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CONSTITUTIONAL PERSPECTIVE OF CAMPAIGN FINANCE REFORM

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

Hearing Held in Washington, DC, June 14, 2001

Printed for the Use of the Committee on House Administration

U.S. GOVERNMENT PRINTING OFFICE

87–573 WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONSTITUTIONAL PERSPECTIVE OF CAMPAIGN FINANCE REFORM

THURSDAY, JUNE 14, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 11:20 a.m., in Room 1310, Longworth House Office Building, Hon. Robert W. Ney (chairman of the committee) presiding.

Present: Representatives Ney, Mica, Linder, Reynolds, Hoyer and Davis.

Staff present: Jeff Janas, Professional Staff; Paul Vinovich, Counsel; Roman Buhler, Counsel; Luke Nichter, Staff Assistant; Sara Salupo, Staff Assistant; Robert Bean, Minority Staff Director; Keith Abouchar, Minority Professional Staff Member; and Matt Pinkus, Minority Professional Staff Member.

The CHAIRMAN. The committee will come to order.

I want to initially apologize for the wait. As you know, we never know particularly when there are going to be votes in the U.S. House.

Today the House Administration Committee is holding a hearing on campaign finance reform legislation. Today's hearing will focus on the constitutionality of the reform legislation currently before this Congress and this committee, namely, the Shays-Meehan bill and the McCain-Feingold bill.

We will hear a lot today about the First Amendment, so I just want to start by reading that amendment. It says:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for the redress of grievances."

I am not an attorney by degree, but the words "Congress shall make no law" abridging the freedom of speech, or the right of the people to petition their government, seem pretty clear to me. Some people, I understand, do not have the same opinion.

One prominent congressional leader who has advocated reforms once said, "What we have is two important values in direct conflict: Freedom of speech and our desire for healthy campaigns in a healthy democracy. You can't have both."

I think basically that tends to be a shocking statement, but it pretty much sums up the thinking of some proponents of some reform measures. To their way of thinking, our first amendment is an inconvenient obstacle that must be knocked down to preserve

our democracy. I respect their opinion, but I disagree. Under this philosophy, to promote speech, we must restrict it. To preserve our liberties, we must forfeit them.

Well, I do not share that view.

I believe our democracy is best secured when the people, not the government control the extent to which they will speak and assemble to discuss public issues. Our democracy is the strongest and oldest in the world because of our first amendment, not in spite of it.

As the Supreme Court noted 25 years ago in the *Buckley* decision, "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."

Some have described certain reform bills before this committee as "an assault on the first amendment." Major newspapers that normally jealously guard and protect the first amendment are virtually unanimous in their support of reform in this instance.

Perhaps not surprisingly, the media is explicitly exempted from the speech restrictions in this bill before us. It is unfortunate that rather than cry out in protest, as they do when they perceive threats to their own rights of expression—and they should cry out when they perceive threats or some type of grievance against their own rights of expression—the media has, for the most part, wholeheartedly endorsed the proposed limits on speech. Sadly, they do not seem to hold the first amendment rights of others as dear as they do their own.

I do realize these statements I am making prompt an editorial, but that is also free speech. Instead, having diagnosed a cancer of corruption on the body politic, they have bought into the notion that nothing short of a radically invasive treatment will save the patient.

I think we need to look at both the so-called disease and the proposed cure. If the disease is corruption, what are the symptoms, and how should we combat that corruption? What are the proposed cures and what will be their impact? Only by examining and answering these questions will we be able to determined if the cure really is worse than the disease. It would be foolish, dangerous and irresponsible to swallow the cure without knowing all of the potential side effects.

I have made my views pretty clear, but I also want to make it clear that I realize that people of goodwill can disagree on this issue. I am not necessarily personally questioning their integrity.

I also think statements have been made before the Congress and before the committees about corruption in general and rampant corruption and also statements about how the political parties are money laundering machines. I do not happen to share that belief. I think there are a lot of good people in both major political parties and all other philosophy parties in this country, and I think that the vast majority of people in public office across the United States, although we may not philosophically agree with each other, tend to be here for the right reasons, which is to serve the people.

We need to have a real debate on this subject. It is time to move past the simplified stereotypes that cast all those who support reform as heroic and virtuous, while all those who oppose it are portrayed as self-serving and corrupt. I do not necessarily believe that to be either case. Reform proponents genuinely believe that the proposals are necessary to preserve our democracy and enhance the voice of the average citizen. Opponents fear that enactment of these proposals will have the opposite effect, discouraging citizen involvement and, thereby, endangering our democracy itself.

I hope that today and in all the weeks ahead we will be able to conduct this debate in a fashion that shows respect for the difference of viewpoints. We have a distinguished panel today and I believe that this panel brings to us, whether they are for or against reform measures, a broad and thoughtful range from a constitutional perspective.

Mr. Hoyer is detained. I would note to you this is his 39th birthday today. Trying to keep the great comity that we do have together, please tell him I said it is his 39th birthday.

With that, I yield to Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman. It is my honor to be here in place of Mr. Hoyer who is celebrating his 39th birthday, as he has done so many times before.

I was not going to speak, but I feel compelled to do so, because you expressed such heartfelt views.

I have heard that *Buckley* case, and, you know, *Buckley* really describes the tension that we are trying to work through today and that is that the first amendment is balanced against the need to protect the republic from corruption, even the appearance of corruption, because, ultimately, the confidence of the voters and how we make decisions is what empowers us and empowers this country, and it is the fundamental value on which our republic is based.

The devil is in the details, and I think this committee has a very, very important job to do here. Because one of the things that always makes our life more difficult is when we do not just have different opinions, we have different versions of the facts. Reasonable people will disagree, but I am hopeful that this committee can do a service to everybody by focusing on what the facts are surrounding this issue. I think that is terribly important.

The last think I would say is I think what is very, very important about this particular debate is that we—I know I feel this way for myself—have to try very hard not to look at this from the standpoint of our rights as candidates or incumbents, but how this affects the voters, how this affects their ability to make informed judgments about the candidates, how it affects their ability ultimately to control the outcome of elections based on the vote, which is so sacred. It is the other issue we have been spending so much time on, and I laud your work on this issue, and Mr. Hoyer has been focusing on it as well. So I look forward to the hearing.

The CHAIRMAN. Any other opening statements or comments?

Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman, for convening this hearing. I think it is an important topic, the constitutional perspective of campaign finance reform.

One of the problems we have as we undertake this task is that we have 535 experts in the House and the Senate on the issue. Unfortunately, we are also handicapped by having an inordinate number of attorneys who are also part of that mix of 535. I think all of us would like to see confidence and faith in the system that we hold so dear to our electoral process by the same perspective as we celebrate Flag Day today and the appreciation of the great constitutional government we live under. We do not want to disrupt people's right to express themselves in an open and free society for which so many sacrificed their life under the symbol that we celebrate today.

So there are some tough questions here. We want to have a good, fair, open system, but we want to also keep it within the constitutional framework that is so important.

So I look forward to working with you on that. I think there is a lot of sincerity on both sides, and I do not think people should question motivation. Thank you.

The CHAIRMAN. Thank you, Mr. Mica.

We will begin with the first panel. We have James Bopp, Jr., with the law firm of Bopp, Coleson & Bostrom from Terre Haute, Indiana; Cleta Mitchell of Foley & Lardner, Washington, D.C.; Joel M. Gora, American Civil Liberties Union, New York, New York; Laurence E. Gold, Associate General Counsel, AFL–CIO, Washington, D.C.; E. Joshua Rosenkranz, President and CEO of the Brennan Center for Justice, New York, New York; Donald J. Simon, Sonosky, Chambers, Sachs, Endreson & Perry, Washington, DC.

I want to welcome the panel, and I appreciate your testifying here today.

STATEMENTS OF JAMES BOPP, JR., BOPP, COLESON & BOSTROM, TERRE HAUTE, INDIANA; CLETA MITCHELL, FOLEY & LARDNER, WASHINGTON, D.C.; JOEL M. GORA, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, NEW YORK; LAURENCE E. GOLD, ASSOCIATE GENERAL COUNSEL, AFL–CIO, WASHINGTON, D.C.; E. JOSHUA ROSENKRANZ, PRESIDENT AND CEO; THE BRENNAN CENTER FOR JUSTICE, NEW YORK, NEW YORK; AND DONALD J. SIMON, SONOSKY, CHAMBERS, SACHS, ENDRESON & PERRY, WASHINGTON, D.C.

The CHAIRMAN. We will start with Mr. Bopp.

STATEMENT OF JAMES BOPP, JR.

Mr. BOPP. Thank you very much, Mr. Chairman.

I am a member of the law firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana, and the co-counsel to the Washington, D.C. Firm of Webster, Chamberlain & Bean.

My expertise on campaign finance law has developed over 20 years of litigation where I have brought more than 50 cases challenging on first amendment grounds State and Federal election laws, based upon the idea that they violate first amendment protections. Of the some 30 cases, over 30 cases that have been resolved, I have won 90 percent of those cases, winning 1 or more cases in 8 of the 12 Circuit Courts of Appeal in the Federal system;

and, among those, I am currently 8 and 0 against the Federal Election Commission specifically.

Thus, I have won cases, both against the Federal Election Commission and the State election laws, that contained provisions materially identical to the provisions contained in McCain-Feingold and Shays-Meehan. The efforts of McCain-Feingold and Shays-Meehan to limit issue advocacy by not-for-profits and labor unions, the efforts of McCain-Feingold to severely limit contributions and the activities of political parties have been uniformly struck down by the Federal and State courts.

Now, I would characterize McCain-Feingold and Shays-Meehan as an unprecedented and broad-based assault on the right of citizens, particularly citizens of average means, to participate in our political process. The reason for that is that Shays-Meehan and McCain-Feingold attack groups, that is, not-for-profit and for-profit corporations, labor unions and political parties.

Groups are essential for people of average means to participate in our political process. In other words, the average janitor does not have the funds to buy an ad in The New York Times that would express his or her opinion on major issues of the day. Thus, that person needs to join a labor union or a citizens' group in order to pool resources and have their voices heard.

The wealthy do not have to join a group. They already have all the money they need, and they can run off and buy an ad in The New York Times. Thus, when you attack groups, you are attacking citizens of average means, because it prevents them from putting the money together to pool their resources to participate.

McCain-Feingold and Shays-Meehan expressly does nothing, nothing about the wealthy. There is no limit on the ability of wealthy people to spend their money. Furthermore, there is no limit in McCain-Feingold or Shays-Meehan upon the media and their ability to spend money to effect elections. And, of course, it finally does nothing to prevent the corruption of candidates, because usually, when we are talking about corruption, it is surely not about the ability of average citizens to participate and speak out about public officials, but we are talking about incumbent officeholders who take money and, as a result, change their vote. Shays-Meehan and McCain-Feingold does absolutely nothing about those few incumbent officeholders that might be tempted to sell their vote for a contribution.

Thus, we have winners and losers here. Average citizens are prohibited, driven from the field, because their only effective means of participating, the groups that they join, their speech is stifled; and then we have the winners, the news media, the wealthy who can spend their own money, and incumbent politicians who are now immunized from criticism, immunized from having their constituents know, at least to the extent that citizens' groups want to talk about this, know what they are doing to them or for them while in office.

Now, McCain-Feingold and Shays-Meehan does this in several ways. First is by imposing two gag rules. One gag rule is through defining express advocacy as an unmistakable and unambiguous support for or opposition to a candidate when taken as a whole and with limited reference to external events such as the proximity of an election. Thus, a communication that talked about, for instance,

how an incumbent Member of Congress is voting in Congress, praising them or condemning them for that, if viewed within the proximity of an election or with reference to other external events anytime during the year, that group, the labor union or corporation, would be absolutely prohibited from engaging in that speech.

Secondly, if you simply have the audacity to name candidates who are, of course, often current officeholders, within 60 days of the general election or 30 days of a primary, as a group, you would be committing a Federal crime under Shays-Meehan and McCain-Feingold. Thus, if there was legislation being voted on, as there very often is—in the last Congress, nearly the whole budget was being voted on within 60 days of a general election—all groups would be prohibited from engaging in grass-roots lobbying such as, call your Congressman and tell him to support raising the minimum wage in the budget, or many of the numerous issues that were then being debated in Congress. You could not do effective grass-roots lobbying because you could not mention the name of somebody running for office during that period of time.

It also prohibits corporations and labor unions from engaging in the sort of issue advocacy by creating a coordination trap and, that is, if anything of value is coordinated with a candidate, which would include any communications about a candidate, if they referenced a candidate, if coordinated, would be deemed a contribution and would also be prohibited, a Federal crime, by a corporation or a labor union.

Now, this coordination trap is, I think, well demonstrated by an attachment to my testimony, which is Exhibit C, which lists the 45 different ways in which a communication could be coordinated. This coordination trap, as does the two gag rules contained in McCain-Feingold and Shays-Meehan, also violate the well-established express advocacy test of the Court. The express advocacy is where a person uses explicit words to advocate the election or defeat of a candidate. Each of these provisions go way beyond that express advocacy test.

Now, there is so far, to my count, over 40 cases—two Supreme Court, 13 Circuit Court, and 25 lower Federal court and State Supreme Court cases—that every single one of them have adhered to the express advocacy test, that you must focus on the words, not external events like the proximity of election, and the words must be specific, that is, explicit words of advocacy. I have listed all of those cases that fill up more than a page on page 4 of my testimony.

Now, to indicate the utter death of support on the other side for these provisions, all you have to do is look at the testimony of Mr. Simon and Mr. Rosenkranz. In all of their testimony, the only reference to a court case, one reference to a court case is simply referring to the Supreme Court's holding on the express advocacy test. They can cite not one case and do not cite one case to support their position.

In other words, their view is not what the law is or what the first amendment requires or what the courts have said the first amendment requires. What their view is is that they hope that the U.S. Supreme Court will cut the heart out of the first amendment. That is, allow extensive regulation of political speech, cutting the heart

out, leaving nude dancing, flag burning, pornography on the Internet.

That is not what the first amendment was about. It was about protecting the right of average citizens to speak out, to criticize incumbent Members of Congress, to talk about what they are doing to us and for us in Congress, and that is exactly what Shays-Meehan and McCain-Feingold would unconstitutionally prohibit.

The CHAIRMAN. I would have to note that what we want to try to do is limit each person, unfortunately, to 5 minutes at this point in time until we have rounds of question. So I appreciate your testimony, but we should try to keep it to the red light.

[The statement of Mr. Bopp follows:]

Testimony of James Bopp, Jr.
Before the House Administration Committee Regarding
Constitutional Issues Raised by Recent Campaign Finance Legislation
June 14, 2001[1]

Thank you for the opportunity to testify regarding constitutional issues raised by recent campaign finance legislation. My testimony today will focus on the effect on citizen groups if current campaign finance "reform" bills – such as McCain-Feingold (S. 27) and Shays-Meehan (H.R. 380) – were enacted into law.

On June 12, I also testified on constitutional problems posed by these bills before the Subcommittee on the Constitution of the House Committee on the Judiciary, and that testimony focused on the effect of such legislation on political parties. Members of this Subcommittee are respectfully referred to my June 14 testimony for that analysis.

