THE AMERICAN ANTI-CORRUPTION ACT

Constitutionality

Is the American Anti-Corruption Act constitutional? In short, yes. It was drafted by some of the nation's foremost constitutional attorneys. This document details each provision and why it passes constitutional muster.

conflicts of interest

PROVISION 1

The American Anti-Corruption Act will prohibit Members of Congress from raising funds from the special interests that they regulate. Under the Act, if an organization lobbies a Member of Congress, the Member may not solicit contributions from that organization, its lobbyists, or persons in the organization that lobby or supervise lobbying efforts, for two years unless the Member recuses himself from taking actions at the Committee or Subcommittee level to benefit that organization. Additionally, if an organization and its lobbyists and persons who engage in or supervise lobbying efforts have, in the aggregate, directly or indirectly contributed $50,000 to a Member or spent more than $100,000 on electioneering communications or independent expenditures benefitting the Member's campaign, the Member also must recuse himself from taking actions at the Committee or Subcommittee level to benefit the organization. This provision includes a two-year lookback.

Constitutionality

Requiring Members of Congress to recuse themselves from taking official actions in situations in which their independence of judgment is questioned is highly likely to be found constitutional. As the Supreme Court recently held in *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), restrictions on official actions taken by legislators do not constitute restrictions on the First Amendment free speech rights of such legislators.

PROVISION 2

The Act limits the amount that lobbyists, clients of lobbyists, and employees of lobbyists or clients that either engage in lobbying or supervise lobbying activities may contribute to a federal candidate, political party, or political committee to $500 per calendar year. Additionally, these individuals are prohibited from fundraising for federal candidates, political parties, and political committees. This provision also includes a one year cooling off period: Individuals who make contributions in excess of $500 in a calendar year to a federal candidate, political party, or political committee, or engage in fundraising activities to benefit federal elected officials or candidates are prohibited for one year thereafter from becoming a lobbyist. Finally, individuals involved in lobbying activities are prohibited from making contributions in excess of $500 or engaging in fundraising activities to benefit federal candidates for one year after terminating their status as a lobbyist.

Constitutionality

Imposing a $500 contribution limit on lobbyists is very likely to be found constitutional. The Supreme Court has never directly addressed the constitutionality of applying a lower campaign contribution limit to lobbyists. However, the Fourth Circuit recently upheld a North Carolina law that completely prohibits contributions in any amount from lobbyists in *Preston v. Leake*, 660 F. 3d 726 (2011). The Second Circuit also has recently issued an opinion suggesting that contributions by lobbyists can be strictly limited, but not prohibited entirely, in *Green Party of Connecticut v. Garfield*, 616 F. 3d 189, 206 (2d Cir. 2010), and such limits enacted by New York City were subsequently upheld by the Second Circuit in 2011 in *Ognibene v. Parkes*, 671 F. 3d 174, 179-80 (2d Cir. 2011). The Act does not prohibit contributions from lobbyists entirely, but rather limits them to $500 per calendar year to each recipient. This $500 amount permits lobbyists to express their support for candidates, but recognizes the increased danger of corruption and the appearance of corruption presented by contributions made by lobbyists.

The application of the $500 contribution limit to clients and personnel that either engage in or supervise others who engage in lobbying activities is designed to reduce corruption and the appearance of corruption and to prevent the circumvention of the $500 limit on lobbyist contributions. This is in part modeled on a pay-to-play rule promulgated by the Securities and Exchange Commission in 2010 (Rule 206(4)-5) that strictly limits contributions ($350, or in certain instances, $150) that can be made by investment advisers and their executives and marketing personnel to certain government officials and candidates for elective office. While one cannot be absolutely certain that the current Supreme Court would find the application of the $500 limit to individuals who are not lobbyists constitutional, it is likely constitutional.

The constitutionality of prohibiting these individuals from soliciting or coordinating contributions to federal candidates, committees, and political parties has not yet been decided. While the U.S. Court of Appeals for the Second Circuit recently struck down a Connecticut law that entirely prohibited lobbyists from soliciting contributions, the Court's opinion suggests that if such a solicitation ban permitted the solicitation of contributions from immediate family members, the ban would be more likely to be upheld. See *Green Party of Connecticut v. Garfield*, 616 F.3d 189, 208-10 (2d Cir. 2010).

PROVISION 3

Currently, Members of the House and employees of the House who are paid at least 75% of a Member's salary are prohibited from lobbying Congress for one year. This restriction also applies to former Senators for two years; to Senate employees who are paid at least 75% of a Member's salary for one year; and in a more limited fashion to less-compensated Senate employees. Under current law, former Members of the House, Senate, and congressional employees may freely aid or advise clients on how to lobby Congress in a "background role" or freely lobby the executive branch. The Act extends the existing revolving-door restrictions to 5 years for former Members and former congressional staffers, and brings all lobbying activities—even acting in a background or supervisory role—within the prohibition.

