

**Testimony of Kevin J. Kennedy  
Director and General Counsel  
Wisconsin Government Accountability Board**

**Senate Committee on Elections and Local Government  
Assembly Committee on Campaigns and Elections**

**Joint Informational Hearing  
Room 411 South, State Capitol**

**March 24, 2015  
9:00 a.m.**

Chairpersons LeMahieu and Bernier and Committee Members:

Thank you for the opportunity to speak to you about long overdue revisions to Wisconsin's campaign finance law. Chapter 11 of the Wisconsin Statutes was created in 1974 following the national campaign finance scandal revealed by the Watergate break-in and subsequent Congressional hearings. Chapter 334, Laws of 1973. Chapter 11 had its genesis in a 1974 report of the Governor's Study Committee on Political Finance. Professor David W. Adamany, who was serving as Governor Lucey's Secretary of the Department of Revenue, chaired the Committee and authored the report which was submitted in March 1974.

The report called for sweeping changes in Wisconsin's campaign finance disclosure regulations including expenditure limits, contribution limits, full and complete disclosure of campaign finance transactions, an independent enforcement agency and a generous measure of public financing of campaigns. The report advocated for joining the trend of comprehensive

campaign finance revision that had already begun at the national level and in several states.

In 1911, Wisconsin adopted the Corrupt Practices Act (Wis. Stat. ch. 12) to regulate the financing of political campaigns. At the time it was a model for the nation. The 1974 Report described the current state of that campaign finance regulation as “wholly inadequate to the times ... enfeebled by lack of enforcement ... and in urgent need of complete revision.” Given the parade of campaign finance decisions emanating from the United States Supreme Court, as well as other federal courts, the current campaign finance law set out in Chapter 11 is also “wholly inadequate to the times.” The driving force for reviewing and revising Wisconsin campaign finance law is to harmonize regulation with new case law.

In 1974, the Legislature included a declaration of policy along with a directive on statutory construction for Chapter 11. That policy and directive are found in the preface to the then new comprehensive regulatory structure. A copy of those provisions is attached to my written remarks. Some of the legislative policies have been relegated to mere aspirations by court decisions limiting the role of regulation. For example, the policies sought to limit “excessive spending on campaigns for public office,” to “encourage the broadest possible participation in financing campaigns by all citizens” and to “enable candidates to have an equal opportunity to present their programs to the voters.” These are laudable public policy goals, but they are not likely to withstand the compelling state interest test of First Amendment scrutiny.

However, the fundamental finding of the 1974 Wisconsin Legislature remains viable and critical to any campaign finance reform – “our democratic system of government can be maintained only if the electorate is informed.” The Legislature went on to state: “One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization.”

The 1974 Legislature pinned its concerns about an informed electorate on a robust system of campaign finance disclosure. The Legislature found the state “has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities.” Our current system provides an excellent source of disclosure on the political finances of candidates, political parties, political action committees and conduits. Any revision to Chapter 11 should be focused on continuing to make campaign finance information readily available for public consumption.

Chapter 11, as enacted in 1974, was soon the subject of revision due to the seminal case on campaign finance regulation. *Buckley v. Valeo*, 424 U.S. 1 (1976). It continued to be the subject of legal challenges throughout the 1970s, 80s, 90s and well into the current century.

As noted earlier there has been a parade of court cases that have rendered the current campaign finance law wholly inadequate to the times. These include

*Citizens United v. FEC*, 586 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. \_\_\_ (2014); *Wisconsin Right to Life v. Barland*, 664 F. 3d 139 (7<sup>th</sup> Cir. 2011) (*Barland I*); and *Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7<sup>th</sup> Cir. 2014) (*Barland II*). These and other recent decisions are the impetus for reviewing and revising Wisconsin regulation of campaign finance to harmonize regulation with case law interpreting the First Amendment and reflect current legislative intent.

The Government Accountability Board has offered its take on a basic outline for campaign finance reform. In December 2014 it reviewed a series of legislative proposals from its staff. The Board established a subcommittee to draft a resolution to the Legislature on the topic of campaign finance reform. The Board adopted the resolution on January 13, 2015. A copy of that resolution is attached to my testimony.

In its resolution the Government Accountability Board urges the Legislature to undertake a comprehensive review and revision of chapter 11 of the Wisconsin Statutes. The resolution focuses on eight areas for reform.

- ***The definition of “political purpose” in order to be consistent with court rulings;***

The *Barland II* decision challenges Wisconsin’s definition of political purpose in Wis. Stats. 11.01 (16), particularly as it applies to entities and organizations whose major purpose is not to expressly advocate for the election or defeat of a candidate or candidates. This also includes entities and organizations whose major purpose is not to expressly advocate for the

passage or defeat of referenda. Any Chapter 11 revision should provide direction on the factors to include in addressing the “major purpose” criteria.

- ***What, if any, registration and reporting requirements should apply to organizations that only make independent disbursements;***

*Citizens United* made it clear that First Amendment associational and speech provisions enable a wide array of entities and organizations to engage in political speech without limitation. The Legislature should address how much disclosure it desires of independent candidate and referenda advocacy to ensure a well informed electorate.

- ***Reporting requirements related to independent disbursements;***

Essential to any decision on the scope of disclosure of independent candidate and referenda advocacy is a clear articulation of the specific reporting requirements related to independent speech. The amount, timing and source of funds are key elements of these requirements.