I have appended (as *Appendix B*) to this testimony my 37-page analysis of McCain-Feingold, entitled *"McCain-Feingold": Analysis of S. 27 as Passed by the Senate* (hereinafter *"McCain-Feingold Analysis"*; available online at <www.jamesmadisoncenter.org>, where the present analysis will also be posted). It raises numerous constitutional and practical issues that are directly transferable to Shays-Meehan that will not be repeated herein. The *McCain-Feingold Analysis* has several appendices listing court opinions recognizing the constitutional rights relevant to the present testimony. The analysis makes the point that such forms of campaign finance "reform" would have the effect of denying the average person an effective voice in the public forum because in order for average individuals to be heard on vital issues they must associate in issue advocacy groups and pool resources to amplify their voices.

I am a practicing attorney with the law firm of Bopp, Coleson & Bostrom in Terre Haute, Indiana. Since 1980, a significant portion of my law practice has involved the representation of non-profit corporations – including the National Right to Life Committee and the Christian Coalition – and political action committees regarding compliance with the Federal Election Campaign Act (FECA). I have also represented several state political party committees, including the Vermont and Michigan Republican Parties, in both state and federal courts, including successfully challenging unconstitutional state election laws on their behalf.

I am also the General Counsel for the James Madison Center for Free Speech (a corporation recognized by the Internal Revenue Service under 501(c)(3) of the Internal Revenue Code), which advocates and promotes free speech and association rights in the election law context through litigation, legislative analysis and testimony, comments on proposed rulemaking by the Federal Election Commission, and publishing scholarly and popular articles.

In these capacities, I have represented parties in numerous FEC investigations and enforcement actions, as well as in preenforcement suits against the FEC that resulted in the

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[1]The witness states, in compliance with the House rule requiring disclosure of grants or contracts relevant to a witness' testimony received in the current or two preceding fiscal years by the witness or any entity represented by the witness, that no such grants or contracts exist.

striking down of five separate FEC regulations and section 441b of the FECA for violating the First Amendment. I have won eight cases against the FEC, without sustaining any losses. In addition, I have represented numerous plaintiffs in successful law suits challenging state election statutes and regulations.[2]

Because of my developed expertise in federal election law, I have provided testimony on numerous occasions before federal and state legislative committees on proposed election legislation and before the FEC on proposed regulations. Since 1996, I have served as the Chairman of the Election Law Subcommittee, Free Speech & Election Law Practice Group, The Federalist Society for Law & Public Policy Studies.

A summary of my resume is attached as *Appendix A*, and a full version is in my June 12 testimony before the Subcommittee on the Constitution of the House Committee on the Judiciary on these same issues and on the James Madison Center website at <www.jamesmadisoncenter.org>.

Introduction

In general, Shays-Meehan would severely restrict the ability of citizen groups to communicate with the public regarding the positions and voting records of public office candidates and incumbents – or even upcoming votes in Congress.

Shays-Meehan would impose a year-round prohibition on unions and corporations (including citizen groups) from paying for public communications that an FEC regulator might consider "for the purpose of influencing a Federal election," if that communication is pursuant to

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[2]In addition to dozens of successful federal district court decisions, I have been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional rights to free speech in the election context, which resulted in reported appellate decisions by the United States Courts of Appeals for the 1st, 2nd, 4th, 7th, 8th, 9th, 10th and 11th circuits. *See Florida Right to Life Committee v. Lamar,* 238 F.3d 1288 (11th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999); *North Carolina Right To Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *California Prolife Council v. Scully,* 164 F.3d 1184 (9th Cir. 1999); *Brownsburg Area Patrons Against Change v. Baldwin*, 137 F.3d 503 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D. Me. 1995, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *New Hampshire Right to Life v. Gardner,* 99 F.3d 8 (1st Cir1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

any "general or particular understanding with a candidate,"[3] or if the citizen group has any of several broad categories of direct, indirect, presumed, or actual links to a candidate.[4] These prohibitions apply "regardless of whether the . . . communication . . . is express advocacy." (§§ 201(c), 206.)

Even if a group seeks to avoid "coordination" by avoiding virtually all two-way conversation with their congressmen (or other candidates), the organization must avoid issuing communications that comment favorably or critically on a candidate year round because to the broad definition of "express advocacy." (§ 201.)

Avoiding such "coordination" or "express advocacy" is even insufficient in the 60-day blackout period before elections, during which even mentioning a candidate's name would be deemed express advocacy of the election or defeat of a clearly identified candidate and therefore forbidden to corporations and labor unions. (§ 201.)

Shays-Meehan would only permit such forms of speech to PACs, which would seriously restrict the rights of citizen groups wanting to engage in issue advocacy.

Shays-Meehan purports to make an exception for voting records and voter guides, but the exception would deprive citizen groups of their current ability to express a viewpoint on the issues being discussed, e.g., by making "correct" answers all pluses and "incorrect" answers all minuses. The sort of voter guides typically done by citizen groups would be banned under this alleged "exception." (§ 201.)

The restrictions of Shays-Meehan would apply even to communications from citizen groups to the public about coming critical votes in Congress.

These general observations are developed more fully below, as is the constitutional standard against which they are measured and found wanting.

I. The Constitutional Standard[5]

The First Amendment to the U.S. Constitution protects the right of nonprofit, corporate citizen groups to engage in issue advocacy. The United States Supreme Court has repeatedly refused to allow campaign finance regulations to be applied beyond the narrow scope of "communications that expressly advocate the election or defeat of a clearly identified candidate."

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[3]An example would be an understanding that an organization would publicize which candidates sign a "pledge" form on a certain bill.

[4]"Candidate" includes all federal incumbents (unless they have announced retirement) from the day after election (i.e., for six years for senators).

[5]A fuller discussion of the constitutional standard is found in the attached *McCain-Feingold Analysis*.

Buckley v. Valeo, 424 U.S. 1, 80 (1976); *FEC v. Massachusetts Citizens For Life*, 479 U.S.238, 259 (1986). Such a bright line is necessary in order to prevent vague or overbroad restrictions of core political speech. *Buckley*, 424 U.S. at 43, 80. This bright line distinction between express advocacy, which may be regulated, and issue advocacy, which may not, has been followed by a host of lower court decisions which have struck down numerous attempts by federal or state governments to regulate issue advocacy. *See Citizens For Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Lamar v. Florida Right to Life, Inc.*, 238 F.3d 1288 (11th Cir. 2001); *Vermont Right To Life Committee, Inc. v. Sorrell*, 221 F.3D 376 (2nd Cir. 2000); *Iowa Right to Life Committee, Inc. v. Williams*, 187 F.3d 963, 969-70 (8th Cir. 1999); *North Carolina Right To Life, Inc. v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 (7th Cir. 1998); *Virginia Soc'y For Human Life, Inc. v. Caldwell*, 152 F. 3d 268, 270 (4th Cir. 1998); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997); *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (*en banc*).[6]

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[6]*See also FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d 1178 (4th Cir. 1996); *Richey v. Tyson*, 120 F. Supp.2d 1298, 1309 (S.D. Ala. 2000); *North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp.2d 498 (E.D. N.C. 2000); *Virginia Society for Human Life v. Federal Election Commission*, 83 F. Supp.2d 668 (E.D. Va. 2000); *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45, 62 (D.D.C. 1999); *Kansans for Life, Inc. v. Gaede*, 38 F. Supp.2d 928 (D. Kan. 1999); *Right to Life of Mich., Inc. v. Miller*, 23 F. Supp.2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Mich., Inc. v. Miller*, 21 F. Supp.2d 740 (E.D. Mich. 1998) (same); *Right To Life of Dutchess County, Inc. v. FEC*, 6 F. Supp.2d 248 (S.D. N.Y. 1998); *Clifton v. FEC*, 927 F. Supp. 493, 496 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Survival Educ. Fund, Inc*, 1994 WL 9658, at *3 (S.D. N.Y. Jan. 12, 1994), *aff'd in part and rev'd in part on other grounds*, 65 F.3d 285 (2d Cir. 1995); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1456 (D. Colo. 1993), *rev'd*, 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 116 S. Ct. 2309 (1996); *West Virginians For Life, Inc. v. Smith*, 919 F. Supp. 954, 959 (S.D. W.Va. 1996); *FEC v. NOW*, 713 F. Supp. 428 (1989); *FEC v. AFSCME*, 471 F. Supp. 315, 317 (D. D.C. 1979); *The League of Women Voters of Colorado v. Davidson*, 2001 Colo. App. LEXIS 656 (2001); *Osterberg v. Peca*, 12 S.W.3d 31, 51-65 (Tex. 2000); *Washington State Republican Party v. Washington State Public Disclosure Comm'n*, 4 P.3d 808, 814-829 (Wash. 2000); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 614 (Alaska 1999); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999); *Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721, 737 (Wisc. 1999); *Doe v. Mortham*, 708 So.2d 929, 932 (Fla. 1998); *Virginia Soc'y for Human Life v. Caldwell*, 500 S.E.2d 814 (Va. 1998);

(continued...)

The constitutional protection for advocating issues extends to advising the public about the positions of candidates on the issues and the merits of those positions. Issue advocacy involving discussion of candidate positions on issues at election time is not some deceptive "loophole" that citizen groups are exploiting and needs to be closed. Rather, it is core First Amendment speech. It is our democratic Republic working as it is supposed to work, with the marketplace of ideas busy as always. To be for the right to free expression is to be for strong protection of robust issue advocacy right in the middle of election campaigns.

The Supreme Court in *Buckley* expressly stated that citizen groups could employ issue advocacy as much as desired to promote candidates:

> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want *to promote the candidate and his views*. [emphasis added]

To protect issue advocacy, the High Court in *Buckley* developed the bright-line "express advocacy" test, which held that a citizen group could safely discuss candidate's positions on issues and the merits of those issues so long as the nonprofit corporation avoided "explicit words" "expressly advocating the election or defeat of a clearly identified candidate for public office." Express advocacy is based on the actual words used in the communication, not on the basis of third party judgment regarding motivation or intent, e.g., by the FEC after the fact, or how the communication might be understood by recipients. The Court insisted that a bright-line test is essential to provide "security for free discussion" so that a speaker need not "hedge and trim."

II. Shays-Meehan Provisions Affecting Citizen Groups

A. Year-Round Restrictions & 60-Day Blackouts

Current FECA law prohibits corporations and unions from spending funds for express advocacy (with exceptions not discussed here). As noted, the Supreme Court has defined express advocacy in terms of explicit words expressly advocating the election or defeat of a clearly identified federal candidate. This was dictated, the Court said, by the First Amendment and is, therefore, not open to redefinition. The express advocacy bright line was drawn precisely at the border between issue advocacy, which may not be regulated, and express advocacy, which is subject to some governmental regulation.

Nonetheless, Shays-Meehan attempts to move that constitutionally-dictated border line by expanding the reach of "express advocacy." Section 201 expands "express advocacy" to include "words that in context can have no reasonable meaning other than to advocate the

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[6](...continued)
State v. Proto, 526 A.2d 1297, 1310-11 (Conn. 1987); *Klepper v. Christian Coalition*, 259 A.D.2d 926 (N.Y. App. Div. 1999).

election or defeat of one or more clearly identified candidates" or "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election."

These incursions into protected issue advocacy territory would sweep in virtually any sort of commentary on the voting records or positions on issues of politicians. Disgruntled candidates would complain to the FEC if they think commentary is negative, and if it is positive their opponents would file the complaint. On contentious social issues, value judgments on a candidate's view would be difficult to state without triggering a possible complaint under Shays-Meehan's standard of "unmistakable and unambiguous support for or opposition to" a candidate.

These year-round restrictions are supplemented by a 60-day period before primary and general elections when corporations and unions are banned from even "referring to one or more clearly identified candidates in a paid advertisement that is transmitted through radio or television." (§ 201.)

Measuring these proposed restrictions against the constitutional standard reveals their constitutional shortcomings.

It cannot be imagined that the First Amendment that requires the express advocacy bright line to protect issue advocacy will countenance a law that proscribes the mere mention of a politician's name in a broadcast advertisement 60 days before an election. Against the powerful First Amendment free expression right, supporters of Shays-Meehan would need to counterbalance a powerful, "compelling" state interest for the restriction to stand. A federal court will expend little ink before writing the words "unconstitutional" and "enjoined" as the epitaph for a provision that would even proscribe a communication that says: "The Senate will vote next week on bill X. Please call Senator Y and urge him to support the bill."

While slightly less blatant, the definition of express advocacy that speaks of "unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited references to external events, such as proximity to an election" clearly goes beyond the Supreme Courts definition that required examination of the words of the communication itself, without outside references, to see if there are explicit words that expressly advocate the election or defeat of a clearly identified candidate. The key terms of Shays-Meehan, such as "unmistakable and unambiguous support," "anything of value," etc. are terms of subjective judgment, and therefore beyond the scope of the objective criteria that the Supreme Court authorized in this crucial First Amendment area. With the new mandatory prison sentences that Shays-Meehan would authorize, the language is too ambiguous and too far into the protected territory of issue advocacy for the Supreme Court to sustain.

Similar name-or-likeness blackout periods have already been found unconstitutional in the federal courts. For example, in Michigan, the Secretary of State promulgated a rule that banned corporate and labor union communications made within 45 days of an election that merely contained the "name or likeness of a candidate." Two traditional adversaries, Right To

Life of Michigan and Planned Parenthood, challenged the rule in separate federal courts and had the rule declared unconstitutional.[7] In *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000), the Second Circuit struck down a "notice of expenditure" statute that defined "mass media activities" as "includ[ing] the name or likeness of a candidate for office" and required reporting if such occurred "within 30 days of a primary or general election." *Id.* at 380. In *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), the Fourth Circuit also struck down a statute requiring reporting of expenditures for communications "if the printed material or advertisement names a candidate. *Id.* at 159.

B. The Voter Guide "Exception"

Shays-Meehan provides an "exception" to the year-round ban on commentary on politicians by corporations or unions for publication of voter guides and voting records. However, such score cards typically reflect a point of view on the issues scored – through the way they are characterized as positive or negative and through explicit commentary.

All this would now be forbidden by Shays-Meehan. Under the bill, such a scorecard would be an illegal corporate campaign contribution year-round unless it meets all the following conditions, i.e., it:

[1.] presents information solely about the voting record or position on a campaign issue of one or more candidates (including any statement by the sponsor of the voting record or voting guide of its agreement or disagreement with the record or position of a candidate), so long the voting record or voting guide when taken as a whole does not express unmistakable and unambiguous support for or opposition to one or more clearly identified candidates;

[2.] is not coordinated activity . . . [and questions to candidates may only be in writing]; and

[3.] does not contain [express advocacy] or words that in context have no reasonable meaning other than to urge the election or defeat of one or more clearly identified candidates.

Measuring these restrictions on issue advocacy against the constitutional standard, it again becomes clear that Shays-Meehan has gone astray. The words regulated are not explicit words that expressly advocate the election or defeat of a clearly identified candidate. And they would be subject to rulemaking by the FEC, which has often demonstrated that it believes that it can sense such an "urge," even when it is not expressed in explicit words. The presumption of coordination that is obvious in the second point, is based on an unconstitutional concept of

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[7] *Right To Life of Michigan, Inc. v. Miller*, 23 F. Supp. 2d 766 (W.D. Mich. 1998); *Planned Parenthood Affiliates of Michigan, Inc. v. Miller*, 21 F. Supp. 2d 740 (E.D. Mich. 1998).

coordination that is more fully discussed *infra*. Therefore, the restriction is unconstitutional and the "exception" is a meaningless gesture, pretending to offer what it withholds.

