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Mr. Fred Schwartz
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Election Law Opinion No. DAD-22
Re: Constitutionality of
Article 15.16a, Texas Election
Code

Dear Mr. Schwartz:

Reference is made to your recent letter to me, in which you requested my opinion concerning the constitutionality of Tex. Elec. Code Ann. art. 15.16a (Vernon Supp. 1982).

This official election law opinion is rendered by me as chief election officer of the state in accordance with Tex. Elec. Code Ann. art. 1.03, subd. 1 (Vernon Supp. 1982).

Article 15.16a provides as follows:

> "Section 1. That no newspaper, magazine, or other publication, published daily, bi-weekly, weekly, monthly, or at other intervals shall sell, solicit, bargain for, offer, or accept for money, other consideration or favors, any kind or manner of political advertising from more than one candidate for any or all local, county, State, or Federal offices, unless such publication shall have been published and distributed generally for at least twelve (12) months next preceding the acceptance of the advertising.
>
> "Section 2. Provided, however, that this Act shall not apply to publications which have been published and circulated generally for at least twelve (12) months next preceding the acceptance of such advertising, for other than purely political purposes in some locality other than that in which it is located and published at the time of accepting such political advertising from more than one candidate.

"Section 3. And provided further that Section 1 of this Act shall not apply to publications which have, prior to the acceptance of political advertising from more than one candidate, been published and circulated generally for a period of less than one year immediately preceding the acceptance of such advertising in the event that such publication can show ownership of its physical plant and that its advertising rates are in proportion to the amount and kind of its circulation.

"Section 4. Whoever violates the provisions of this Act shall be fined not less than Five Hundred Dollars ($500.00), nor more than One Thousand Dollars ($1,000.00), or be imprisoned in jail not less than three (3) months nor more than six (6) months, or both. Each violation of this Act shall be a separate offense." (Emphasis added.)

Thus, Article 15.16a basically provides that a publication may not accept political advertising from more than one candidate unless it has been in business for at least one year.

The precursor of Article 15.16a (House Bill 700, Acts 1939, 46th Leg., p. 251) was held unconstitutional by the Attorney General of Texas in Tex. Att'y Gen. Op. No. 0-2468 (1940).

More than forty years have passed since the Attorney General rendered his Opinion, and yet the Legislature has not seen fit to repeal Article 15.16a. I shall, therefore, reexamine the matter of the Article's constitutionality and, in particular, address myself to several United States Supreme Court decisions that are apposite to this issue and that have been rendered since the Attorney General's Opinion of 1940.

The following federal and state constitutional provisions are germane to your inquiry:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

". . .No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws." U.S. Const. amend. XIV, § 1.

"All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Tex. Const. art. I, § 3.

". . . [N]o law shall ever be passed curtailing the liberty of speech or of the press. . . ." Tex. Const. art. I, § 8.

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19.

The Supreme Court case primarily relied upon by the Attorney General in holding Article 15.16a unconstitutional was Grosjean v. American Press Co., 297 U.S. 233 (1936). In Grosjean, the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week. In holding the tax unconstitutional, a unanimous Court stated:

"[T]he suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. The tax here involved is not bad because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantees. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

". . . .

"The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." Id. at 250-51 (emphasis added).

It is clearly settled that political advertising is fully protected by the First Amendment. It is not "commerical advertising" which enjoys a lesser level of constitutional scrutiny. See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). Advertisements dealing with political and social matters which newspapers carry for a fee are protected by the First Amendment. New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964).

In Mills v. State of Alabama, 384 U.S. 214 (1966), a unanimous Supreme Court held that the Alabama Corrupt Practices Act, which provided criminal penalties for publishing newspaper editorials on election day, was violative of the constitutional protection of freedom of speech and press. Mr. Justice Black stated:

> "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see Lovell v. City of Griffin, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Id. at 218-19.

In United States v. O'Brien, 391 U.S. 367 (1968), the Court held that the permissible zone of governmental regulation of freedom of speech and of the press is narrow. In order to

sustain the constitutionality of governmental limitations of First Amendment rights, the Court, speaking through Mr. Chief Justice Warren, articulated the following test:

> "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." Id. at 376-77. (Emphasis added, footnotes omitted.)

In view of the one-year ownership requirement of Article 15.16a, it is interesting to note that the Court has stated:

> "This Court has often recognized that the requirements of due process cannot be ascertained through mechanical application of a formula [citing cases]." Groppi v. Leslie, 404 U.S. 496, 500 (1972) (emphasis added).

The Court faced an inverse analogy to Article 15.16a in Miami Publishing Company v. Tornillo, 418 U.S. 241 (1974). In that case, the Court unanimously held that a Florida statute requiring newspapers to afford free space for a candidate, who had been assailed by the newspaper, to reply violated the First Amendment. Commencing with a discussion of a case rendered earlier by the Court, Mr. Chief Justice Burger stated:

> "In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117 . . . (1973), the plurality opinion as to Part III noted:
>
> > "'The power of a privately owned newspaper to advance its own political social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers---and hence advertisers---to assure financial success; and, second, the journalistic integrity of its editors and publishers'. . . .

"Recently, while approving a bar against employment advertising specifying 'male' or 'female' preference, the Court's opinion in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391 . . . (1973), took pains to limit its holding within narrow bounds:

> "'Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.'

"Dissenting in Pittsburgh Press, Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that no 'government agency---local, state, or federal---can tell a newspaper in advance what it can print and what it cannot . . . ."

"[W]ith Associated Press [326 U.S. 1 (1945)], the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would otherwise not print. The clear implication has been that any such compulsion to publish that which '"reason" tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated . . . .

