

United States Senate

REPUBLICAN POLICY COMMITTEE

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\$135 of TRIM Brochures Brings FEC Lawsuit

Should Pamphleteers Be Licensed?

Proposals to "reform" campaign laws often give additional powers to the Federal Election Commission (FEC), but many thoughtful students of campaign laws and practices oppose giving more power to the FEC because that kind of governmental power often dampens political activity, particularly that of average Americans.

The Central Long Island Tax Reform Immediately Committee was formed as a nonprofit unincorporated association. It published a newsletter, the *TRIM Bulletin*, that explained the Committee's views, identified its members, and invited others to join. The *Bulletin* also set out a voting record of the local Congressman. There was a photograph of the Congressman and a chart showing 24 of his votes: 21 of these were characterized as for "Higher Taxes and More Government" and 3 as for "Lower Taxes and Less Government." TRIM's stand against higher taxes and big government was made clear by the text. However, the *Bulletin* did not refer to any federal election, to the Congressman's political affiliation or candidacy, or to any electoral opponent of the Congressman. Printing the *Bulletin* cost \$135, and fewer than 10,000 were handed out at grocery stores and train stations. The Committee disbanded the same year it was formed.

The Federal Election Commission filed a civil complaint against the Long Island Committee and its chairman alleging that the Committee had spent more than \$100 "expressly advocating" the defeat of a "clearly identified candidate" without complying with the filing and disclaimer requirements of the Federal Election Campaign Act (FECA), but the FEC lost the case in the United States Court of Appeals for the Second Circuit. The concurring opinion of the court's Chief Judge, the late Irving R. Kaufman, is especially noteworthy and is reprinted here:

"[T]he insensitivity to First Amendment values displayed by the Federal Election Commission in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act.

"The defendants in this case [the Central Long Island Tax Reform Immediately Committee] undertook

to spend the modest sum of \$135 for the purpose of preparing and circulating to their fellow citizens a pamphlet addressed to the issue of tax reform, specifically advocating their belief in the necessity of significant reductions in current taxation levels. Further, the pamphlet assessed the legislative record of their congressman on issues implicating taxation and government spending. It is this conduct that the FEC seeks to 'enjoin' because the defendants chose not to register their activity with the federal government, 2 U.S.C. 434(e), or to include in their publication specific information required by the government, *id.* 441d.

"I confess that I find this episode somewhat perverse. It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues. Indeed, since the days of the infamous Stamp Act, vigorous denunciation of 'oppressive' rates of taxation has enjoyed a long and notable history. Moreover, it is incongruous to compel defendants to convince a court that they have not dared to 'expressly advocate' the defeat of a candidate for public office. I had always believed that such advocacy was to be applauded in a representative democracy.

"This case has served to reinforce my view that we 'must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections.' *Thomas v. Board of Education*, 607 F.2d 1043, at 1047 (2d Cir. 1979). From this perspective, I continue to believe that campaign 'reform' legislation of the sort before us is of doubtful constitutionality. Indeed, before *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court had emphasized that freedom to criticize public officials and oppose or support their continuation in office constitutes the 'central meaning' of the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Mills v. Alabama*, 384 U.S. 214 (1966). The First Amendment presupposes that free expression, without government regulation, is the best method of fostering an informed electorate. Moreover, 'if there be any danger that the people cannot evaluate the information and arguments advanced, . . . it is a danger contemplated by the Framers.' *First National Bank v. Bellotti*, 435 U.S. 765 (1978). Thus, courts have consistently struck down not only government attempts to restrain or punish expression, but also government regulation of speech designed to make information available to the public. See, e. g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Talley v. California*, 362 U.S. 60 (1960).

"There are sound justifications for this view. Officials can misuse even the most benign regulation of political expression to harass those who oppose them. . . .

"If speakers are not granted wide latitude to disseminate information without government interference, they will 'steer far wider of the unlawful zone.' *Speiser v. Randall*, 357 U.S. 513 (1958), thereby depriving citizens of valuable opinions and information. This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled, or sterilized. *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972). Accordingly, it is not completely surprising that the FEC should view the content of defendants' leaflet in a substantially different light than the members of this court.

"The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley v. Valeo, supra*, imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility."

[Cited case is, *Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980) (per curiam) (Kaufman, C.J., concurring) (edited).]