However, even if a communication meets all of the above-stated government-imposed speech specifications, it would still be forbidden if it is deemed to be "coordinated" with a candidate or party, a term that is defined in the bill with broad expansiveness.

The specific conditions set forth in the definition of "express advocacy" and the voter guide "exception" track past attempts by the FEC to regulate commentary on politicians that have been repeatedly invalidated under the First Amendment.

For example, the "unambiguous support" definition of "express advocacy" is similar to a 1995 definition[8] declared unconstitutional by the First Circuit in *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997). It is also similar to the FEC's "circumstances" definition emphatically rejected by the Fourth Circuit in *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). And its controls of speech content and tone in voter guides are similar to FEC regulations declared unconstitutional by the First Circuit in *FEC v. Clifton*, 114 F.3d 1309 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).[9]

B. Allowing Only PACs to Comment

Shays-Meehan would ban expenditures by citizen groups to comment on incumbents or candidates except under a PAC, with all the attendant compliance burdens. This would silence many small citizen groups that lack the resources consult specialist lawyers and to hire accountants and compliance staff to meet the complex and burdensome compliance requirements.

In *FEC v. Massachusetts Citizens for Life*, 479 U.S.238, the Supreme Court held that it was unconstitutional to enforce the FECA to prohibit non-profit, issue-oriented corporations from making expenditures even for *express advocacy*, or to require that it be done through a PAC. The Court described the speech-suppressing effect of such a policy as "substantial" and enumerated the burdens of complex compliance requirements on small, simple citizen groups. The Court held that there was no justification for such burdens because such groups posed no danger of corruption, the only possible justification for such a law. If there is no justification for limiting the *express advocacy* of such citizen groups, there can be no justification to so limit their *issue advocacy* swept into express advocacy by a flawed, overreaching definition.

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[8]"[W]hen taken as a whole and with limited reference to external events, such as proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates."

[9]For a detailed discussion of these and other cases, see James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 University of West Los Angeles Law Review 1 (1997).

Even those groups with the resources and sophistication to operate a PAC would yet be severely limited because of the restrictions on PACs, which Shays-Meehan would further tighten. For example, no individual may contribute more than $5,000 per year to a particular PAC, and PACs connected to a parent citizen group may solicit PAC contributions only from group members. The name of all donors over $200 must be reported (the bill would reduce this to $50). Thus, Shays-Meehan would sharply reduce the amount of commentary about incumbent politicians and candidates, which is obviously the unconstitutional goal.

C. "Coordinated Activity" Trap

Shays-Meehan also would suppress issue advocacy by trying to make much of it a forbidden corporate contribution. It does this by (1) ignoring the express advocacy line and (2) expanding "coordination with a candidate."

1. Ignoring the Express Advocacy Line

As described earlier in this testimony, *supra* at I, government may only regulate express advocacy, not issue advocacy. The bright-line boundary between the two is the express advocacy test, which the United States Supreme Court has established and reaffirmed as being mandated by the First Amendment to the U.S. Constitution. The express advocacy line is required, the Court said, to prevent unconstitutional vagueness and overbreadth in the super-protected zone of free speech about public issues.

The federal courts have recognized the threat posed by vague and overreaching efforts to classify political communications as "coordinated" expenditures subject to regulation as contributions, and have therefore allowed such regulation only in the presence of substantial coordination and prearrangement, even where the communication itself contained express advocacy.[10] The FEC's efforts to regulate issue advocacy as coordinated expenditures have twice been struck down. *See Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. at 1454-55; *Clifton*, 927 F. Supp. at 496-500. The District of Colorado rejected the FEC's attempts to extend its coordination regulations into the realm of issue advocacy, finding that "the fact that [the coordination provision] implicates first amendment freedoms argues for adoption of the more

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[10]*See, e.g.*, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617-18 (1996); *NCPAC*, 470 U.S. at 498; *Iowa Right To Life Comm., Inc. v. Williams*, 187 F.3d 963, 967-68 (8th Cir. 1999); *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997); *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490-91 (D. Vt. 2000); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999); *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999); *Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Colorado Republican Fed. Campaign Comm.*, 839 F. Supp. 1448, 1455 (D. Colo. 1993), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated*, 518 U.S. 604 (1996).

narrowly defined "express advocacy" interpretation in order to minimize intrusions." *Colorado Republican*, 839 F.Supp. at 1454. Therefore, the court concluded "that 'express advocacy' is required in order for a coordinated expenditure to be 'in connection with' the general election campaign." *Id.* at 1455. The District of Maine has also blocked efforts to treat issue advocacy as coordinated, holding that, "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate." *Clifton*, 927 F. Supp. at 500.

Even the lone court to allow for some theoretical regulation of coordinated issue advocacy still allowed only a slight reach beyond the express advocacy test, theorizing that the FEC might be allowed to regulate payments for advertisements so close to the express advocacy threshold that they "would be every bit as beneficial to the candidate as a cash contribution of equal magnitude," such as "gauzy candidate profiles prepared for television broadcast or use at a national political convention" or "coordinated attack advertisements, through which a candidate could spread a negative message about her opponent." *Christian Coalition*, 52 F. Supp. 2d at 126. Such a standard would fall short of the advocation of legislative action at issue here.

In contrast, the FEC was upheld in its earlier recognition that the express advocacy requirement was vital to its regulatory scheme, and that its regulatory power therefore did not reach corporate donations for a non-political picnic sponsored by a committee organized by a Congressman. *See Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). There, the FEC followed a clear and objective test "for distinguishing between political and non-political congressional events":

> An event is non-political if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event.

Orloski, 795 F.2d at 160. Although the District of Columbia Circuit stopped short of holding the FEC's express advocacy test to be constitutionally required in the context of coordinated expenditures, it did uphold the test as "logical, reasonable, and consistent with the overall statutory framework." *Id.* at 167. Such description cannot be applied to the far reaching and standardless approach which Shays-Meehan proposes.

a. The First Amendment demands that any regulation of political speech must be precisely drawn without ambiguity as to its scope.

Where government seeks to regulate political speech "'so closely touching our most precious freedoms,' precision of regulation must be the touchstone." *Iowa Right to Life*, 187 F.3d at 968 *quoting Buckley*, 424 U.S. at 41. A lack of specificity poses a severe threat to the exercise

of First Amendment rights. As the Supreme Court explained, such vague laws threaten to "trap the innocent by not providing fair warning," they give reign to "arbitrary and discriminatory application," and they force citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley*, 424 U.S. at 41 n. 48 *quoting Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Hence, "[t]o avoid uncertainty, and therefore invalidation of a regulation of political speech, the Supreme Court in Buckley, established a bright line test." *Iowa Right to Life*, 187 F.3d at 969. This test limits regulation to communications which "contain express language of advocacy with an exhortation to elect or defeat a candidate." *Id.* at 969-70.

This necessity for a bright line is ignored by Shays-Meehan. Instead, the bill would reach "anything of value" "in connection with a Federal candidate's election" "regardless of whether the value provided is in the form of a communication which expressly advocates a vote for or against a candidate." (§ 206.) While this regulation by its own terms extends well beyond the realm of express advocacy, its outer boundaries cannot be discerned with any degree of certainty.

Such failure to limit the scope to express advocacy cannot be tolerated by the First Amendment. As the Eighth Circuit explained in striking an Iowa law that did provide some guidance, "absent the bright-line limitation in Buckley, 'the distinction between issue discussion (in the context of electoral politics) and candidate advocacy would be sufficiently indistinct that the right of citizens to engage in the vigorous discussion of issues of public interest without fear of official reprisal would be intolerably chilled." *Iowa Right to Life*, 187 F.3d at 970 *quoting FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir 1997).

That this speech is "coordinated" with a candidate does nothing to alleviate its vagueness. A blurring of the lines between express advocacy and issue advocacy poses the identical threats of uncertain prohibitions and selective enforcement regardless of whether the communications are coordinated. As the Supreme Court has explained,

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42. Discussions of issues and candidates do not cease to overlap simply because the speaker coordinates its message with a politician. In fact, the same intimate link between candidates and issues that necessitates a bright regulatory line also makes coordination with candidates an invaluable aid to the effective promotion of issues.

Indeed, the uncertainty posed by vague regulation may actually pose a greater threat to free speech and association in this context than in the uncoordinated contexts analyzed in *Buckley* and *Massachusetts Citizens* because the burdens posed by investigation are likely to be

substantially greater. To determine a violation under Shays-Meehan, the FEC would have to evaluate not merely the communication itself, but also whether it had been coordinated with the identified candidate. Exploring and establishing whether or not coordination actually occurred may necessitate an incredibly burdensome and intrusive investigation into the affairs of both the organization and the candidate. Such a burdensome investigation would, in and of itself, strip the organization of its First Amendment rights.

Unlike other regulatory agencies, the "subject matter which the FEC oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak, and associate for political purposes." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981). Accordingly, the scope of the FEC's investigatory powers is more limited than other agencies. *Id.* This is so since the investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 345 U.S. 234, 245 (1957).

If an investigation targets a group's lawful issue advocacy, "the First Amendment may be invoked against infringement of the protected freedoms." *Watkins and United States*, 354 U.S. 178, 196 (1957). This is so, since "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of government interference." *Id.; Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). Such disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

That an investigation into whether issue advocacy has been coordinated can impose a severe burden upon speakers engaging in constitutionally protected activity is demonstrated by the example of the FEC's attempted enforcement of such provisions against the Christian Coalition. This attempt led to "lengthy" discovery and "voluminous" facts which were established by testimony and documents from numerous individuals including a former President of the United States. *Christian Coalition*, 52 F. Supp.2d at 14, 23, 94 n.56.

b. Issue advocacy is protected from laws that may permissibly govern express advocacy.

Besides serving as a bulwark against vagueness, the express advocacy test is also necessary to prevent overbreadth. Because Shays-Meehan infringes on core First Amendment rights, it can be justified only to the extent necessitated by a compelling governmental interest. Where a law extends beyond the communications that give rise to the compelling interest, it is overbroad.

In order to prevent overbreadth, the Supreme Court has held that government only has an interest in regulating speech that "expressly advocate[] the election or defeat of a clearly identified candidate. *Massachusetts Citizens*, 479 U.S. at 248-49; *Buckley*, 424 U.S. at 80.

The express advocacy test marks the effective boundary of these interests for coordinated expenditures just as it did for the uncoordinated expenditures at issue in *Buckley* and *Massachusetts Citizens*. With regards to the corporate ban of § 441b, the interest in banning corporate contributions is precisely the same as that in banning corporate expenditures. In either case the concern is that the corporation may skew the political process by advocating the election or defeat of candidates through the use of large quantities of funds obtained not from contributors interested in the corporation's political agenda, but from investors interested in making money through the corporate form. The scope of this interest is identical regardless of whether the money is used to advocate independently or in coordination with a candidate. In either case, an advertisement which expressly advocates the candidate's election (or his opponent's defeat) falls within the scope of permissible regulation, but one which advocates political issues does not.

With regard to the contribution limits of § 441a, the permissible breadth of regulation is actually narrower than for the disclosure provisions for which the express advocacy test was created. Requiring disclosure of express advocacy expenditures is permissible because it "lessens the risk that individuals will spend money to support a candidate as a quid pro quo for special treatment." *McIntyre*, 514 U.S. at 356. This is an offshoot of the anti-corruption justification for contribution limits, but the less intrusive nature of disclosure allows it to be applied more broadly. In contrast, the Supreme Court has held that monetary limits on independent expenditures violate the constitution, even after the limit was construed to encompass only express advocacy. *Buckley*, 424 U.S. at 43-48. Hence, the severity of the burden posed by contribution limits allows their application only to a subset of the broader category of express advocacy which can be subjected to disclosure provisions.

c. Expenditures are given greater constitutional protection than contributions.

The Supreme Court has also emphasized that limits on expenditures impose a far greater burden on speech than do limits on contributions. As it explained, "[E]xpenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," whereas contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 19-20 (footnote omitted). This is because a "contribution serves as a general expression of support for the candidate" which "does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. In contrast, restrictions on what can be spent on communications "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. It is because of this distinction that contributions are subject to limits which cannot be imposed upon expenditures. *Nixon v. Shrink Missouri Government PAC*, 120 S.Ct. 897, 903-04 (2000).

Here, although Shays-Meehan seeks to treat the proposed communications as contributions, the impact of § 441a's limits would be that of a spending limit rather than a contribution

limit. As the Supreme Court has noted, "coordinated expenditures do share some of the constitutionally relevant features of independent expenditures." *Colorado Republican Federal Campaign Committee v. F.E.C.*, 518 U.S. 604, 624 (1996). Hence, the scope of permissible regulation cannot logically be any greater for such "coordinated expenditures" than they would be for true contributions of money or non-communicative donations such as food or office space.

In sum, only express advocacy may become a contribution by coordination. Shays-Meehan violates the constitution by attempting to make issue advocacy capable of becoming a coordinated contribution. There is also an extremely practical reason for avoiding what Shays-Meehan attempts – preventing every complaint to the FEC from becoming a burdensome investigation to determine whether coordination has occurred. If even issue advocacy may be a coordinated expenditure, then every citizen group may be investigated for everything. The investigation itself, as already noted *supra* at II.C.1.a, can become a punishing burden.

2. Expanding "Coordination With a Candidate"

Shays-Meehan also expands the concept of "coordination with a candidate." Section 206 of the bill defines "coordinated activity" as

> anything of value provided by a person in connection with a Federal candidate's election who is (or at any time during the same election cycle has been) acting in coordination with that candidate (or an agent of that candidate) on any campaign activity in connection with a Federal election in which such candidate seeks nomination or election to Federal office (*regardless of whether the value provided is in the form of a communication which [sic] expressly advocates a vote for or against any candidate*), and includes any of the following . . . ." [emphasis added]

The list that follows includes (1) "[a] payment made in cooperation . . . with, at the request of suggestion of, or pursuant to a general or particular understanding with a candidate."

Current law provides that "coordination" with a "candidate" requires that the citizen group have an actual prior communication about a specific expenditure for a specific project that results in the expenditure that results in the expenditure being under the control of a candidate or being based on information provided by the candidate about the candidates's plans or needs.

The new definition above is vastly expansive and places citizen groups that lobby and incumbent politicians at risk. For example, the mere discussion with a member of congress about her "message" (e.g., a specific bill introduced by that member of congress) any time during his or her two year term of office would create coordination. Thereafter, the citizen group would be forbidden at any time in any manner to make any public communication that would be "of value" to the lawmaker because it would be an illegal corporate campaign contribution. For example, literature promoting a congressman's bill in his home state could thus become a contribution.

Because judicial precedent is clearly to the contrary, these provision will not withstand judicial scrutiny.

D. Presumed Coordination from Shared "Professionals"

Section 206 of Shays-Meehan further creates a presumption of coordination (converting issue advocacy to forbidden contributions) where

> the person making the payment retains the professional services [defined as "polling, meda advice, fundraising, campaign research or direct mail"] of any person that has provided or is providing those services in the same election cycle to a candidate (including services provided through a political committee of the candidate's political party) in connection with the candidates pursuit of nomination for election, or election, to Federal office, ... and the person retained is retained to work on activities relating to that candidate's campaign.

