

Senate Committee on Rules

Meeting on 2021-03-09

Public Testimony of Richard M. Botteri

On Senate Bill 336

I think it is important to begin my testimony with a summary of my election law experience to fully understand why I oppose the adoption of SB 336.

I am a retired lawyer who practiced in Portland for nearly 30 years. I also have a master's degree in legal history. For 25 years I represented multiple political candidates, office holders, and political committees as an election lawyer. In partisan races I exclusively represented Democrats. My clients included Oregon governors, Congressional representatives, the Democratic Party of Oregon, political campaign committees, and Oregon Democratic legislators. In the 2001 legislative session I was retained by the Oregon Democratic Party to provide legal counsel to the Oregon Legislature's Democratic House and Senate caucuses in connection with redistricting. During that time, the legislature's Democrats walked out of the session to prevent an effort of the Republicans to establish a redistricting plan the Democrats felt was unfair.

I developed significant expertise with both the Federal Election Campaign Act regulating campaign contributions and with Oregon election laws in all matters including contributions and expenditures, conduct of elections, election contests, initiative and referendum campaigns, election recounts, and enforcement proceedings under both federal and state laws and regulations. At one point I acted as the head of an independent political committee that raised money for Democratic legislative candidates. I also advised sponsors of a major independent expenditure effort in connection with a federal election.

I was a member of the national lawyers committee of the Democratic National Committee. I acted as "stand-by" counsel in Oregon for the six Democratic presidential campaigns in each election from 1980 through 2000. I was a delegate to the 1976 Democratic National Convention and served on the Credentials and Rules Committees of the National Convention at later times.

I engaged in extensive election law litigation in Oregon courts and in regulatory hearings. I wrote and opposed ballot measures. I trained well over 100

Democratic election recount observers to act in connection with state-wide election recounts.

When I received my master's degree from the University of Oregon in 2006, I wrote my thesis on the development of voting laws in nineteenth century Oregon.

Based on my legal experience and understanding of the law and my political experience, I have concluded that SB 336 is a bad bill.

First, I join in the analysis of Kyle Markley presented in his submitted testimony. His analysis of the unfair impact on minor parties and the constitutional defects in the bill relating to independent expenditures are correct in my opinion. His objections deserve serious consideration.

Second, the law will not achieve its aim of reducing the effect of political contributions. In fact, it will encourage massive campaign expenditures outside the control of Oregon candidates interfering with their ability to run their own campaigns. Because of the law's failure to recognize political reality and election history, the law will not accomplish the goals of the sponsors. If passed, it will be presented to the people as a major reform guaranteeing election integrity. But this promise will not be fulfilled.

In my opinion, the campaign contribution problems we face today were literally invented directly by major campaign finance reform such as the federal statute, or by persons using the full extent of their powers of imagination to create ways of avoiding contribution limitations. These include individual candidate political committees being used to raise unlimited amounts of money despite individual contribution limitations, political committees with multiple state and federal campaign committees, partisan caucus committees, corporate and union pacs, trade-association committees, industry committees, committees reflecting certain religious views, committees supporting various societal views such those dealing with gun control, racial and gender issues and super pacs, massive independent expenditure committees that can raise unlimited funds from corporations, unions and individuals supporting or opposing individual presidential and congressional candidates. There are 2276 such organizations in the United States. <https://www.opensecrets.org/political-action-committees-pacs/super-pacs/2020>

The only promising campaign expenditure law was the federal law that collects dollars taxpayers check off from their refunds for a presidential election campaign fund. The law provides that presidential candidates will receive campaign money from this fund if they agree to forego all other campaign contributions. The big test of the law happened in the 2008 presidential campaign. The two major party candidates Barack Obama and John McCain agreed to abide by the law and only receive the federal funds. But when Senator Obama realized that he could raise substantially more money by taking individual contributions directly, he canceled his pledge and rejected the federal financing. John McCain stayed with his pledge and was outspent.

Vast sums of money are available for political campaigns. But how effective the spending is remains open to question. Despite all the regulations under federal law, nearly \$14 billion was raised and spent in the 2020 election for presidential and federal offices. Democrats raised significant amounts with small contribution campaigns. According to the Center for Responsive Politics, the Democrats outspent the Republicans by \$75 million in House races but lost seats, and \$280 million in Senate races and gained a net of one seat.

<https://graphics.reuters.com/USA-ELECTION/SENATE-FUNDRAISING/yxmvjeyjkpr/>
How did the Democrats raise so much money?