"The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. . . . The Florida statute exacts a penalty on the basis of the content of a newspaper. . . .

"[T]he Florida statute fails to clear the barriers of the First Amendment because of its intrustion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decision made as to limitations on the size and content of the paper, and treatment of public issues and public officials---whether fair or unfair---constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of

a free press as they have evolved to this time. . . ." Id. at 255-58 (emphasis added).

In Tornillo, the Court also noted that "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. . . ." Id. at 258 n.24.

With Tornillo, the Court has clearly held that no governmental body can dictate what a newspaper publisher must publish. It is now appropriate to address the question of what, if any, a governmental body may dictate that a newspaper may not publish. In sum, no prior restraint may be imposed unless a bona fide national security interest, or a similar paramount concern, is juxtaposed between the press and the governmental body. See New York Times Co. United States [The Pentagon Papers Case], 403 U.S. 713 (1971) and Near v. Minnesota, 283 U.S. 697 (1931).

A case of major importance that delineates the requirements for a sufficiently important governmental interest in regulating the contents of political expression, and, a fortiori, whether the government may regulate the right of a political candidate to advertise, is Buckley v. Valeo, 424 U.S. 1 (1976).

The 293-page opinion in Buckley involved a challenge to the constitutionality of several political campaign disclosure, expenditure, and other requirements of the Federal Election Campaign Act of 1971, as amended in 1974 (2 U.S.C.A. § 431 et seq. [West Supp. 1982]).

In referring to United States v. O'Brien, cited supra, among others, the Buckley Court stated at the onset that "The critical difference between this case and those time, place, and manner cases is that the present Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties in addition to any reasonable time, place, and manner regulations otherwise imposed." Id. at 18 (emphasis added.)

In holding the expenditure limitations of the Act unconstitutional, the Court stated:

> "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'

Williams v. Rhodes, 393 U.S. 23 . . . (1968)." Id. at 39.

The Court continued:

> "While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality of appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to '"speak one's mind . . . on all public institutions"' includes the right to engage in '"vigorous advocacy" no less than "abstract discussion."' New York Times Co. v. Sullivan, 376 U.S., at 269, 84 S. Ct., at 721, quoting Bridges v. California, 314 U.S. 252, 270, 62 S. Ct. 190, 197, 86 L. Ed. 192 (1941), and NAACP v. Button, 371 U.S., at 429, 83 S. Ct., at 335. Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation" Id. at 47-48 (emphasis added).

Dictum in Buckley that is particularly apposite to Article 15.16a is found in the following passage: "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice others is wholly foreign to the First Amendment. . . ." Id. at 48-49.

In an important footnote, Buckley noted that "The Act exempts most elements of the institutional press . . . . But, whatever differences there may be between the constitutional guarantees of a free press and of free speech, it is difficult to conceive of any principled basis upon which to distinguish § 608(e)(1)'s limitations upon the public at large and similar limitations imposed upon the press specifically." Id. at 51 n.56.

In continuing its discussion on the right of a political candidate to have unrestricted access to expenditures on his behalf, the Court stated:

> "The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in § 608(e)(1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the

> election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' Whitney v. California, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office. Section 608(a)'s ceiling on personal expenditures by a candidate in furtherance of this own candidacy thus clearly and directly interferes with constitutionally protected freedoms." Id. at 52-53 (emphasis added).

In concluding, the Buckley court held that

> "[M]ore fundamentally, the First Amendment simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy. We therefore hold that § 608(a)'s restriction on a candidate's personal expenditures is unconstitutional." Id. at 54.

and that

> "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not the government, but the people---individually as citizens and candidates and collectively as associations and political committees---who must retain control over the quantity and range of debate on public issues in a political campaign." Id. at 57.

Lastly, we are mindful of the fact that Article 15.16a is a statute carrying criminal penalties for its violation. In a case construing the Political Funds Reporting and Disclosure Act of 1975 (now codified as Tex. Elec. Code Ann. art. 14.01 et seq. [Vernon Supp. 1982]), the Texas Court of Criminal Appeals stated that

> "Since criminal penalties are exacted in an area permeated with the most fundamental of First Amendment interests, the statutory scheme involved must be subjected to exacting and close scrutiny" [Citing Buckley, supra, Smith v. Goguen, 415 U.S. 566 (1974), Grayned v. City of Rockford, 408 U.S. 104 (1972), and

NAACP v. Button, 371 U.S. 415 (1963)]. Beck v. State, 583 S.W. 2d 338, 343 (Tex. Crim. App. 1979).

The issue of the constitutionality of Article 15.16a presents an intertwining nexus of not only the First Amendment, but also of the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. It is manifest that equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Buckley, supra, at 93.

In my opinion, Article 15.16a serves to penalize and discriminate against a discrete class of publishers, i.e., those whose publications have been extant for less than one year. Article 15.16a serves absolutely no rational state interest. Moreover, the Article fails to even approach any of the governmental interest facets that would sanction the criteria set forth in United States v. O'Brien, supra. The state interest served by the Article is neither compelling, substantial, subordinating, paramount, cogent, nor strong.

In view of the foregoing, and being mindful of the recent decisions of the United States Supreme Court in this area, you are accordingly advised that Article 15.16a, both on its face and as applied, is constitutionally infirm and violative of both the Constitutions of the United States and of the State of Texas.

SUMMARY

Article 15.16a, Texas Election Code, is unconstitutional and violative of the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and also of Article I, Sections 3, 8, and 19, of the Constitution of the State of Texas.

Sincerely,

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