This provision amounts to an unconstitutional penalty on free speech. An incorporated citizen group cannot be forced to forfeit its right to associate freely with legitimate providers of professional services in order to exercise its freedom of speech. Moreover, a vendor at any point during an election cycle could unilaterally decide to sell election-related services to a candidate thereby cancelling the frees speech rights of all his PAC clients regarding that candidate. In some areas, there may be only one or two vendors of a specific service that a PAC requires to make its independent expenditure, and this bill could consequently eliminate the ability to make PAC expenditures.

The First Amendment permits spending limits to be applied to an express advocacy expenditure only if that expenditure actually has been discussed between the candidate and the person or citizen group. Coordination may not be presumed on the basis of some relationship. In *Colorado Republican Federal Campaign Committee v. FEC* (1996), the Supreme Court emphatically rejected the FEC's position that an political party expenditure may be presumed coordinated with the party's federal candidate. The Court declared the proper test to be whether the specific expenditure was in fact the subject of communication between the those making the expenditure and the candidate. ("We therefore treat the expenditure, for constitutional purposes, as an 'independent' expenditure, not an indirect campaign contribution"because, the Court said, "the summary judgment record shows no actual coordination as a matter of fact.")

If the constitution forbids applying such a coordination presumption between a party and its nominee, the same principle plainly applies in the present situation.

Appended as *Appendix C* is a chart entitled *Shays-Meehan Trip Wires*, showing the complexity that this bill would impose on citizen groups. It begins with issue-oriented speech that is then analyzed and sorted as to its content, the Shays-Meehan statutory test language and whether it is independent or coordinated. The result reveals whether the expenditure for the communication constitutes an independent expenditure, a contribution to a candidate, or non-political speech. Then, based on what entity has made the expenditure for the communication and whether it has complied with statutory and regulatory mandates, it may be determined whether the issue-oriented speech is allowed or prohibited.

E. Congressional Member Endorsements

Section 101 of Shays-Meehan would prohibit members of Congress from endorsing the fundraising efforts of citizen groups that use any part of the money for communications to the public by any medium at any time of the year that "promotes," "supports," "attacks," or "opposes" any candidate. This would encompass many routine communications by a citizen group to promote pending legislation. Political party officials would also be prohibited from raising money for any 501(c)(3) (including charities), 501(c)(4), or 527 organizations.

F. Advance Notice Requirements

Section 204 of Shays-Meehan requires that independent expenditures be reported as soon as any contract is signed for the communication, which could be weeks or months in advance of the dissemination of the communication to the public.

Common sense dictates rejection of a proposal that would make "expenditures" (when contracts or payments are made) into "independent expenditures" that require reporting.[11] Major public policy organizations routinely buy air time in advance of elections in key markets in order to have broadcast time available if the organization decides to make independent expenditures. Then the air time may not be used for strategy reasons (and contracts are no problem because broadcasters usually have ready markets for freed-up air time before elections). For example, the organization may decide that independent expenditures are needed more elsewhere in a different race that has just become more critical based on current polling data.

Another example is that of a planned independent expenditure on printed express advocacy pieces in support of U.S. Senate candidate John Ashcroft by the National Right to Life Committee's. When Ashcroft's opponent died, NRLC did not think it seemly to release the brochures and elected to spend its money on other races. In such situations, contracts and payments are made, but there is no communication, and it would be inaccurate and misleading to the public to have such "expenditures" reported as "independent expenditures."

A further example, typical of major public policy organizations, is found in NRL PAC's practice of arranging for telemarketing firms to make express advocacy phone calls into targeted areas at election time. The general agreement is made well in advance of the election, but the agreement is only for a set range of expenditures (low and high ends) and the rate per call. At this

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[11]Common sense has always told public policy organizations that a printed independent expenditure communication is reportable when it is posted and that broadcast express advocacy communications are reportable when put out on the air. That has been the uniform practice of all organizations in their reporting of independent expenditures to date under existing rules. The FEC is in the process of ill-advised rulemaking proposing to require independent expenditures to be reported when a contract is made for the communication. Notice 2001-6, "Independent Expenditure Reporting," 66 Fed. Reg. 23628, May 9, 2001.

point, the amount of money that will be available to spend is yet unknown, for it has not been raised yet. In what state or races the calls will be made is unknown; in fact it may be only decided on the day before the phone calling begins as last-minute polling indicates where there is a need. Thus, at the time of the agreement for telemarketing services, the total amount to be spent is yet unknown, as is the location of the calls. The idea of reporting when an agreement for services is made would simply be unworkable for telemarketing. These communications are properly "made" when the calling begins.

The same is true of print communications. Major organizations often purchase paper stock in large quantities long before elections. Some generally used materials, e.g., brochures, may also be printed in advance without any knowledge of where the materials will actually be mailed.

As may be seen, the proposal on when independent expenditures are "made" is simply unworkable in the real world of major public policy organizations. The present practice is in place because it is the only reasonable, workable one.

Incumbents, of course, would love the proposed legislation because it would provide advance opportunity to dissuade broadcasters and newspapers from carrying independent expenditure communications. Such things actually happen.

An example is the case of *National Right to Life PAC v. Friends for Bryan* (No. CV-S-88-865-PMP-(RJJ)), a 1988 case brought in state court by NRL PAC against Nevada Governor Richard Bryan's U.S. Senatorial campaign committee for tortious interference with contractual relations. Lawyer Jeffrey Eskin had written intimidating letters on behalf of Friends for Bryan to radio and television stations that had contracted to carry independent expenditure communications for NRL PAC. As a result, stations refused to broadcast contracted advertisements, imposing the equivalent of a prior restraint on NRL PAC's speech.

Some of the threatening correspondence that was admitted into evidence in that case is appended as *Appendix D* with items bearing their original exhibit numbers. Plaintiff's Exhibit 5 is a fax letter sent to KOH News, accompanied by a copy of Eskin's October 31, 1988, letter. Exhibit 6 is an identical letter (but for candidate name changes) of the same date from lawyer Robert Bauer (of the District of Columbia law firm Perkins Coie, counsel for the Senator Burdick Campaign Committee in North Dakota) targeted at broadcasters of NRL PAC express advocacy communications. Exhibit 7 is a letter that contains the same boilerplate language tailored to intimidate broadcasters from broadcasting NRL PAC ads in opposition to U.S. Senate-candidate Bob Kerrey, written by his campaign chairman in Nebraska. Exhibit 32 is the same letter as the Eskin letter sent with Exhibit 5 concerning NRL PAC ads, but on Bryan for U.S. Senate letterhead.

The source of this systematic campaign of intimidation is evident in Exhibit 33, an October 21, 1988, form letter prepared by Robert F. Bauer, Counsel to the Democratic Senatorial Campaign Committee, from which the other letters were obviously derived. This letter, obtained

by legal discovery in this case, reveals a well-orchestrated intimidation effort of which the other letters were a part.

Governor Bryan's lawyer, Jeffrey L. Eskin, also sent threatening letters to stations concerning independent expenditure ads by other organizations. Exhibit 34 was an intimidation letter against broadcast independent expenditure ads by the American Medical Association PAC, and Exhibit 35 sought to prevent express advocacy communications by the Auto Dealers and Drivers for Free Trade PAC in the Bryan race.

This evidence demonstrates what is usually invisible to the public – a widespread practice of well-planned, systematic intimidation attempts against broadcasters to gain political advantage.

Shays-Meehan would provide increased time for such mischief, at the expense of First Amendment rights. If broadcasters are willing to cancel advertisements to which they have already committed and that are in process (as were NRL PACs) – even though it means they might suffer unwanted publicity for pulling ads in progress – how much easier will it be for intimidation to prevail with the extra time the bill would provide before broadcasting even begins. Candidates seeing reports of contracts would immediately demand to see copies of the ads for which the contract had been made, claiming the ads must be perused for libelous or inaccurate material (and, as noted above, the ad scripts might not even have been created yet). Even if there is only delay in ads being aired as a result of the opportunity for interference provided by the proposed rule, that would be a satisfactory result for the opposition.

As a result of the harassment that would likely arise from the advance reporting of contracts for independent expenditures, many broadcasters would likely be tempted simply not to accept express advocacy communications, thereby depriving advocacy organizations of their opportunity for free speech. The vital ability of Americans to participate in the political process would therefore be thwarted, to the detriment of the Republic.

G. Mandatory Prison

Despite the added ambiguity imposed by Shays-Meehan and the coordination traps it creates, its creators have decided to impose a mandatory minimum one-year prison sentence for "knowing and willful" violations of any of the above restrictions that involve a "contribution" or "expenditure" of $2,000 or more in a calendar year. This, coupled with the increasing complexity of the FECA, would cast an Alberta-clipper level of chill over constitutionally protected free speech about politicians, forcing many small citizen groups into silence and greatly encumbering the more sophisticated with the need to "hedge and trim," as the United States Supreme Court described it in *Buckley*.

Conclusion

Shays-Meehan would virtually destroy the ability of citizen groups to participate in our Republic, thereby trampling on freedom of speech and association with respect to the most vital

issues of our day. Fortunately, the federal courts have shown greater solicitude for the Constitution and the workings of our Republic, along with less respect for the incumbent-protection urges of members of Congress, and may be relied upon to promptly bury such alleged "reform." However, members of Congress have also taken an oath to uphold the Constitution. Passage of Shays-Meehan would be in derogation of that oath and duty.

APPENDICES

A Summary of Resume of James Bopp, Jr.

B *McCain-Feingold Analysis*

C *Shays-Meehan Tripwires*

D Intimidating Letters in Evidence in *National Right to Life PAC v. Friends for Bryan*

- Plaintiff's Exhibit 5
- Plaintiff's Exhibit 6
- Plaintiff's Exhibit 7
- Plaintiff's Exhibit 32
- Plaintiff's Exhibit 33
- Plaintiff's Exhibit 34
- Plaintiff's Exhibit 35

The CHAIRMAN. Next, Mr. Simon.

STATEMENT OF DONALD J. SIMON

Mr. SIMON. Thank you, Mr. Chairman. I appreciate the opportunity to testify on behalf of Common Cause regarding the constitutionality of campaign finance reform legislation.

The House reform leaders have said that they intend to introduce a bill which is closely modeled on the reform bill recently passed by the Senate, the McCain-Feingold bill. For purposes of focusing discussion, therefore, I am going to discuss the constitutional issues as framed by the McCain-Feingold bill.

The two principal provisions of McCain-Feingold are a ban on soft money which is contained in Title I of the bill, and the Snowe-Jeffords provision in Title II which defines a category of electioneering communications that are subject to appropriate regulation. Both of these provision do raise important constitutional questions, and I will briefly address each.

The provisions banning soft money are clearly constitutional. Dozens of constitutional scholars have said so. A letter signed by every living former leader of the ACLU says so, and multiple rulings of the Supreme Court support this position.

The *Buckley* v. *Valeo* case, of course, is the foundation. The Court there held in unequivocal terms that Congress serves compelling governmental purposes when it regulates money in the political process to deter corruption and the appearance of corruption. Even though such regulations undoubtedly do impinge on first amendment rights, they are nonetheless constitutional because they serve those compelling governmental interest.

Buckley upheld limits on contributions to candidates and parties. It did so because the Court took note of the reality or appearance of corruption inherent in a system permitting unlimited financial contributions. The Court noted that the integrity of our system of democracy is undermined by large political contributions, and of almost equal concern to the Court was the impact of the appearance of corruption stemming from large financial contributions.

Now, the Court strongly reaffirmed these views just last year in the *Shrink Missouri* case. Again upholding contribution limits, the Court said, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters. The abuses that the Court sees as inherent in a system of unlimited financial contributions perfectly describes the soft money system which, of course, is a system of unlimited financial contributions.

The Court's repeated recognition that Congress can legislate to address those abuses is a complete response to any claim that the soft money provisions of McCain-Feingold are unconstitutional. These provisions do nothing more than restore the integrity of the campaigns finance laws previously enacted by Congress and upheld by the Court. They leave the national political parties free to engage in any speech or any activity they want and to spend as much money as they want for that speech or those activities, so long as the money is raised in compliance with the fund-raising rules that apply to the national parties and that have been sustained by the

Supreme Court as necessary to guard against corruption and the appearance of corruption.

I also believe that the Snowe-Jeffords provision of the Senate bill is constitutional. There is no question that Congress can regulate money spent for political speech. If speech is aimed at influencing a Federal election, the law is clear that Congress can impose limits on the amount of money that can be contributed for such purposes. It can ban entirely the use of money from corporate or union treasury funds. It can require corporations and unions to speak only through their affiliated political committees, using money from individuals that was voluntarily contributed, and it can require full disclosure of that money. All of these provisions have been in law for many years, and they all have been sustained by the Supreme Court.

Congress can impose all of these regulations on the money spent for speech aimed at election activity not because the speech is unprotected by the first amendment—I think we would all agree that such speech is at the heart of the first amendment—but because the Court has repeatedly recognized that first amendment interests must accommodate Congress's purposes in protecting the integrity of the election process.

So the question in this debate is not about whether issue ads should be limited or regulated or banned. They should not be. The question is how to draw a correct line between issue advocacy on the one hand, which is generally not subject to regulation, and campaign advocacy on the other hand, which clearly and constitutionally is subject to regulation.

Now, currently that line is drawn by whether the ad contains magic words such as "vote for" or "vote against." That is almost certainly the wrong line, because it is radically under-inclusive. Many ads which are clearly campaign ads do not use magic words. I dare say in the ads that you ran last year in your own elections, they did not use magic words, and you would be in good company. Because as a study conducted by the Brennan Center found, only 4 percent of ads by candidates themselves used words like vote for or vote against. These are unquestionably campaign ads, but they flunk the magic words test.

So the one point we can be most certain of in this debate is that the magic words test does a poor job of drawing the line between issue discussion and campaign discussion. The Snowe-Jeffords provision redraws that line by defining as electioneering activity a narrow category of speech, those radio or TV ads which are broadcast within 60 days of a general election or 30 days of a primary which refer to a clearly identified candidate and which are targeted to the candidate's electorate.

Now, critics describe this provision as banning speech. That is clearly false. These electioneering communications are no more banned than the tens of millions of dollars of campaign ads we see every 2 years. Like those ads, of which there are plenty, this new category of electioneering communications must be funded by individuals either alone or in association with each other for money which is subject to disclosure.

Lest anyone think that the Snowe-Jeffords provision is too broad, let me state what it does not include. It does not include any news-

paper, print, pamphlet, leaflet, billboard or other nonbroadcast ad. It does into include any ad outside the 60-day pre-election window. It does not include any ad which discusses an issue and does not mention a Federal candidate in that election, and it does not include any ad which is broadcast anywhere other than to the electorate of that candidate.

Let me emphasize again, the provision bans no speech whatsoever and creates no new regulations whatsoever. All it does is shift the line between nonelection speech, which is generally free from regulation on the one hand and election-related speech, which is subject to regulations that the Supreme Court has upheld as constitutional.

Finally, let me state the premise behind this. The premise is that when someone spends a lot of money to run an ad right before an election that mentions a candidate and is targeted to that candidate's district, he or she or they are most likely trying to influence that election. That is not a bad thing. It should not be banned, and it is not. It just means that the money behind the ad should be subject to the same rules that apply to all of the other campaign ads being run at the same time.