Constitutionality

There is little doubt that these expanded revolving door restrictions are constitutional. Such restrictions on post government-service employment have been upheld on various occasions by various courts, because such laws prevent government employees from being "influenced in the performance of public duties by the thought of later reaping a benefit from a private individual." *Brown v. District of Columbia Board of Zoning*, 423 A.2d 1276, 1282 (D.C. App. 1980). See also *General Motors Corporation v. City of New York*, 501 F.2d 639 (2d Cir. 1974); *United States v. Nasser*, 476 F.2d 1111 (7th Cir. 1973); and *United States v. Conlon*, 628 F.2d 150 (D.C. Cir. 1980).

PROVISION 4

Existing law prohibits federal contractors from making contributions to federal candidates, political parties, and political committees. The Act extends this prohibition to the federal contractors' PACs, lobbyists, and employees who engage in or supervise lobbying.

Constitutionality

The existing prohibition on contributions from government contractors was upheld by the U.S. District Court for the Southern District of New York in *Fed. Election Comm'n v. Weinsten*, 462 F. Supp. 243 (S.D.N.Y. 1978), and was recently upheld by the U.S. District Court for the District of Columbia in *Wagner v. Fed. Election Comm'n*, 2012 WL 5378224 (D.D.C. Nov. 2, 2012). The Wagner decision has been appealed to the U.S. Court of Appeals for the D.C. Circuit. It is hard to know whether or not the current Supreme Court will uphold the existing prohibition of contributions from government contractors, let alone the Act's expansion of the prohibition to the PACs, lobbyists, and certain employees of government contractors. The U.S. Court of Appeals for the Second Circuit recently upheld a strict New York City restriction on campaign contributions from persons and entities doing business with the City in *Ognibene v. Parkes*, 671 F. 3d 174 (2d Cir. 2011) cert. deined, 11-1153, 2012 WL 950086 (U.S. June 25, 2012), and also upheld an outright ban on state contractor contributions contained in the Connecticut Campaign Finance Reform Act in *Green Party of Connecticut v. Garfield*, 616 F. 3d 189 (2d Cir. 2010). Whether or not this provision would be found constitutional may become more clear when the D.C. Circuit rules on the Wagner case.

campaign finance

PROVISION 5

The Act would require Super PACs to abide by the same contribution limits that apply to other federal political committees

Constitutionality

This question has not yet been decided by the Supreme Court. The Supreme Court held in *Citizens United* that corporations and unions may not be prohibited from *spending* funds to influence federal elections totally independently from federal candidates and political parties. The Court did not specifically hold that unions and corporations can *contribute* unlimited amounts to federally registered independent expenditure-only political committees (a.k.a. Super PACs). The 2012 election amply demonstrated that Super PACs do not operate "totally independently" of candidates and political parties. Although it is certainly not a slam dunk, in can be argued that the application of the existing PAC contribution limits to Super PACs should be found constitutional because, (1) donations to Super PACs are contributions rather than expenditures, and (2) experience has forcefully demonstrated that Super PACs do not operate totally independently of candidates and political parties

PROVISION 6

The Act empowers individual citizens to become the primary funders of federal elections through the creation of an annual Tax Rebate of $100 that registered voters can use to make contributions to the federal candidates, political parties, and political committees that they support. In order to be eligible to receive Tax Rebate contributions, candidates, political parties, and political committees must agree to limit the contributions they receive to contributions from individuals of no more than $500 per contributor per calendar year or contributions from political parties and political committees that are funded exclusively by Tax Rebates and contributions from individuals of no more than $500 per contributor per calendar year.

Constitutionality

There is little doubt that this provision is constitutional. The Supreme Court upheld the Presidential Public Financing System in *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). The Tax Rebate created by the Act does not make additional funds available to a candidate who faces a self-financed opponent. Such "trigger" mechanisms have been found unconstitutional by the Supreme Court in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816 (2011) and in *Davis v. FEC*, 554 U.S. 724 (2008).

PROVISION 7

The FEC's current coordination regulations permit extensive collaboration between candidates and supposedly "independent" Super PACs. The Act would amend federal campaign finance laws to more broadly define what activities constitute "coordination," such that the current phenomenon of single-candidate Super PACs and Super PACs with close ties to campaigns would no longer be permissible.

