

Report of the Special Committee on Governmental Ethics Reform, Campaign Finance Law to the 2024 Kansas Legislature

CHAIRPERSON: Representative Pat Proctor

VICE-CHAIRPERSON: Senator Mike Thompson

OTHER MEMBERS: Senators Chase Blasi, Elaine Bowers, Ethan Corson, and Ronald Ryckman; and Representatives Emil Bergquist, Leah Howell, Cindy Neighbor, Mari-Lynn Poskin, and Jeff Underhill

STUDY TOPIC

The Committee is directed to:

- Evaluate current laws and regulations concerning the Kansas Governmental Ethics Commission and campaign finance and recommend changes to the Legislature.

Special Committee on Governmental Ethics Reform, Campaign Finance Law

REPORT

Conclusions and Recommendations

The Special Committee on Governmental Ethics Reform, Campaign Finance Law submits the following recommendations to the 2024 Legislature:

- To address concerns that defined terms in the Campaign Finance Act are too vague, the Committee recommends:
 - Defining the term “coordination” in the Campaign Finance Act;
 - Clarifying the definition of the term “giving in the name of another” or “contribution in the name of another” in the Campaign Finance Act; and
 - Clarifying the definition of the term “political committee” or “political action committee” (PAC) and clarifying the test for determining what is a PAC in the Campaign Finance Act.
- To address concerns that contribution limits are too low, the Committee recommends considering increasing contribution limits.

Proposed Legislation: None.

BACKGROUND

The Special Committee on Governmental Ethics Reform, Campaign Finance Law was created by the Legislative Coordinating Council (LCC) to study current laws and regulations concerning the Kansas Governmental Ethics Commission and campaign finance and recommend changes to the Legislature. The need for additional study arose during conversations regarding 2023 House Sub. for SB 208, which was enacted.

The Committee was authorized by the LCC to meet for two days and met at the Statehouse on October 5 and October 6, 2023.

COMMITTEE ACTIVITIES

October 5, 2023

Review of Study Topic

The Chairperson of the Committee and research analysts from the Kansas Legislative Research Department (KLRD) reviewed the Committee’s study topic and additional resources.

Presentation on Regulating First Amendment Activity

A professor from Northwestern University Pritzker School of Law discussed guiding principles for regulating free speech, U.S. Supreme Court case law, legislative principles, and policy recommendations.

The professor discussed arguments both for and against regulating speech in campaigns and elections. Those in favor of regulation argue regulation ensures everyone has an equal opportunity to speak and that money is not speech. Those against regulation argue the First Amendment is not an equality right, but a right of individuals to express and support their beliefs and that regulation is not necessary to protect equal speech. Further, money is considered speech; therefore, the First Amendment applies to any legislation that attempts to target campaign contributions.

The professor provided an overview of the U.S. Supreme Court case *Buckley v. Valeo* (1976), in which the Supreme Court found both independent expenditures and campaign contributions are protected by free speech, but differently. Independent expenditures, which are moneys spent by a candidate or an individual expressing support for a candidate, cannot be limited, as they are free speech. Campaign contributions, which are moneys given directly to a campaign, can be reasonably restricted, as they could give the appearance of a *quid pro quo*, which would reduce the confidence in elections. The professor expounded on other U.S. Supreme Court cases relevant to campaign finance law.

The professor provided principles that are important for state legislatures to observe, including the following:

- Independent expenditures should be unlimited;
- Restrictions on campaign contributions should be reasonable and take into account inflation and changing times;
- There should be a clear distinction between expenditures and coordinated expenditures; and
- Laws should not be vague.

The professor provided the Committee with two policy recommendations. The first recommendation would be to structure laws, such as the definitions of the terms “independent expenditure” and “coordination,” to be in tune

with the federal rules, so there is less uncertainty and vagueness. The second recommendation would be to increase contribution limits to help avoid polarization.

Comments from the Office of the Governor

The Chief of Staff for Governor Kelly addressed the Committee and stated the Office of the Governor supports promoting transparency and placing limits on campaign contributions. The Chief of Staff also discussed being open to increasing contribution limits, making contribution limits unlimited for political parties, and putting protections in place so political parties do not influence primary races.

Public Comment

Ten conferees provided public comment, and written-only testimony was provided by representatives of two members of ethics commissions in other states.

An attorney and professor at the University of Kansas School of Law discussed disclosure requirements for campaign contributions and stated such disclosure requirements have not been a hindrance to his clients when contributing to campaigns.

