should work with the Attorney General's Office. Neb.Rev.Stat. § 84-204 (Reissue 1987).

You then inquire as to the venue for any action since the Act does not address venue. Neb.Rev.Stat. §§ 25-401 et seq. (Reissue 1989) sets out the venue for civil actions. Neb.Rev.Stat. § 29-1301 et seq. (Reissue 1989) sets out venue in criminal actions. Each civil wrong or crime must be reviewed separately based on the facts specific to the crime and the nature of the crime alleged in relation to the venue statutes in order to determine in which court the action should be filed. It is our determination that there is no requirement that there be clarifying legislation on the matter of venue since the statutes currently exist, as cited above, addressing how venue is determined.

In conclusion, it is our determination that the Campaign Finance Limitation Act is not unconstitutional in relation to the questions which you have raised. Further, the Commission should work in concert with the appropriate county attorney or the Attorney General's Office in prosecuting criminal violations. Venue for these prosecutions should be determined from the existing venue statutes and the facts of a particular case.

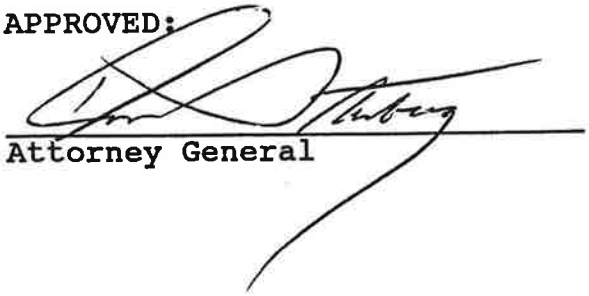
Sincerely,

DON STENBERG
Attorney General

Linda L. Willard
Assistant Attorney General

28-05-14.92

APPROVED:



Attorney General