Constitutionality

There is little doubt that tightening the coordination regulations is constitutional. The Supreme Court has variously stated that independent expenditures must be made "totally independently," "wholly independently," and "truly" independently from campaigns and political parties. See *Buckley v. Valeo*, 424 U.S. at 47; *McConnell v. Fed. Election Comm'n*, 540 U.S. at 221; and *Fed. Election Comm'n. v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 442 (2001) (stating that independent expenditures must be made "without any candidate's approval (or wink or nod))." Bringing the FEC's regulations closer in line with these statements of the Supreme Court is very likely to be upheld if challenged.

transparency

PROVISION 8

The American-Anti-Corruption Act will require Members of Congress to disclose on a monthly basis how much time they spend engaging in fundraising while the Congress is in session.

Constitutionality

This requirement would be included in the rules of the House and Senate. The U.S. Constitution provides in Art. 1, Sec. 5, cl. 2 that "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a member." A court would be highly unlikely to even reach the question of whether this restriction is constitutional, because separation of powers considerations would likely prevent a court from encroaching on the exclusive role that each House of Congress has under the Constitution to set its own rules and to punish Members for violating those rules.

PROVISION 9

The Anti-Corruption Act will expand the definition of "lobbyist" to include every person who, for compensation, (1) makes two or more lobbying contacts or who provides strategic advice or directs or supervises lobbying efforts, and (2) spends more than 12 hours on lobbying activities on behalf of a client. The Act will broaden the definition of lobbying to include the provision of strategic advice; advice and assistance with earned media related to legislation or legislative issues; polling related to lobbying goals; and advice on the production of public communications related to lobbying goals. The Act also will require the clients of lobbying firms to register and file disclosure reports, and require registrants to identify the funders of their lobbying efforts. Finally, the Act will require lobbying disclosure reports to include more detailed information about lobbying activities, such as the specific congressional offices, committees, subcommittees, and Members contacted.

Constitutionality

The existing registration and disclosure requirements of the Lobbying Disclosure Act of 1995, as amended, were challenged on First Amendment grounds and upheld by the U.S. Court of Appeals for the D.C. Circuit in *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F. 3d 1 (D.C. Cir. 2009). Given that the Act makes only minor changes to the Lobbying Disclosure Act, and that the Supreme Court has repeatedly upheld disclosure requirements in similar contexts—most recently in *Citizens United* by a 8-1 vote—it is very likely that this provision would be found constitutional.

PROVISION 10

The Act will require federal candidates to disclose the names of individuals who "bundle" contributions for the Member or candidate, regardless of whether such individuals are registered lobbyists. The Act also will require any organization that spends $10,000 or more on advertisements to elect or defeat federal candidates to file a disclosure report with the Federal Election Commission within 24 hours of airing the advertisement. This report would be immediately available on the FEC website, and must list each of the organization's donors who donated $10,000 or more to the organization to run such ads.

Constitutionality

The Supreme Court has repeatedly upheld disclosure requirements—most recently in *Citizens United* by a vote of 8-1. It is very likely that the disclosure requirements in this provision would be found constitutional. Note however that in 2012, opponents of the DISCLOSE Act claimed that the Act was unconstitutional. For example, the National Rifle Association claimed that the DISCLOSE Act's "provisions require organizations to turn membership and donor lists over to the government" and would unconstitutionally abridge the right of citizens "to speak and associate privately and anonymously." We do not believe that these arguments are correct, but we anticipate that they will be made by opponents of the Act.

enforcement

PROVISION 11

The Act will establish a bipartisan, bicameral Task Force in Congress to examine and provide specific recommendations to fix the shortcomings of the Federal Election Commission and the House and Senate ethics investigation and enforcement processes, and to examine the IRS's enforcement of regulations governing the political activity of tax-exempt organizations. Until these recommendations are developed and enacted, the Act will, in the interim, strengthen the Federal Election Commission's independence and enforcement powers. The Act also will provide federal prosecutors additional tools that are necessary to combat public corruption and will prohibit lobbyists who fail to properly register and disclose their activities from engaging in federal lobbying activities for a period of two years.

Constitutionality

There is little danger that the Task Force or the interim changes to the FEC would be found unconstitutional. With regard to the provisions incorporated into the American Anti-Corruption Act from the Public Corruption Prosecution Improvements Act, some have expressed concern that certain aspects of the Public Corruption Prosecution Improvements Act may be unconstitutionally vague. See D. Michael Crites et. al., *A Congressional "Meat Axe"? New Legislation Would Broaden the Potential for Prosecutions Under the Federal Illegal Gratuity Statute*, 36 J. Legis. 249, 261 (2010). To be sure, the Public Corruption Prosecution Improvements Act does broaden the scope of the federal honest services fraud statute, gratuities statute, and the bribery statute. These broadened statutes are highly unlikely to be found unconstitutional on their face, but it is possible that they would be narrowed somewhat in their scope as they are applied to the facts and circumstances of particular cases.