SB 336 is intent on reducing total campaign contributions and limiting all avenues for various types of committees to generate and contribute funds. The bill's aggressive approach will significantly lessen the amount of funds that will come under the control of individual candidates' campaigns. But will not significantly reduce the effect of money in Oregon elections.

The reason is the concept of "independent expenditures." The Oregon Supreme Court's opinion in *Multnomah County v. Trojan* is the case that has encouraged the drafting of Oregon statutes such as SB336 limiting campaign contributions by ruling such limits are permissible under the Oregon Constitution. But it makes clear that independent expenditures are not subject to such controls. They are permissible under the First Amendment. The more Oregon law clamps down on direct contributions, the greater will be the growth of independent expenditures. People experienced in political campaigns know there are hundreds of individuals who are professionally experienced in running campaigns, who can design campaigns, raise funds, purchase media to achieve election ends in favor of or to

defeat individual candidates, without involving the participation of individual candidates themselves. Such efforts are essentially out of the control of the election law enforcement mechanism.

In the 2019-2020 election cycle Super Pacs made independent expenditures totaling \$2,111,459,472 in campaigns. <https://www.opensecrets.org/political-action-committees-pacs/super-pacs/2020> According to FollowtheMoney. Org, \$1.035 billion was spent as independent expenditures just in congressional elections in 2020. The Center for Responsive Politics reported that during the campaign in Florida Congressional District 26, nearly 38 independent groups spent money. \$1,400,626 was spent supporting the Democrat and \$8,694,968 was spent opposing her. \$1,134,163 was spent in support of the Republican, and \$7,530,140 was spent opposing him. <https://www.opensecrets.org/races/outside-spending?cycle=2020&id=FL26>

Trying to control independent expenditures will be fruitless in Oregon.

First, independent expenditure committees established and operating outside the State of Oregon, for example, are not subject to the enforcement jurisdiction of Oregon election law. So, committees operating in Boise, Seattle, or even Vancouver, B.C., using the internet can order up and pay for media campaigns in Oregon. If there is perceived to be a need for funds to support campaigns in Oregon and the individual candidates can not raise the money they need, we will see independent expenditure campaigns from outside the state playing a larger role here.

Second, there is no practical way of ensuring that independent efforts remain truly “independent.” The essential element of such efforts is that there must be no “coordination” between the candidate being supported and the operators of the independent effort. But how does one determine if coordination has occurred? After the election of 1988 when George H.W. Bush ran against Michael Dukakis, the Federal Election Commission wanted to examine whether there had been improper coordination between the Bush campaign and a so-called independent committee. Telephone records were acquired showing calls between the two organizations but there was no way of proving what was talked about. Nothing forbids mere conversation apart of cooperation in the application of campaign funds. A dramatic reduction in funds flowing to candidate committees will tempt the start of quiet, surreptitious coordination between

campaigns and independent expenditure groups. Unless Oregon is prepared to create an “elections police force” with wiretap authority, such coordination will escape notice.

One motive for this bill is to reduce the influence contributors have on office holders after elections. Coordination or not, nothing will prevent an independent group from reminding an office holder how their outside spending contributed to his/her election victory. It is naïve to think SB336 will have this desired effect. Another loophole which many do not recognize is the so-called “Non-partisan voter registration and get-out-the vote drive.” Basically, such an effort encourages people to register without urging them to register in any specific party, and encourages voters to cast ballots, again without endorsing any particular candidate. Under federal law, financial donations for such efforts are not treated as contributions. The same would be true under Oregon law. These efforts have been used quietly to support partisan campaigns. The example of the reelection campaign of a U.S. senator in 1986 is illustrative. In that close race, the senator’s principal financial contributors had “maxed out.” But candidate needed more funds. So, two non-partisan efforts were mounted in the state. They complied with federal law. However, the efforts were mounted primarily in areas where persons who were encouraged to register would most likely register in the same party as that of the senator.

Such efforts can and probably have been mounted in Oregon. For example, conservative churches might mount such campaigns to make sure their congregants vote, being able reasonably to predict how these people will vote. The same is true for groups seeking to encourage members of certain racial groups to register, again without endorsing any candidate or party.

The problem for the candidates with independent expenditures is that they lose control over the management of their campaigns if substantial sums of money are being spent in the elections on their behalf without their consent or against them without ready access to funds to fight back.

In conclusion, I do not believe there is any possible combination of words in the English language, that can be written into a constitutional law, that will effectively reduce the impact of donations of money in political campaigns. If such a law were possible, it would have been enacted decades ago.

(Please note: my remark about political committees operating out of Vancouver, B.C., is erroneous because of federal law prohibiting foreign contributions in American political campaigns.)