



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.**

MAY 2016

1. CONFLICTS OF INTEREST

Prohibiting paid lobbyists from making and bundling contributions

The AACA prohibits paid lobbyists from making campaign contributions and from bundling campaign contributions.

Constitutionality

A ban on contributions to federal candidates by paid lobbyists is likely to be found constitutional. 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), recognizing that the fact that recent corruption scandals in the state involved lobbyists justified an outright ban. And the Second Circuit also recently issued an opinion suggesting that contributions by lobbyists can be prohibited if recent corruption scandal involved lobbyists, in *Green Party of Connecticut v. Garfield*, 616 F. 3d 189, 206 (2d Cir. 2010). Given that public perception of lobbyist contribution activity is highly negative, and that the country has in recent memory experienced scandal involving lobbyists at the federal level, a prohibition on lobbyist contributions would likely be upheld by the Supreme Court. Moreover, a prohibition on lobbyist contributions would mirror the longstanding federal prohibition on contributions by government contractors.

This prohibition has been in place since 1940 and was recently upheld in 2015 by a unanimous en banc D.C. Circuit (Chief Judge Garland writing). The Supreme Court declined to review. *Wagner v. Fed. Election Comm'n*, 793 F.3d 1 (D.C. Cir. 2015) cert. denied sub nom. *Miller v. F.E.C.*, 136 S. Ct. 895 (2016).

And while the Supreme Court has not directly confronted a ban on lobbyist bundling, it is also likely constitutional. Such a ban does nothing to affect the rights of individuals to make political contributions; it simply requires that contributors send their checks directly to candidates instead of allowing lobbyists to peddle such contributions for influence and outcomes. Paid lobbyists have chosen a profession that focuses on influencing legislative action. Because such a career inherently carries an increased risk of corruption, a simple restriction that prevents lobbyists from benefiting from the contribution choices of others is commonsense and narrowly tailored.

Expanding revolving door restrictions

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 after leaving government service. 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 Senate employees compensated at a lower level. Under current law, former Members of the House and Senate and former congressional employees may freely aid or advise clients on how to lobby Congress in a “background role” or freely lobby the executive branch. The AACA 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 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).

Curbing the influence of federal contractors

Existing law prohibits federal contractors from making contributions to federal candidates, political parties, and political committees. The AACA 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 AACA’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. denied, 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.

2. CAMPAIGN FINANCE

Giving voters more voice with a credit for political contributions

The AACA empowers individual citizens to become the primary funders of federal elections through the creation of an annual credit 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 such credits, candidates, political parties, and political committees must agree to only accept contributions from individuals of no more than \$500 per contributor per calendar year and/or contributions from political parties and political committees that are funded exclusively by credits 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 credit created by the AACA 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).

3. TRANSPARENCY

Disclosing bundling and election spending

The AACA 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 AACA 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 valid, but we anticipate that they will be made by opponents of the AACA.

4. ENFORCEMENT

Prohibiting illegal super PAC coordination

The FEC’s current coordination regulations permit extensive collaboration between candidates and supposedly “independent” super PACs. The AACA 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.

Calling all lobbyists “lobbyists”

The AACA 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 AACA 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 AACA also will require the clients of lobbying firms to register and file disclosure reports, and will require registrants to identify the funders of their lobbying efforts. Finally, the AACA 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 AACA 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.

Enforcing the rules, and fixing major enforcement problems

The AACA will establish a bipartisan, bicameral task force in Congress to 1) examine and provide specific recommendations to fix the shortcomings of both the Federal Election Commission and the House and Senate ethics investigation and enforcement processes, and 2) to examine the IRS's enforcement of regulations governing the political activity of tax-exempt organizations. Until these recommendations are developed and enacted, the AACA will, in the interim, strengthen the Federal Election Commission's independence and enforcement powers. The AACA 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 AACA 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.

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