Thank you

The CHAIRMAN. Thank you.

[The statement of Mr. Simon follows:]

TESTIMONY OF

DONALD J. SIMON

ON BEHALF OF COMMON CAUSE

REGARDING CONSTITUTIONAL ISSUES

IN CAMPAIGN FINANCE REFORM

BEFORE THE HOUSE ADMINISTRATION COMMITTEE

JUNE 14, 2001

Mr. Chairman and Members of the Committee:

I appreciate the opportunity to testify on behalf of Common Cause regarding the constitutionality of campaign finance reform legislation.

The House has passed the Shays-Meehan reform bill in each of the last two Congresses, thus sending a strong message to the American people that there is need for fundamental reform of the role that money plays in our political system.

Now that the Senate has this year passed the McCain-Feingold bill, we look forward to the House once again enacting this important legislation, and sending the bill to the President for his signature.

House reform leaders have said that they intend to introduce a bill which is closely modeled on the reform bill recently passed by the Senate. I will accordingly discuss the constitutional issues as framed by the McCain-Feingold bill passed by the Senate.

The two principal provisions of the McCain-Feingold legislation are Title I, which bans political party soft money, and Title II (the so-called Snowe-Jeffords provision) which bans the use of corporate and labor union treasury funds to pay for broadcast ads that refer to federal candidates in the sixty day period before an election, and requires disclosure for such ads run by other groups and by individuals.

Each provision involves separate constitutional issues, which are addressed below.

I. General constitutional principles

The Supreme Court has recognized that Congress can act, consistent with the First Amendment, to protect the political process from corruption and the appearance of corruption caused by money.

In *Buckley v. Valeo,* 424 U.S. 1 (1976), the Court upheld limits on contributions by individuals to candidates, to the political parties and to political committees. These limits, the Court said, "limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26. The Court noted that "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of democracy is undermined." *Id.* at 26-7. This problem, the Court said, "is not an illusory one." *Id.* at 27.

The Court held that measures which protect against the appearance of corruption serve compelling governmental purposes as well:

> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical ...if confidence in the system of representative government is not to be eroded to a disastrous extent.'
>
> *Id.* at 27 *quoting CSC v. Letter Carriers,* 413 U.S. 548, 565 (1973).

The Court took special note here, and elsewhere, of "the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions." *Id.* at 28

(emphasis added). The Court's concern plainly encompasses the current soft money system.

Further, the Court said that limits on contributions to parties and candidates – as opposed to limits on expenditures by parties and candidates – "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates and political parties." *Id.* at 29.

Last year, in *Nixon v. Shrink Missouri PAC,* 528 U.S. ___, 145 L.Ed.2d 886 (2000), the Court strongly reaffirmed this ruling. It upheld a $1,050 individual contribution limit in Missouri law on the ground that the legislature "could constitutionally address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery." 145 L.Ed.2d at 899 *quoting Buckley,* 424 U.S. at 28.

The Court noted its concern with "the broader threat from politicians too compliant with the wishes of large contributors" as a constitutionally sufficient justification for limiting contributions. *Id.* Such limits are justified, the Court said, not only by the compelling governmental interest in deterring corruption, but also the appearance of corruption: "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Id.* at 900.

Similarly, the Court has upheld a total ban on contributions and expenditures by corporations and labor unions in connection with federal elections. The corporate ban has been a part of federal law since 1907, and the union ban since 1947.

The ban on corporate contributions, the Court held, serves to combat "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form...." *Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652, 660 (1989).

In *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), the Court explained the rationale supporting the ban on corporate expenditures. Chief Justice Rehnquist noted the primary purpose of the regulation: "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions..." *Id.* at 207. The Court found this purpose to be compelling:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted.
>
> *Id.* at 208 *quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n. 26 (1978).

The constitutionality of the ban on corporate and union money in federal elections has been repeatedly upheld by the Court. *E.g., FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("Direct corporate spending on political activity raises the prospect

that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace....The expenditure restrictions of section 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas."); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) ("'the compelling governmental interest in preventing corruption support[s] the restriction on the influence of political war chests funneled through the corporate form.'").

Thus, the existing framework of the federal campaign finance law limits the size of contributions that can be made to federal candidates and political parties by individuals and political committees to influence federal elections. It also prohibits altogether such contributions (as well as expenditures) from corporate and union sources. This framework has been upheld by the Supreme Court as consistent with the First Amendment and constitutional.

II. A ban on soft money is constitutional

In order to understand why soft money has become such a major problem with our campaign finance system, it is important first to understand clearly what it is.

Simply put, soft money is precisely that money which is not supposed to be part of our federal campaign finance system. It is precisely the kind of money which federal law and policy have sought to exclude from federal campaigns.

Since 1907, it has been illegal for corporations to spend money in connection with federal elections. Since 1947, it has been illegal for labor unions to spend money in connection with federal elections. And since 1974, it has been illegal for an individual to contribute more than $1,000 to a federal candidate, or more than $20,000 per year to a political party, for the purpose of influencing a federal election. All of these regulations have been upheld by the Supreme Court as constitutional.

Soft money, simply stated, is money which violates these rules. It is money donated to political parties out of corporate and union treasury funds and the large – $100,000, $250,000 or even $1 million – contributions given by wealthy individuals to the political parties.

The Senate Watergate hearings conducted more than 25 years ago revealed deep problems in the financing of our federal elections – problems caused by precisely the same kinds of money that now appear again in our system, but this time in the guise of soft money.

The Watergate investigation showed numerous instances of corporations buying government favors through the use of campaign contributions. The public linked the Milk Producer Association's pledge of $2 million to the Nixon campaign with the Nixon Administration's backing of an increase in the federal milk price supports. So too, ITT's donation of $400,000 to the Republican National Committee to fund its 1972 convention in San Diego was linked in the public mind to the Administration's settlement of an antitrust action against ITT.

The Watergate investigation also found that wealthy individuals were buying ambassador positions with huge campaign contributions. More than $1.8 million in contributions to the Nixon campaign came from individuals who were later appointed to ambassadors.

In the wake of Watergate, those who broke the law were prosecuted. Some of the best known companies in the country – American Airlines, Goodyear, Gulf Oil, Greyhound – pleaded guilty to violating the ban on corporate contributions.

Following the Watergate scandal, Congress comprehensively reformed the campaign finance laws to address what the Watergate investigation revealed to be gross improprieties in the campaign finance system. The Federal Election Campaign Act of 1974, enacted in response to the Watergate scandals, was specifically intended to reinforce the long-standing ban on corporate and union treasury money in federal elections, and to strictly limit the money that wealthy individuals could contribute to federal candidates and political parties. The post-Watergate law put into place the limits and reaffirmed the source prohibitions that exist today. That system worked well for a number of years.

But the creation of the soft money system has served to re-introduce into the American political process precisely the kinds of money that the Watergate reforms were specifically intended to eliminate. Unrestricted corporate contributions are back. Unregulated union contributions are back. And unlimited donations from wealthy individuals are back.

The soft money loophole was created, not by Congress, but by the Federal Election Commission in an obscure administrative ruling in 1978. This ruling opened the door for the political parties to raise non-federal money to spend on so-called "party building" activity that was intended to influence both federal and non-federal elections.

For years this potential loophole remained largely dormant. It emerged from this dormancy in the 1988 presidential campaign when, first the Dukakis campaign, and then the Bush campaign, began aggressive soft money fundraising as part of their presidential campaigns. This fundraising involved the solicitation of corporate and union treasury funds, as well as unlimited contributions from individuals.

From then, the growth of soft money has been nothing short of explosive, almost doubling from $45 million in 1988 to $86 million in 1992, more than tripling to $262 million in 1996 and finally again doubling to about $500 million in the 2000 election.

The theory of soft money is that it is raised and spent by the political parties for activities that do not affect federal elections, and therefore it does not need to comply with the federal fundraising rules.

This theory is a complete fiction.

In reality, the political parties raise and spend soft money for activities that are clearly for the purpose of influencing federal elections and electing federal candidates – such as so-called "issue ads" promoting specific federal candidates, and get-out-the-vote drives in federal election years.

Furthermore, federal officeholders and candidates are the principal fundraisers of soft money. For example, the four congressional campaign committees – committees that are comprised *exclusively* of Members of Congress -- raised and spent some $200 million in soft money during the 2000 elections.

In the 2000 elections, furthermore, some two-dozen Senate candidates from both parties created special committees so they could *personally* solicit their *own* unlimited soft money contributions to be used to support their candidacies.

These Senate candidates each formed a so-called "joint fundraising committee" or "victory" committee sponsored by their own Senate campaign committee and their party's Senate campaign committee (the NRSC or DSCC). The "joint committee" operated as vehicle for the Senate candidates to directly solicit their own unlimited soft money contributions to support their campaigns.

The soft money funds were then transferred to the NRSC or DSCC, which typically transferred the funds to the Senate candidates' state parties. The state parties then spent the soft money on "issue ads" and other activities promoting the Senate candidates.

The soft money system has served to radically erode the campaign finance rules adopted in the light of the lessons of Watergate. And because of the explosive growth of soft money, our elections are again tainted by the same kinds of money, the same kinds of scandals, and the same kinds of corruption, that led to national outrage more than 25 years ago.

A ban on soft money is constitutional because it operates mainly as a restriction on the kind of contributions that can be made to the national parties, prohibiting the national parties from soliciting or receiving contributions that do not comply with federal campaign finance rules.

As such, the soft money ban would close loopholes now being used to massively evade the existing federal rules on the contributions that can be given to the national parties and to federal candidates for the purpose of influencing federal elections.

A soft money ban thus is a contribution restriction – precisely the kind of restriction that the Supreme Court has consistently upheld as constitutional under applicable First Amendment standards.

Title I of McCain Feingold contains three provisions that are essential to banning soft money. These provisions:

(1) prohibit the national political parties from raising or spending any money that does not comply with federal contribution limits and source prohibitions;

(2) prohibit federal officeholders and candidates from raising or spending any money in connection with *any* election unless the money complies with federal law; and

(3) require state parties to primarily use money that complies with federal campaign finance rules when the state parties fund "federal election activities" — such as "issue ads" promoting federal candidates and get-out-the-vote drives in federal election years.

These three provisions, taken together, end the soft money system. All three provisions are necessary to effectively shut the system down.

These provisions are constitutional:

First, the ban on soft money is consistent with the contribution limits and source prohibitions that the Supreme Court has already upheld as constitutional.

The Court in *Buckley* found it constitutional for Congress to limit the amount of money that an individual can give to a political party to protect against corruption and the appearance of corruption arising from large contributions. The Court in *Austin* for similar reasons found it constitutional to limit the role of corporate money in the political process.

Thus, a ban on soft money contributions to the national political parties is well within existing constitutional doctrine. Indeed, the purpose of the ban on soft money is to close a loophole that is allowing the wholesale evasion of the existing, constitutional limits on contributions to national parties and federal candidates.

Similarly, a requirement that state parties use funds that comply with federal contributions limits when they are making expenditures for federal election activities is designed to close a loophole whereby state parties are spending funds that do not comply with federal contribution limits to influence federal elections.

Second, in upholding contribution limits, the Court has focused on the corrupting effect that corporate, union and large contributions have on the recipient, whether a candidate or a party.

Thus, the fact that the parties may spend money on non-federal, as well as federal, activities does not entitle the parties to receive contributions that the Court has agreed pose a serious risk of corruption of federal officeholders. Such contributions, whether made directly to candidates or to their parties, can be regulated consistent with the First Amendment.

Third, a ban on soft money does not bar speech by parties. The parties are free to raise and spend as much hard money as they wish. The Court in *Buckley* held that a limit on contributions does not inhibit speech by candidates; it just requires them to raise contributions from more sources. As the Court said there:

> There is no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations. The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of people....
>
> 424 U.S. at 21-2.

The same is true of a ban on soft money fundraising by the parties: they must just raise more hard money "from a greater number of people" to pay for their speech.

Fourth, insofar as the soft money ban would require state parties to use money subject to federal limits to finance "federal election activity," there is no Tenth Amendment or other federalism problem. *State parties already are required by federal law to spend only money subject to federal limits on activities that are for the purpose of influencing federal elections.*

The effect of the soft money ban is to extend this clearly constitutional rule to four specifically defined categories of federal election activities – such as ads that deal with federal candidates and get-out-the-vote drives in federal election years. The bill does not "federalize" state parties -- it only requires them to spend federally regulated money on their federal activities, and leaves them free to raise and spend money permissible under state law for any other activities.

Finally, a ban on soft money does not conflict with the Supreme Court's ruling in *Colorado Republican Campaign Committee v. FEC,* 518 U.S. 604 (1996) (*Colorado I).* In that case, the Court held that Congress could not limit the amount of hard money spent by a party independently of one of its own candidates to support that candidate. But that case involved a provision very different from a ban on soft money. It addressed a limit on *spending* by a party, not on *contributions* to a party. And the case involved party hard money, not soft money. Nothing in *Colorado Republican I* limits the ability of Congress to ban soft money.

III. The Snowe-Jeffords provision regarding "issue ads" is constitutional

Sham issue advocacy is another fast-growing abuse of the campaign finance system. Such ads purport to be purely issue-oriented, but include the name and often the picture of a federal candidate, praise or criticize the identified candidate in stark terms, and are plainly intended to influence the outcome of the election. These ads skirt the

contribution limits, source prohibitions and disclosure requirements of federal law by avoiding the use of the so-called "magic words" such as "vote for" or "vote against."

The growth of sham issue advocacy in campaigns raises a question of fundamental importance to the continued viability of federal campaign finance laws: whether the Congress will permit the effective evisceration of the federal election laws by tolerating the creation of a massive loophole through which a flood of unlimited, unregulated and undisclosed money will flow into federal campaigns, thereby subverting the law's purpose of protecting the integrity of the electoral process from corruption and the appearance of corruption, interests which Supreme Court found to be compelling in *Buckley, Austin* and *Shrink Missouri*, among others.

The question in this debate is not about whether issue ads should be limited, or regulated, or banned. They should not. The question is whether campaign ads should be allowed to escape regulation as electioneering activity -- regulation that serves compelling public purposes -- simply because those ads are cleverly, if cynically, crafted to skirt the use of certain words.

Thus, this debate is not about whether to regulate issue advocacy. It is about how to draw a correct line between issue advocacy, on the one hand, which is not subject to regulation, and campaign advocacy, on the other hand, which clearly and constitutionally is. That line must protect an unfettered public right to engage in issue discussion, but not at the expense of sacrificing the integrity of the laws regulating money in the political process.

Under current law, ads "in connection with" a federal election – in other words, campaign ads – must be paid for with money subject to federal contribution limits and source prohibitions. This means that corporations and unions cannot use their treasury funds to pay for such ads. (A corporation or union, however, can use PAC money raised under federal law from individuals to pay for such ads, and individuals can use their personal funds.)

The problem has come in drawing a line between what constitutes an ad that is a campaign ad, and therefore subject to campaign finance laws, and what constitutes an ad that is an issue discussion ad, and therefore constitutionally protected from government regulation.

In *Buckley,* the Supreme Court found that for purposes of applying the federal campaign finance laws to non-candidates and outside groups, statutory language such as "relative to" an election or "in connection with" an election is unconstitutionally vague because it draws too imprecise a line between campaign activity that may be regulated by law and issue discussion that may not.