A representative of People United for Privacy offered three changes to campaign finance law for the Committee to focus on:

- Clearly define the term “political action committee” (PAC);
- Increase the threshold for campaign contribution disclosure from \$50 to \$500; and
- Clarify the scope of donor exposure organizations that are not PACs if they make independent expenditures, because it is unclear what non-PAC entities are required to report under current law.

A professor of political science from Emporia State University discussed his concern that provisions of 2023 HB 2391 weaken transparency. He also emphasized that U.S. Supreme Court

precedence explicitly allows disclosure laws and regulations that promote transparency.

A representative of the Campaign Legal Center emphasized the importance of disclosure and transparency laws. The conferee stated these laws uphold First Amendment values and allow voters to effectively participate in elections, ensure representatives remain responsive to their constituents, deter corruption, and assist regulators in detecting campaign finance violations.

An attorney discussed an ethics investigation in Wisconsin where a former governor was the respondent in the investigation. The conferee described the investigation as an example of a state campaign finance regulatory organization that became mismanaged and was eventually disbanded. The conferee stated ethics enforcement should not be a political weapon and should not have a political bias.

A representative of Common Cause discussed research showing the public supports candidates who are transparent. The conferee also stated public trust in politics is at an all-time low, and a good way to rebuild trust is to shine light on campaign finance disclosures.

The Interim Dean at Washburn University School of Law stated money equals speech because it makes speech possible and is a way to send a message. The Interim Dean also stated there should not be limits on expenditures because it is speech, and contribution limits should be narrowly drawn to help build the trust of the voting public.

An attorney discussed his experience representing clients who were investigated by the Kansas Governmental Ethics Commission (KGEC). The conferee stated current statutes need to be changed to allow citizens to engage in political causes without the fear of subpoenas and investigations.

Another attorney discussed the differences between contributions to political parties and individual contributions. The conferee also discussed contributions in the name of another and provided examples of contributions that could be interpreted as such from the Republican and Democratic parties.

A final attorney discussed why campaign finance is regulated, why limits should be put on campaign contributions, and his experience as a practitioner who litigated in front of the KGEC. The conferee reviewed the changes made in 2023 House Sub. for SB 208 and noted there are additional statutes that need review because they have not been updated or enforced for many years or need review for vagueness. The conferee also offered two goals for the Committee to keep in mind when making additional changes to campaign finance and ethics laws:

- Identify key principles that should guide limited regulation of campaign speech in Kansas; and
- Flag particular vague statutes and areas of public policy that can be improved.

Overview of the Kansas Governmental Ethics Commission

The Executive Director of the KGEC provided information about investigations, the role and makeup of the KGEC, the impact of disclosures on speech, and KGEC's legislative recommendations for the 2024 Legislative Session.

The Executive Director addressed how an individual's name is cleared in an investigation. The KGEC will evaluate an individual's conduct and determine if there was a violation or if there might have been a violation but the KGEC will not seek to impose fines or penalties. In either situation, the individual will be sent a letter of warning or letter of caution with one of the following determinations:

- The individual is cleared;
- The individual may have violated the law and is advised not to do it again; or
- The individual has violated the law and is advised not to do it again.

The Executive Director stated it is important to have legislation that provides clear guidance and bright-line rules that will help encourage and

support public trust in the political process. The Executive Director also explained the structure of KGEC is designed to be independent, and the makeup of the Commission itself promotes that independence. The Governor appoints two members, legislative leadership appoints four members, and the Attorney General, Secretary of State, and the Chief Justice of the Kansas Supreme Court each appoint one member. Additionally, only five of nine members can be from the same political party. While serving on the Commission, a member cannot engage in political activity, such as fundraising or endorsements.

The Executive Director addressed *quid pro quo* corruption and how secret donations and large donations are often seen as given in expectation of particular results. He emphasized the importance of transparency and presented research from 23 states indicating that disclosure does not chill speech. He also shared an example from Seattle, Washington, where democracy vouchers are provided to the public at no cost, and the public commits the vouchers to their chosen candidates. The democracy vouchers and commitments are publicly available, and research found Seattle citizens were more likely to submit a public democracy voucher than they were to vote.

The Executive Director concluded by sharing the KGEC's legislative recommendations for the 2024 Legislative Session:

- Increase KGEC staff and funding;
- Clarify the definition of a PAC;
- Clarify the definition of the term “giving in the name of another” or “contribution in the name of another”;
- Address coordination by adopting the federal coordination definition and test;
- Redefine express advocacy to use the “only reasonable interpretation” test;
- Put limits on contributions to PACs; and
- Shorten “paid for by” attributions.