- ***Thresholds for registration and reporting and to what entities those thresholds apply;***

There are a wide range of candidates and committees organized to win election to public office or secure passage of a ballot measure. It is essential to revisit current thresholds. Registration and reporting thresholds need to be low enough to give the public critical information which aids it in knowing the true source and extent of support for a candidate or political organization. However, thresholds must be high enough to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process.

- ***Adjusting or eliminating contribution limits enacted in the 1970s;***

Contribution limits enacted in 1974 have not changed in the past 40 years. The costs and nature of political campaigns however have changed dramatically. In 1972 total political spending for state and local campaigns crept over the \$5 million threshold. Now in many statewide campaigns, each major candidate spends in excess of \$5 million and attracts at least that amount in independent spending.

Any limit on contributions to candidates and political committees needs to reflect the current political landscape and be flexible enough to anticipate changes in the future political landscape. Contribution limits also need to harmonize with court decisions striking down restrictions that impinged on First Amendment associational and speech rights. Courts have upheld contribution limits which serve as barriers to quid pro quo corruption of candidates for public office.

- ***Whether and what type of corporate contributions should be allowed;***

Wisconsin has banned corporate contributions to candidates for public office since 1911. Many states permit such contributions. This remains a critical policy decision in any revision of Chapter 11.

- ***What coordination between a candidate and other committees should be permissible and what should be prohibited;***

As court cases limit the amount of regulation of political speech, it is essential for the Legislature to carefully consider the parameters for

regulating coordination between candidates and other entities. Restricting coordination has been a core element of campaign finance regulation in order to ensure the efficacy of campaign contribution limits. The 7<sup>th</sup> Circuit has noted the U.S. Supreme Court has not defined coordination and no state or federal court has ruled on coordination of issue advocacy in the context of the First Amendment. *O’Keefe v. Chisholm*, \_\_\_\_ F. 3d \_\_\_\_ (7th Cir. 2014).

- ***Consider whether or not to establish contribution limits from individuals to non-candidate committees that were removed when the statutory aggregate limit was deemed unconstitutional.***

One consequence of the removal of aggregate contribution limits was to remove any limit on the amount an individual could give to a political party or legislative campaign committee. As the Legislature examines the nature and scope of contribution limits, it should be clear to which political entities contribution limits will apply.

The Board believes that the best approach to this endeavor would be through the establishment of a Legislative Council study committee. As noted earlier, our current set of campaign finance regulations had its origins in a Governor’s Study Committee. Chapter 11 has been the subject of considerable study since its inception.

In November 1996, Governor Thompson appointed a Blue Ribbon Commission on Campaign Finance Reform. That Commission issued a report in May, 1997. At the same time a group of citizens established its own Commission on campaign finance reform. The Wisconsin Citizen’s

Panel for a Clean Election Option issued its report in June, 1997. A Legislative Council Study Committee was also established in 1992. The conduct and financing of political campaigns is at the heart of our representative form of government. For that reason, the Board believes a thorough and transparent study of changes to the current regulatory structure is critical to achieving a result that provides the public with the fullest amount of information on political campaigns consistent with the principles of the First Amendment which is the basis for that representative government.

Whether or not a Legislative Council study committee is established, the Board believes that revision of campaign finance laws is necessary, and offers its assistance, experience and cooperation to the Legislature in that endeavor.

Respectfully submitted,

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style.

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## **Declaration of policy**

The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence. The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.

Wis. Stat. § 11.001(1)

## **Construction**

This chapter shall be construed to impose the least possible restraint on persons or organizations whose activities do not directly affect the elective process, consistent with the right of the public to have a full, complete and readily understandable accounting of those activities intended to influence elections.

Wis. Stat. § 11.002

# State of Wisconsin \ Government Accountability Board

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JUDGE GERALD C. NICHOL  
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## RESOLUTION

1. Whereas, Wisconsin's campaign finance laws, Wis. Stats. Ch. 11, have not undergone a thorough legislative review or revision since 1978.
2. Whereas, a number of federal court cases, holding various portions of the statutes unconstitutional, have made the practical application of the law difficult.
3. Whereas, the Government Accountability Board believes that, rather than a patchwork attempt to revise the law, a better approach would be a thorough review and revision of Wisconsin's campaign finance laws.

Therefore be it RESOLVED as follows:

1. The Government Accountability Board urges the Legislature to undertake a comprehensive review and revision of Wis. Stats., ch. 11 that, among other things, addresses:
  - The definition of political purpose so as to be consistent with court rulings;
  - What, if any, registration and reporting requirements should apply to organizations that only make independent disbursements;
  - What coordination between a candidate and other committees should be permissible and what should be prohibited;
  - Whether and what type of corporate contributions should be allowed;
  - Reporting requirements related to independent disbursements;
  - Thresholds for registration and reporting and to what committees those thresholds apply;
  - Adjusting or eliminating contribution limits enacted in the 1970s;
  - Consider whether or not to establish contribution limits from individuals to non-candidate committees that were removed when the statutory aggregate limit was deemed unconstitutional.
2. The Board believes that the best approach to this endeavor would be through the establishment of a Legislative Council study committee.
3. Whether or not a Legislative Council study committee is established, the Board being persuaded that revision of campaign finance laws is necessary, the Board offers its assistance, experience and cooperation to the Legislature in revision of campaign finance laws.

Adopted by unanimous vote of the Government Accountability Board, January 13, 2015.