In holding that these portions of the statute were impermissibly vague, the Court then proceeded to construe the provisions narrowly to apply only to ads containing "magic words" such as "vote for," "vote against," "support," "defeat," etc.

This ruling in *Buckley* (and in a subsequent 1986 case, *Massachusetts Citizens for Life v. FEC*, 479 U.S. 539 (1986)) applied only to ads run by non-candidates and outside groups. The "magic words" test *did not* apply to ads run by candidates, political parties

or political committees, all of which, the Court said, engage in activities which are "by definition, campaign-related." 424 U.S. at 79.

But even in regard to ads run by non-candidates and outside groups, it has become overwhelmingly clear that the "magic words" test is insufficient. This test has proven to be a completely unrealistic means of defining whether an ad is a campaign ad.

Most campaign ads by non-candidates and outside groups (as well as by candidates and parties) simply do not use "magic words" like "vote for" or "vote against." Instead, such ads praise or criticize candidates by name in a way that makes their intent to advocate unmistakable.

Thus, the "magic words" test for determining whether an ad is a campaign ad or an issue ad clearly marks the wrong line between the two. The test is radically under-inclusive, and allows many campaign ads to escape regulation under the campaign finance laws.

The consequences are serious of using a test that is so flawed. Under this standard, for instance, by the simple expedient of avoiding "magic words," corporations are easily able to effectively gut the FECA's ban on corporate money in federal campaigns - a core principle of our election laws since 1907 - and thereby create a flow of unregulated, unlimited, and undisclosed corporate money in federal elections. The same is true for labor unions, for which the spending of treasury funds in connection with federal elections has been banned since the 1940's. Political parties and individuals are also easily able to avoid other key FECA provisions by the same mechanism.

Particularly where such ads are run right before an election, it is clear that they are intended by their sponsors to be campaign ads, and they have the same effect on the voters as campaign ads. As a matter of common sense and political reality, such ads should be treated by law the same as any other campaign ads, whether or not they use "magic words."

That, in essence, is the effect of the Snowe-Jeffords provision, which applies a new test – in addition to the existing "magic words" standard -- for defining what constitutes a campaign ad. The provision is simply intended to help ensure that all campaign ads that influence federal elections, whether or not they contain "magic words," are subject to the same campaign finance rules.

Snowe-Jeffords provides that *a broadcast ad that refers to a clearly identified federal candidate, that is broadcast within 60 days of a general election (or 30 days before a primary election) and that is targeted to the electorate of the candidate* will be deemed to be an "electioneering communication." Such electioneering communications, like any other campaign ads, cannot be funded with corporate or union treasury money, and the funds spent to finance such ads will be subject to a limited disclosure.

This provision is a reasonable and constitutional approach to closing a serious loophole in the campaign finance laws:

First, in defining the scope of what constitutes a federal campaign ad, the Snowe-Jeffords provision is extremely narrowly tailored to ensure that only ads that are widely viewed as campaign ads are subject to campaign finance laws. It applies *only* to ads that

are broadcast, that refer to a clearly identified federal candidate *and* that are run in the 60 days before a general election or 30 days before a primary election. These are clear, narrow and bright line tests.

Second, the ability to speak is not banned or even limited by the provision. Any corporation or union, for example, can still speak by using its PAC funds (which come from individuals) to pay for such "electioneering communications." And a corporation or union could use its treasury funds to pay for any ad on any issue — including any lobbying ad — so long as it is run before the 60 day pre-election window or does not mention a federal candidate if run within the window, or is not targeted to the electorate of the candidate mentioned.

Third, the overbreadth argument — the idea that an ad could mention a candidate within 60 days of an election and be a legitimate lobbying communication, not an electioneering communication — is not fatal to the statute.

Overbreadth of a statute does not, in and of itself, make the statute unconstitutional unless it is "substantially overbroad" — unless the statute would repeatedly be used to suppress speech that is not properly within its scope. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). In *Broadrick,* the Supreme Court held that overbreadth of a statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

Here, by contrast, Congress is entitled to make the reasonable judgment that the overwhelming majority of broadcast ads that refer to a federal candidate within the 60-

day period before an election do influence elections and are intended to do so. Thus, even though it may be possible for some non-campaign ads to fall within the 60-day time frame test, Congress can make a reasonable determination that a clear bright-line test for this period is not *substantially* overbroad and therefore is constitutional.

Finally, the Supreme Court has never said that *only* ads with "magic words" can be subject to campaign finance laws. In *Buckley* it formulated the "magic words" test in order to narrow – and save – broad but vague language enacted by Congress. It did not prohibit Congress from adopting a new definition of campaign speech that does not suffer from the same infirmity of vagueness. The bright-line time frame test in the Snowe-Jeffords provision achieves this purpose. The test is not vague because there is no question as to whether an ad falls within it or not. It thus remedies the statutory problem identified by the Court in *Buckley* which necessitated the "magic words" test formulated by the Court.

IV. Conclusion

Common Cause strongly urges the House to join the Senate by promptly passing campaign finance reform legislation to put an end to the twin loopholes now eroding the integrity of the federal election laws: the soft money system and the use of sham issue ads.

We believe that the provisions of the McCain-Feingold bill passed by the Senate are both effective and constitutional. We urge the House to pass this bill without further delay.

The CHAIRMAN. Ms. Mitchell.

STATEMENT OF CLETA MITCHELL

Ms. MITCHELL. Thank you, Mr. Chairman, members of the committee.

I, too, want to commend the committee for conducting this hearing on this very important subject. I know that the media is clamoring for swift action: no hearings, do not read the bill, pass it, and go home. The fact of the matter is, this reminds of that guy, Jim Jones, who took those people from San Francisco to Guyana a few years back and handed out Kool Aid and all of those people died. I have always wondered why somebody did not look up and say, hey, what is in this Kool Aid? I think it is important for Members of Congress to say, what is in this campaign finance Kool Aid? It is easy for the media to clamor, drink the Kool Aid, drink the Kool Aid, because the media is exempt, and they do not have to worry about ingesting any poison.

So I think it is important to note that in both Shays-Meehan and in McCain-Feingold, particularly McCain-Feingold, there are 3½ pages in McCain-Feingold of directives to the United States Sentencing Commission to enhance the criminal penalties for violation of the law by candidates and high campaign officials. There are increased civil penalties—substantial increased civil penalties to be imposed by the Federal Election Commission for violation of the law. This is something that the Congress needs to pay very close attention to.

By way of introduction I am an attorney. Our practice is entirely devoted to advising people how to participate in the political process without violating the law. Believe me, I would commend the chairman's comments at the beginning of this hearing, because the truth of the matter is, people get involved in political activity, they are not there to try to corrupt anything and, oftentimes, after advising people who want to participate in the process, the proverbial chilling effect has occurred. They say, I do not want to deal with all of this regulation, and they walk away. I think that is terribly unfortunate.

I want to mention in my brief period of time here a couple of things. I have attached to my testimony two things I hope the members of the committee will look at. One is the impact on State and local political parties, the practical impact on State and local political parties of McCain-Feingold as it was passed by the Senate, I think with some modification; and the same thing would be true by passage of Shays-Meehan.

The other is, one of the reasons that this issue is so front-and-center is because there has been spent over the last 5 years—we have documented in a report by the American Conservative Union Foundation—over $73 million spent by the pro-campaign finance regulation movement in the last 5 years alone, yet there is not one organization who would essentially exist solely on what I would consider my side of the issue, which is to say we do not think that these additional regulations are a good idea. There is not one organization that exists solely to do that on our side. So I think it is very important to realize that we have been subjected to a mass

media and financial cabal urging that Congress enact more regulations on citizens who want to participate in the political process.

Now, as the chairman pointed out at the outset, the first responsibility of this committee is to identify what is the corruption or the appearance of corruption which Congress is trying to solve by enacting legislation in this arena. Because this is legislating in the first amendment arena, Congress is obligated to identify the problem.

The Supreme Court has said the only compelling governmental interest in enacting legislation in this area is corruption or the appearance thereof. So what is the corruption that people are concerned about? Those—

I heard Mr. Hoyer's opening comments at the first hearing conducted by this committee, and I was struck by your comments with respect to this issue of corruption and the sense that the public has that there is something corrupt going on.

Do not, please, members of the committee, do not just allow yourselves to be stampeded by these epithets of corruption. Identify specific instances. Do the committee members know of specific instances of corruption that have occurred because of contributions to the political parties? If so, have hearings on that. Ferret out the information. Do not let the appearance of corruption argument be like a modern-day McCarthyism of screaming that there is communism behind every tree.

I would argue and submit to the committee that if it is concerned that there is corruption in terms of special interests having influence with Members of Congress, then perhaps the committee ought to recommend to the House the enactment of then candidate and now President Bush's proposal a year ago which was to prohibit contributions to Members of Congress from lobbyists during the congressional session. There are a dozen States that have such a prohibition, that legislators and elected officials may not solicit or receive contributions during the session. If it is corruption because of the relationship between special interests with bills before the Congress, then it seems to me that Congress ought to do something about that which affects you directly, rather than stampeding the rights of ordinary citizens and political parties.

Secondly, I am not going to read to you all the language from *Buckley,* although I would like to, because I really think that people—it is like the Federalist Papers where everybody has said we have read them and I do not think we really have. But remember that the Supreme Court in *Buckley* created the express advocacy test, and they said that there had to be a bright line, that citizens had the right to know in advance what speech would be regulated by the government and what speech would not.

And if you come up to the line, if you do not cross it, if you do not use, using their words, the constitutional deficiencies can be avoided only by reading the law as limited to communications that include explicit words of advocacy, of election or defeat of a candidate. It must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for Federal office. This construction would restrict the application of the statute to communications containing express words of advocacy, of election or defeat such as

"vote for," "elect," "support," "cast your ballot for Smith for Congress," "vote against," "defeat," "reject."

It is important to note that the Supreme Court created that bright line.

I have heard Members of Congress and so-called reformers argue in favor of restrictions on issue advocacy because of two problems, only two that I can recall. One, the anonymity that groups run issue ads and you do not really know who they are. The other is that voting records or positions on issues are distorted.

I would submit to the committee that there is a more narrowly tailored—I do this at my peril because I basically do not believe that you should be regulating this area. But I would submit to you that when you are legislating in the first amendment arena you are obligated to ascertain if there is a more narrowly tailored solution to the problem you have identified. I would submit to the committee that there is a more narrowly tailored solution than that contained in either Shays-Meehan or McCain-Feingold.

One, the Federal Communications Act already provides that a nonpolitical ad is subject to the same standards of accuracy as an aspirin commercial. An issue ad is not defined under the Federal communications law as a political ad, only candidate ads; and candidate ads cannot be rejected for content. I have advised clients and worked with stations on ascertaining accuracy. And if issue ads were accompanied by a disclosure statement that simply tied the content to the specific public record, that substantiates the assertions, and if you are concerned about anonymity, the FCC already requires that all broadcast advertising must disclose the true identity of the sponsors. And in the disclosure statement you could simply require a certain minimum threshold that a percentage of who pays for the production or broadcast of the advertisement to be identified, to identify the legal entity.

The CHAIRMAN. I have to let you know we are running over. We want to get to questions.

Ms. MITCHELL. But I just wanted to make sure that the committee knows——

Mr. MICA. Mr. Chairman, could we by unanimous consent have their entire statements made a part of the record?

The CHAIRMAN. Yes. Your statements, without objection, will be entered into the record.

Mr. MITCHELL. I urge the committee to carefully consider that there are other solutions, and in order to make certain that the committee does its job to propose those solutions that are more narrowly tailored to address the problem rather than the meat-ax approach that these bills represent.

Thank you.

The CHAIRMAN. Thank you.

[The statement of Ms. Mitchell follows:]

TESTIMONY OF CLETA MITCHELL, ESQ.
CAMPAIGN FINANCE LAW ATTORNEY
BEFORE HOUSE ADMINISTRATION COMMITTEE
JUNE 14, 2001

THE CONSTITUTIONALITY OF CAMPAIGN FINANCE REGULATION

Mr. Chairman, Members of the House Administration Committee. Thank you for the opportunity to appear before you today to offer my thoughts on the constitutional issues of campaign finance law. I want to commend this Committee for taking some time to thoughtfully and carefully consider the issue of campaign finance – and not to allow yourselves to be stampeded by the media into precipitous action on this most significant of all issues. Congress should be mindful of the 'legislation by headline' it enacted this time last year regarding Section 527 committees. That law resulted mainly in requiring hundreds of state regulated political committees to suddenly be faced with a whole new set of filing and reporting requirements with the IRS. With all due respect, Congress barely knew what §527 Committees were, but when the media demanded action, Congress was obliged to act, regardless of the facts or the consequences.

So it goes with this area of law. Don't make the same mistakes again. Take time to read the bills – and to understand them and their consequences.

I am reminded of the situation a number of years ago when Jim Jones took his People's Temple from San Francisco to Guyana – and got hundreds of people one day to drink poisonous Kool-Aid in a mass suicide. I've always wondered why *someone* didn't look up and say, "Hey, what's in this Kool Aid?"

That's what the House of Representatives *must* do – and is doing today. The members of this body must say, "What's in this campaign finance Kool-Aid?"

By way of introduction, I am an attorney in Washington, D.C., specializing in the business and regulation of politics. Our law practice involves advising clients how to participate in the political process at the state and federal levels and not break the law.

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Campaign finance regulations are the rules of engagement for politics, politicians AND citizens. And it matters – it impacts every other issue that Congress considers.

What matters is NOT what the public opinion polls say about this issue – or what the *New York Times* or *Washington Post or National Public Radio* says about this issue.

What matters is what the Constitution says, what the Constitution requires and what the Constitution *allows* the rules and regulations to be.

By the way, I will not refer today to campaign finance reform. I realized recently that those of us who work in this area use a shorthand to describe campaign finance reform when we write memos, send emails, etc. We write "CFR" – CFR is the shorthand for 'campaign finance reform'.

But CFR is a legal term of art. It stands for "Code of Federal Regulations". And that is *exactly* what campaign finance reform really is: an ever more and more complex and restrictive 'code of federal regulations' on political speech, involvement and association.

So, I will refer to the various bills as proposals for new campaign finance *regulation* – not reform. Regulation.

Make no mistake. There is enormous regulation of the political involvement of citizens, citizens groups, corporations, candidates, political parties and it has mushroomed over the past twenty-five years. I always tell my clients (and prospective clients) that 'politics is a highly regulated business at the local, state and federal levels'.

I would like to enter into the record two additional documents: one is an outline of the impact of McCain-Feingold on state and local political parties, something I prepared a few weeks ago after Senate passage of the bill. The second is a report I prepared for the American Conservative Union, entitled "*Who's Buying Campaign Finance Reform?*" which documents the enormous amounts of funds and the extensive projects calling for greater regulation of

political speech. During the past five years alone over $70 million, that we can document, has been devoted to this national effort to force Congress to enact greater restrictions on political speech and expression. The report also discusses some of the practical implications of the proposed regulations.

Point One. The Supreme Court in *Buckley v. Valeo* has given us the blueprint for consideration of all campaign finance law and regulation.

As the Supreme Court has said, 'the FECA's contribution and expenditure limits operate in an area of the most fundamental First Amendment activities'.