October 6, 2023

Presentation on Free Speech Best Practices

The Chairman and the President of the Institute for Free Speech (IFS) gave a joint presentation and provided information about how Kansas scores on IFS' Free Speech Index and how certain changes to Kansas law could affect such score.

The Chairman of IFS noted the primary way to protect free speech is to follow the *U.S. Constitution*, and he stated Kansas does that through its definitions of express advocacy, contributions, and expenditures. He recommended simplicity as the guiding principle; simple disclaimers help with compliance. He also stated contribution limits add complexity, and over-regulation hinders people from getting involved in politics and campaigns as candidates or volunteers.

The IFS Chairman discussed how major organizations may choose to support an individual candidate, but the individual members of the organizations may not be personally supporting such candidate. Therefore, there is no need to disclose all the individuals who are part of such organizations and connect them to individual candidates and campaigns. He also noted if the issue is identifying who the major donors are, then disclosing the small donors makes it more difficult.

The IFS President and Chairman provided the following observations and recommendations:

- The PAC threshold is unconstitutional because there is no dollar threshold for the registration requirement;
- The major purpose test for PACs is unconstitutional;
- The PAC definition is crucial to a good campaign finance law;
- The current disclosure requirements for independent expenditures by non-PACs is unclear;

- The disclosure thresholds should be increased;
- Contribution limits should be increased and indexed;
- Regulators should not use enforcement to provide clarity on a vague law;
- The Legislature should consider including a presumption of free speech in the law, such as: “The Commission shall use the most reasonable reading of the law in any enforcement action. To the extent a law is vague or ambiguous, the least speech-restrictive interpretation shall prevail”;
- The coordination law is unclear;
- Repeal grassroots advocacy reporting and avoid regulating grassroots advocacy;
- Consider an internet exception because it is unique, as it is a means to communicate with a large audience, often at very little cost; and
- Help political parties by not limiting individual contributions.

Overview and History of the KGEC

Research analysts from KLRD provided an overview of ethics commissions in all 50 states and the history of the KGEC. The analysts discussed how ethics commissions in other states are similar to and different from the KGEC in terms of structure, membership, and regulatory areas. The analysts also provided a brief history of the KGEC, which began in 1970 and has experienced changes in size, membership requirements, name, and funding sources throughout the years.

Limits on Campaign Contributions

A Principal Research Analyst from KLRD provided information regarding the legislative history of campaign contribution limits in Kansas. The current limit of \$2,000 to a candidate was set in 1981.

A Senior Research Analyst from KLRD provided research detailing the campaign contribution limits in each state. The analyst noted five states permit unlimited contributions, and Kansas is in the bottom half of states in terms of dollar limits on contributions.

Overview of 2023 House Sub. for SB 208

A Senior Assistant Revisor of Statutes from the Office of Revisor of Statutes provided an overview of the bill enacted during the 2023 Legislative Session, House Sub. for SB 208. The revisor discussed three major points:

- There is a new statute governing actions taken by the KGEC;
- There is a five-year statute of limitations on actions brought before the KGEC; and
- The KGEC is authorized to adopt new rules and regulations concerning the recusal of Commission members and staff.

The revisor explained the tiered systems for contributions and registration fees for PACs, changes to contributions not allowed to be made during the legislative session, changes to the list of expenditures that may be paid using campaign contributions, changes to the KGEC’s subpoena powers, and procedural changes to the KGEC.

The revisor also reviewed issues that were discussed by the Legislature but were not addressed in House Sub. for SB 208.

Corrupt Political Advertising

A Research Analyst from KLRD provided an overview of express advocacy, corrupt political advertising, and bills from the 2023 Legislative Session concerning express advocacy and corrupt political advertising.

The Executive Director of the KGEC also provided additional information about express advocacy and corrupt political advertising.

CONCLUSIONS AND RECOMMENDATIONS

The Committee appreciated and noted the quantity of testimony concerned with vagueness in the Campaign Finance Act. After discussion, the Committee made the following recommendations:

- To address concerns that defined terms in the Campaign Finance Act are too vague, the Committee recommends defining the term “coordination”; clarifying the
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definition of the term “giving in the name of another” or “contribution in the name of another”; and clarifying the definition of the term “political committee” or “PAC” and clarifying the test for determining what is a PAC.