The *Buckley* court based its ruling on campaign finance law 25 years ago on two First Amendment principles: Those were (and still are) freedom of

speech and political expression AND the freedom of political association. Those two principles were described by the Supreme Court in this way:

I. Freedom of Speech and Political Expression:

"There is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs. . .of course including discussions of candidates". *Mills v. Alabama,* 384 U.S. 214 (1966)

This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254 (1964).

"it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

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II. Freedom of political association:

'The First Amendment protects political association as well as political expression. The constitutional right of association (citing *NAACP v. Alabama*, 357 U.S. 449 (1958) stemmed from the Court's recognition that "(e)ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.

The First (and Fourteenth) Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one's choice.' *Kusper v. Pontikes*, 414 U.S. 51 (1973).

Because First Amendment rights are at stake, Congress must legislate *very* carefully in this area in order to pass constitutional muster:

There are four points, then, which I would like to make with regard to the constitutional issues related to campaign finance regulation.

Point Two. Corruption and the appearance of corruption can be addressed by restricting lobbyists contributions to members of Congress during the congressional session.

First, the Supreme Court has said that preventing 'corruption or the appearance of corruption' is the *only* compelling governmental interest which permits government regulation of political speech. Period.

Not 'leveling the playing field' for all voices – the Supreme Court has said that such a concept is 'anathema to the First Amendment'.

No reason *other* than preventing corruption or the appearance of corruption.

So, what *is* the corruption to be stemmed or alleviated by eliminating 'soft money' contributions to the political parties? This Committee is obligated to *be*

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specific – to establish a record. First Amendment principles also require that any regulatory solution must be narrowly tailored to remedy only the problem identified.

Can any member of this committee point to a specific instance wherein contributions from a donor to a party committee was corrupt? Don't just say 'it's corrupt that political parties receive large amounts of money from wealthy individuals, corporations or unions. . .'

Challenge yourselves and the conventional wisdom – to be more than one question deep on a subject of this magnitude.

The term 'corruption' is bandied about far too easily by the media and the reformers with no actual factual evidence of its existence.

If there is legitimate fear of the presence or existence of the corruption of Congress, then this Committee is duty bound to hold hearings and explore, expose and punish the corrupt and the corrupted.

As columnist George F. Will has written, the claims of 'corruption everywhere' in politics by the campaign reform cabal are nothing short of modern day McCarthyism.

The only examples used by the 'reformers' and the media have to do with campaign contributions to candidates and political parties by those with lobbying interests before the Congress.

So, if that is the corruption which the reformers seek to avoid – or if it is the appearance of corruption caused by campaign contributions from lobbying interests – then this Committee should include in any campaign finance legislation the proposal which candidate, now President George W. Bush proposed more than a year ago: Ban all contributions from lobbyists or lobbying interests to members of Congress during congressional sessions. More than a dozen states prohibit solicitation and / or receipt of contributions to legislators from lobbyists and lobbying interests during the legislative session. Congress, if

it is concerned about the 'appearance of corruption' should include the President's proposal in any legislation in this arena.

No more PAC fundraisers with lobbyists night after night, morning after morning, day after day. Members of Congress can focus on their jobs as members of Congress – rather than raising money during congressional sessions from lobbyists. Interest groups with matters pending before Congress.

Ask your constituents the next time you discuss this issue how many of them would support THAT provision – you'll get a 100% show of support for that one.

If it's corruption you're concerned about, or the appearance of corruption, the way to address the issue is to limit what YOU, as Members of Congress, can and can't do, rather than restricting the political activities and rights of others.

Before Congress goes off wrecking the political party system in America, stop and think about the fact that there is another way to address the 'corruption or appearance of corruption' concern – a solution that impacts the members of Congress, not rank and file citizens who choose to associate with political parties.

Point Three. Issue Advocacy was intended consequence of the Supreme Court in *Buckley*; there are narrowly tailored solutions to insure accuracy and the identity of sponsors.

Congress must take the time to understand what the *Buckley* Court and more than two dozen courts since *Buckley* have said with regard to 'issue advocacy'.

The media and the reformers call issue advocacy and particularly, issue advertising, 'sham advertising'. They contend loudly that this type of political expression is an 'unintended consequence' of the *Buckley* decision.

That is factually and legally incorrect.

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If there is one thing that is perfectly clear from *Buckley*, it is this: that the Court would not have upheld as constitutional the limits on contributions to candidates had the Court not specifically found that citizens would have other ways to express their political views. The Court stated that citizens had the right to know in advance which speech would be subject to government regulation and which speech would not – and that there MUST be a bright line which citizens could see and know *in advance* whether to cross or not to cross.

The *Buckley* court said:

"The test is whether the language . . .affords the 'precision of regulation (that) must be the touchstone in an area so closely touching our most precious freedoms."

"For the distinction between discussions of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. . ."

"Whether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn to his intent and meaning. "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

"The constitutional deficiencies described (above) can be avoided only be reading (the law) as limited to communications that include explicit words of advocacy of election or defeat of a candidate. . .we agree that in order to preserve the provision against invalidation on vagueness grounds, [the statute] must be construed to apply *only* to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for

federal office." FN 52. This construction would restrict the application of [the statute] to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject".

. . . "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office."

* * *

What can any member of this Committee or this Congress possibly be thinking to believe that the issue advocacy restrictions contained in either Shays-Meehan or McCain-Feingold could possible pass constitutional muster under the standards I have just quoted to you from the Supreme Court?

And exactly what is the 'corruption' to be eliminated by such regulation or banning of the right of citizens' groups to mention the names of members of Congress close to an election?

Is it corruption at all which Congress seeks to eliminate – or isn't it really that bothersome third parties say unkind things about incumbent congressmen and senators?

Isn't it that pesky groups of citizens have the audacity to want to talk about *their* issues instead of only those the candidates want to talk about?

I've heard it said many times in recent years that such regulation of citizens' speech is needed because the 'candidates have lost control over their own campaigns. . .'

Where in the Constitution does it say that candidates and officeholders 'own' their campaigns?

The First Amendment protects citizens from government intrusion into and regulation of their speech and political activities. The First Amendment was *never* intended to protect government officials, members of the U.S. House and Senate, from the citizens – but that is exactly the effect both of these campaign finance proposals would have.

So, before adopting the clearly unconstitutional 'solutions' to restrict or essentially prohibit issue advertising contained in both Shays-Meehan and McCain-Feingold, let me posit the only two 'problems' which have ever been identified by members of Congress or the reformers with respect to issue advertising and suggest very narrowly tailored solutions to those identified 'problems'.

First, candidates – particularly incumbent members of Congress – hate the fact that citizens and citizens groups – and opposing political parties – can run advertising during campaign season which, they believe, distorts the member's or candidate's actual legislative voting record or position on issues. So, accuracy is one of the 'problems' identified by some. Mostly candidates worry about accuracy – but that is something that seems to upset and bother them.

Second, candidates, the media and others are bothered by the seeming anonymity of the sponsors of issue advertising. It is not the phony issue ads so much as the phony sponsors of such advertising.

I would submit that there are ways to address both of these problems: accuracy and identity – in ways that are narrowly tailored to solve or address those problems without taking a meat axe to the First Amendment.

Both of these concerns or problems can and should be addressed (if at all) not through the campaign finance laws, but through the Federal Communications Act, which has already acted in this arena.

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Accuracy: Because issue advertising is not defined under the Federal Communications law and regulations as 'political advertising' it is not treated in the same manner as candidate specific advertising. In other words, issue advertising must mean the same standards of accuracy as aspirin commercials. On many occasions, I have been involved with either challenging OR defending the specific content of particular issue advertising. The sponsor(s) of issue advertisements could be required to file in the public file of the broadcast licensee the specific public record which substantiates the statements or assertions of the advertisement. Because the Federal Communications Act already regulates and broadcast licensees, it is not a huge constitutional leap for electronic issue advertisements to be accurate and based on public records which are subject to substantiation.

Identity of Sponsors. The Federal Communications Commission has ruled on a number of occasions that the FCC regulations mandate the disclosure of the true identity of the sponsors of broadcast advertising. Congress could specify that there be placed in the public file of each licensee which broadcasts issue advertising not subject to the FECA a disclosure statement which provides the name of the legal entity which has paid for at least a minimum percentage (say one-third) of the costs of production and/or airing of the advertisement. The disclosure statement could include the identity of the sponsor or sponsors, the address and other contact information and the percentage of sponsorship.

These are two narrowly tailored solutions to the *only* problems ever identified with respect to issue advertising – neither of which are very far afield from existing law governing broadcast advertising. Neither intrude into the internal information of citizens' organizations nor do these proposals regulate the ability of citizens to air advertising on issues at any time they may wish to do so.

Point Four. The Federal Election Commission: Government Intrusion into the Citizens' Fundamental First Amendment Rights.

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It has become an unfortunate truism that part of the modern political process is that everyone on all sides of the political spectrum expects to file at some time during the campaign one or more FEC complaints against their political opponents. The goal is to get a headline or two, chill the opponent's objectionable activity and then go on down the road.

What could be a more blatant abuse of government power?

What can you expect when Congress has created and funds an agency whose sole mission is to investigate and regulate political activities and speech?

Why does Congress want to continue this Hatfields and McCoys system of letting, indeed urging everyone to subject their political opponents to government harassment? This is mutually assured governmental destruction of free speech – and it needs to stop.

The media is fond of saying the FEC is a 'toothless tiger'. That's only because they've never been subject to an enforcement action. Let me give you some examples of the government's regulation of political speech and expression – and ask you, is this what you, as members of Congress, had in mind? Is this what you have in mind today as you consider making these regulations even *more* complicated and *more* restrictive?

In 1995, the AFL-CIO began running television ads in the media markets of targeted congressional districts around the nation. The targets were many of the 74 House GOP freshmen elected in 1994. The AFL-CIO pledged to spend $35 million in their advertising and other efforts. The ads were designed to put pressure on the Republican freshmen to support issues other than those on which the incumbents had won election in November of 1994: instead of lower taxes, less regulation, smaller government, the ads focused on issues such as support for minimum wage increases, opposition to tax cuts, and increased spending for a number of social programs.

Eleven separate FEC complaints were filed against the AFL-CIO. After almost five years, the FEC closed the case in August, 2000.

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But not before the FEC had subpoenaed and reviewed more than 35,000 documents from the AFL-CIO, various Democratic Party committees among others. Another 10,000 to 20,000 documents were subpoenaed but not reviewed by the FEC before it closed the case last August. Memos about political party plans and activities, telephone banks, voter registration activities, voter mobilization activities – on and on and on – all investigated by the FEC.

Interrogatories and subpoenas were issued, depositions were taken and informal interviews with the campaign committees of 28 Democratic candidates for the US House of Representatives in 1996 were conducted.

The FEC as part of the overall enforcement action investigated not only issue advertising but the grassroots and volunteer activities organized by the unions during the special election in the Wyden for Senate Campaign in 199 . According to the FEC General Counsel's report, "This Office conducted informal interviews with more than a dozen individual union members or their spouses who participated in 'labor walks'" (described in the report as volunteer activities organized by labor unions in support of the candidacy of Ron Wyden for Senate).

Think about that, Gentlemen.

Imagine what must go through the mind of a union member – a working person who volunteers his or her time to become involved in a political campaign and who then gets a letter from the Federal Election Commission – a federal agency in Washington, D.C. notifying that volunteer that he/she is now a witness in a federal investigation and will be required to appear to present testimony, documents, and recollections to the government about his or her political involvement.

Is this the United States of America? Or is this some totalitarian government which can send investigators to interrogate citizens because they volunteered in a political campaign?

Members of the Committee, as an attorney in this field, I've represented witnesses in both formal and informal proceedings before the FEC. Trust me.

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Getting a letter from a federal agency to give an 'informal interview' is no walk in the park for the person receiving the letter.

The AFL-CIO investigation subpoenaed and obtained documents and information from vendors, consultants, media buyers, media producers, the staff of the party committees, White House personnel, volunteers, union officials and staff, and on and on and on.

Is that what Congress intended?

That a citizen participates in the political process at his peril and that he can expect a federal investigation in his future?

Similarly, when the business community determined to try and 'fight back' against the labor union advertising campaign by organizing a coalition of business groups to raise money and air some advertising of their own, complaints were filed with the FEC against the business groups.

Tit for tat. Hatfields vs. McCoys. The independent counsel law all over again.

The FEC's theory of illegal coordination in this case was as follows: because every Republican House member is an ex-officio member of the National Republican Congressional Committee, thus making each Republican House member an 'agent' of the NRCC and because a particular House leader gave a speech to a group of business lobbyists at the Chamber of Commerce urging business groups to 'get involved in the process and fight back against the union attack' . . . thus, all subsequent actions by the business groups in response to the speech constituted illegal coordination.

So, for five years, these business groups and many individuals have been subject to an extensive investigation into every conceivable aspect of their involvement in the advertising campaign responding to the AFL-CIO's advertising campaign. And, after thousands and thousands of documents and

responses to interrogatories, numerous subpoenas, depositions, interviews and investigation of dozens upon dozens of people, groups, consultants, lobbyists, party representatives and the like – after FIVE years of investigation of this illegal coordination, the FEC notified the Respondents last Thursday that it had voted to close the file.

Is that what Congress intended?

For a government agency to subject citizens and citizens' groups to years and years and years of investigation, intrusion and costs – extensive, expensive costs—for having the audacity to get involved in the process?

Congress essentially conducts *no* oversight into the actions and activities of the Federal Election Commission. This Committee, I hope, will take seriously its responsibility to make certain that the FEC is not allowed to run roughshod over the First Amendment rights of the American people.

It is a case of congressional malpractice that must STOP – and not expanded as these campaign finance regulation proposals would mandate.

Point Five. Eliminate or Substantially Narrow the Media Exemption.

Some argue that the 'appearance of corruption in politics' manifests itself by 'low voter turnout', public cynicism and apathy.

The *Washington Post* ran a front page story the day before the British elections last week, extolling the virtues of the British campaign system: the law there bans candidates, political parties and interest groups from running television ads (on their government television network), campaigns are thus cheaper, candidates don't have to spend time raising money, campaign season is limited by law, free television time is made available to candidates and political parties.

No First Amendment exists in Britain to interfere with all the restrictions reformers in this country love.

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So, with all the regulations, the cheaper, shorter campaigns, the free television, no issue ads, no fundraising from fat cats. . .

The British elections held last week were decided by the lowest voter turnout since 1918.

So much for restoring voter activism and turnout through more government control.

There are five protected rights under the First Amendment: freedom of speech, freedom of the press, freedom of religion, the right to petition the government and the right to peaceably assemble, from which the Supreme Court has articulated a well-developed body of law recognizing a fundamental freedom of association vested in the citizens of this country.

Campaign finance legislation doesn't directly impact the freedom of religion. But it does directly impact the other four protected First Amendment rights. Except that, the existing campaign finance law specifically *exempts* the media from its application and all the so-called *reform* proposals do likewise.

Maybe that's why the *New York Times*, the *Washington Post*, the national media and virtually all editors and political journalists can clamor for Congress to act quickly to pass whatever piece of legislation comes along which bears the title 'campaign finance reform'.

It's all well and good for the media to demand swift passage – they are exempt from all these regulations. Each of these proposals – whether McCain Feingold or Shays Meehan – would impose stricter civil AND criminal penalties on citizens who violate the law. Political journalists, editors, and media conglomerates and tycoons don't have to worry about complying with the law or being subject to an FEC enforcement action, being punished, fined, or jailed for its violation.

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The only First Amendment right recognized in these bills is the freedom of the press – while the freedom of speech, right to petition and right to associate freely are trampled deliberately. No wonder the press can cheer on the destruction of everyone else's First Amendment rights.

What should you do? Delete, or substantially narrow, the press exemption. Treat the corporations which own media entities the same way the law treats every other corporation and individual: what is more sacrosanct about the freedom of the press any more so than other protected First Amendment rights? Get rid of the press exemption and see how quickly the media wants Congress to act.

It makes absolutely no sense for Congress to carve out special privileges for international media conglomerates such as the Disney Corporation, AOL Time-Warner, Viacom and General Electric through a 'press exemption' while denying similar First Amendment protections to non-profit organizations of ordinary citizens.

Something is seriously wrong when that is considered a positive development.

But because the media clamors for the First Amendment rights of others to be restricted, while their press freedom is untouched, this is considered 'reform' – rather than suppression of political freedom.

There are at the very least serious equal protection problems with regard to protecting only certain corporations in America from government regulation of speech – but not protecting others.

Consider Bill Gates, Microsoft Corporation and MSNBC. Under this unequal system, made even worse by both McCain-Feingold and Shays-Meehan, identical speech regarding a particular issue, say, the government's antitrust case against Microsoft, can be either legal or illegal, depending on who is paying for the speech and when it occurs.

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Take the following statement, broadcast in October of an even numbered year:

"Sen. Slade Gorton has been a stalwart in helping Microsoft fight the Clinton administration's anti-trust lawsuit against Microsoft. Without Slade Gorton's help, Microsoft would really be in a jam."

Under the campaign finance regulation proposals pending before this Committee:

* Bill Gates could pay out of his individual after-tax dollars to broadcast such a statement, subject to certain reporting requirements AND assuming he had not had any serious conversations with Slade Gorton.

* Microsoft Corporation could NOT pay for such a statement to be broadcast within thirty days of a primary or sixty days of a general election.

* MSNBC, owned fifty percent by Microsoft Corporation, could broadcast such a statement whenever and however it chose to do so. Microsoft Corporation could not buy an advertisement on MSNBC to make that statement within thirty days of a primary or sixty days of a general election.

Is that what Congress intended? A complex set of rules and regulations which essentially give free rein to media corporations and wealthy individuals – but gag ordinary citizens and their political parties and membership organizations.

There is a lot in this campaign finance regulatory scheme than the press has bothered to know – because it doesn't affect them.

There is a lot in this campaign finance regulatory scheme that Congress needs to read, study, understand – and get rid of.

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It is time for Congress to stop being stampeded by an industry that is exempt from the coverage and application of the law to further restrict the rights of others.

It is time for Congress to ask, "what's in this kool-aid?" Please do that before it is too late.

Thank you.

The CHAIRMAN. Mr. Rosenkranz.

STATEMENT OF E. JOSHUA ROSENKRANZ

Mr. ROSENKRANZ. Thank you, Mr. Chairman. I thank the entire committee for inviting me here. It is an honor to testify about such an important set of issues that are so fundamentally important to the health of our democracy.

Let me begin with some pretty significant common ground. I agree with the basic thesis of people who often view themselves as opposed to me on this set of issues. Certainly the people before this committee representing vitally important institutions in American life, the AFL–CIO, the American Civil Liberties Union, the various right-to-life committees, these are fundamentally important committees that do empower average citizens in their voices on important issues of public policy. What these various institutions are not are vehicles for electoral advocacy, and they do not claim to be.

It is important to keep in mind as we consider this set of issues that what is before this committee is the regulation of elections, and the Supreme Court has made abundantly clear that elections are special. Elections are different. Elections, therefore, are subject to different constitutional constraints, that every other set of issues of public policy, that speech relating to elections and the funding of that speech are subject to special rules, precisely because it is so important to protect this critical mechanism of our self-government.

Those specific rules really fall into three categories.

The first are fund-raising restrictions, restrictions on the money that is raised that goes toward electoral speech.

The second is disclosure. If you are going to try to influence our vote in an election, you have to tell us who you are and who is paying for what you are saying.

Third and most significantly for today's conversation are source restrictions, restrictions on corporations or unions that, according to the Supreme Court, and this is black letter law, are not permitted to spend a single penny directed at influencing a vote in elections and restrictions on other organizations that rely on corporate and union money. This is black letter law, Mr. Chairman. There is no dispute within this committee about what the law is as it relates to election communications.

The critical issue before this committee and before Congress is where exactly the line falls. Other members of this panel will insist that we are stuck with a rule that they claim the Supreme Court adopted in 1976, a claim that I disagree with, but, most importantly, they believe that that rule is chiseled into stone, despite what might be enormous evidence that this rule does not even begin to describe the correct boundary between electioneering and all other speech.

Mr. Simon already mentioned some of the evidence that the rule the Supreme Court articulated as an amendment, in essence, as to what Congress had adopted when Congress put in the definition is really, truly an absurd rule.

The Supreme Court, Mr. Chairman, does not live in a fantasy world. It lives in practical reality. And if there is any lesson that

we can draw from the last Supreme Court case, *Shrink Missouri,* it is really twofold.

First, the Supreme Court is concerned about practical rules, constitutional rules that actually describe what goes on in the real world; and, secondly, in this context of electoral reform, the Supreme Court wants to defer in the very narrow, specific line-drawing to the legislature, which is most familiar with how campaigns work.

While we are talking about practical reality, let me just end with one point. You are going to hear today—you have already heard, and certainly the testimony, the written testimony, is rife with hypotheticals of ads that various groups would want to bring but cannot any longer bring if the McCain-Feingold legislation passes. What we should look for are the actual facts of what campaigning is about and what these groups are actually doing.

So I will end with a challenge to the various other members of this panel, really two challenges. To the ACLU, I would ask them to identify a single ad that was run in 1998 or 2000, an actual ad that they ran within the time frame regulated by the McCain-Feingold bill and claim that that ad could not be run under McCain-Feingold. I believe, because we actually have the data of all of the ads, that they will not be able to identify a single one.

To the AFL–CIO and Mr. Bopp who represents right to life, yes, they run such ads. While they are testifying here under oath, I would ask them to point to two or three that run afoul of the McCain-Feingold test, but they can attest to this committee that they were actually not intended—I would even say fundamentally, predominantly intended to influence the election. If you do not hear a satisfactory answer to that question, you should feel more confident that these rules do not actually infringe the rule of these very important organizations in educating the public about important issues of public policy.

Thank you.

The CHAIRMAN. Thank you very much.

[The statement of Mr. Rosenkranz follows:]

Testimony of

E. Joshua Rosenkranz

President & CEO, Brennan Center for Justice
at New York University School of Law

before the

Committee on House Administration

on

Constitutional Perspectives of
Campaign Finance Reform

June 14, 2001

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June 14, 2001

Mr. Chairman, I am honored to have been invited to testify before the Subcommittee concerning some of the constitutional principles and problems involved in campaign finance reform legislation.

By way of introduction, the Brennan Center for Justice at New York University School of Law is a nonpartisan institution devoted to scholarship, discourse, and action on issues of justice that were central to the jurisprudential legacy of Justice William J. Brennan Jr. We are guided by principles that were important to Justice Brennan -- a willingness to ask the hard questions and to reexamine old doctrine, an insistence on developing constitutional norms that make pragmatic sense, and an ardent insistence on protecting liberty. Justice Brennan did more than any Justice in the history of our nation to protect civil liberties -- and particularly freedom of speech. Given our

namesake, we would like to think that we approach all issues, and particularly issues relating to the financing of campaigns, with a special sensitivity to concerns about free speech.

The Senate recently passed, by a wide margin, the McCain-Feingold campaign finance reform bill. The House of Representatives is poised to consider either the Senate Bill or similar legislation sponsored by Congressmen Christopher Shays and Marty Meehan. Both of these bills are responding to the campaign finance excesses we have seen in the last few federal election cycles. The two most prominent problems, and the ones about which there are the most constitutional debate, are: (1) the large and unregulated soft money contributions to political parties, and (2) the rising use of sham "issue ads" that support or oppose specifically identified federal candidates without being subject to federal disclosure, source, and fundraising rules. I believe that the McCain-Feingold Bill, which passed the Senate, and the Shays-Meehan Bill, which has been introduced in the House, contain constitutionally-sound general approaches for dealing with these two vexing problems, and I will center my remarks today around those two issues.

I have appended to my testimony two documents which I believe the Committee will find useful in this inquiry. The first is a letter that was sent to Senators McCain and Feingold and signed by 88 legal and constitutional scholars. The letter, which was prepared by the Brennan Center, affirms the constitutional validity of the key provisions of the original McCain-Feingold Bill and states the reasoning in support of that position. I have taken the liberty of drawing substantially from that letter for my prepared statement before this Committee. The second document is a public statement, dated March 22, 2001, that was also introduced as part of the Senate debate on McCain-Feingold. The statement was signed by every living person to have served as ACLU President, ACLU Executive Director, ACLU Legal Director, or ACLU Legislative Director, with the exception of the then-current leadership. This statement from former ACLU leaders likewise affirms the constitutional validity of the original McCain-Feingold Bill. These two documents,

taken together, demonstrate some of the breadth of the academic and legal support for the general approaches taken in the campaign finance reform legislation that will be considered by the House of Representatives.

Distinguishing Electioneering Communications from True Issue Advocacy

In the 2000 federal election cycle, corporations, labor unions, political parties, and advocacy groups spent hundreds of millions of dollars for advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than electioneering. However, the vast majority of these so-called "issue ads" were a sham. Rather than educating the public broadly about issues, the typical sham "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day.

The task that was taken up in both the McCain-Feingold and Shays-Meehan Bills was to attempt to draw a reasonable and constitutionally defensible line that distinguishes between regulable electioneering speech and protected "issue advocacy." These bills recognize that we need to protect true "issue advocacy" – communications that address an issue of national or local political importance. Examples of true "issue advocacy" include the Harry and Louise ads run by the Health Insurance Association of America in opposition to the Clinton national health care reform proposal, or the anti-NAFTA ads run by labor unions in late 1993, while that legislation was pending. However, we cannot permit sham "issue ads," which do nothing beyond advocating the election or defeat of a named candidate, to undermine the valid limitations placed by the law on electioneering activity.

Let me begin with some non-controversial legal principles. Under current law, there is no doubt that it is permissible for Congress to draw *some* line distinguishing electioneering speech

from "issue advocacy." If speech falls on the "electioneering" side of the line, three consequences follow:

1. Disclosure: Congress may require the speaker – whether a PAC or a corporation or a party or an individual or a candidate – to disclose the sources of the money and the nature of the expenditures in support of the speech.

2. Source restrictions: Congress may absolutely bar certain speakers from spending money on electioneering; Congress may preclude corporations and unions from spending general treasury funds on electioneering; Congress may limit participation to individuals and PACs; and Congress may prohibit foreigners from electioneering.

3. Fundraising restrictions: Congress may restrict the sources from which speakers can raise their money – to individuals, for example – and Congress can limit the size of the contributions to a collective fund.

Do these restrictions infringe on speech and privacy rights? Of course they do. Wherever one draws the electioneering line, there are certain words that corporations and unions are banned from uttering. There are certain messages that can be funded only by individuals or by groups that amass individual contributions in discrete amounts. These regulations necessarily reduce the sheer amount of money that can be spent on certain messages. And these regulations require speakers to reveal certain information such as how much they spent and who supported their message.

Even though these regulations infringe on speech, they are indisputably constitutional. Since 1907, corporations have been barred from electioneering, since 1947 those restrictions have been extended to labor unions, and since 1974, the law has restricted the size of contributions that can be made to speech funded by a group. The Supreme Court has upheld all of these restrictions on electioneering. Of course, a great deal rides on what qualifies as "electioneering." If the government defines the concept too broadly, it could end up restricting speech on issues of public importance that happens to have an influence on elections – a result that is antithetical to the First Amendment. If the law defines it too narrowly, we may as well not bother having campaign finance

laws, because all players could readily find a way to influence elections in a direct way, making a mockery of the law.

That is where we find ourselves today. We are now in a world where everyone has become accustomed to thinking that it is not electioneering unless the speaker utters a "magic word" – like "vote for," "vote against," "elect," or "defeat." All players -- corporations, unions, foreigners, and parties -- engage in an open strategy of trying to influence elections by running or paying for ads that look, smell, waddle, and quack like campaign ads, but are just missing the magic words. They use money from prohibited sources, they raise it in prohibited amounts, and they close their books to public scrutiny. In many cases, their stated goal is to influence the election. They brag about their success in influencing the election, and yet they claim the First Amendment protects their right to engage in any speech, even with that clearly proscribable motive.

I do not believe that we are struck with a constitutional doctrine that nominally allows us to place restrictions on electioneering, but nevertheless allows individuals and groups to accomplish the same result through naked subterfuge. The federal courts are not so irrational that they will acknowledge the government's power to regulate in an area while simultaneously imposing rules that make all regulation unworkable.

When the Supreme Court first devised the "express advocacy" test in *Buckley*, it did so in the context of a poorly drafted statute (the Federal Election Campaign Act) whose definition of regulable electioneering contained problems both of vagueness and overbreadth. Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of electioneering might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The *Buckley* Court found that the regulated conduct, which included

expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" were not sufficiently precise to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. The *Buckley* Court was concerned that the Federal Election Campaign Act's attempt to regulate any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public importance.

The Court chose to save the Federal Election Campaign Act from invalidation by reading it very narrowly. However, the Court never said that no legislature could ever devise alternate language that would be both sufficiently narrow and sufficiently precise. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. The key for Congress is to draw a line that distinguishes between regulable electioneering and protected "issue advocacy" in a way that minimizes the vagueness and overbreadth concerns identified by the Court.

One way for Congress to do this is to follow the model presented in the Snowe-Jeffords Amendment to McCain-Feingold. The Snowe-Jeffords Amendment defines the term "electioneering communication" as radio or television ads that refer to clearly identified candidates and are broadcast within 60 days of a general election or 30 days of a primary and are targeted to the relevant electorate. A group that makes electioneering communications totaling $10,000 or more in a calendar year must disclose its identity, the cost of the communication, and the names and addresses of all its donors of $1,000 or more. If the group has a segregated fund that it uses to pay for electioneering communications, then only donors to that fund must be disclosed.

Additionally, corporations and labor unions are barred from using their general treasury funds to pay for electioneering communications. Instead, they must fund electioneering communications through their political action committees.

Snowe-Jeffords presents a definition of electioneering carefully crafted to address the Supreme Court's dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. Any sponsor of a broadcast will know, with absolute certainty, whether its ad depicts or names a candidate and how many days before an election it is being broadcast. There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.

The prohibition is also narrow enough to satisfy the Supreme Court's overbreadth concerns. Advertisements that name a political candidate and are aired close to an election almost invariably are electioneering ads intended to encourage voters to support or oppose the named candidate. This conclusion is supported by a comprehensive academic review conducted of television advertisements in the 1998 federal election cycle. *See Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center for Justice, 2000). This study examined more than 300,000 airings of some 2,100 separate political commercials that appeared in the nation's 75 largest media markets in 1998. The study found that there were a total of 3,100 airings of only two separate commercials that met the Snowe-Jeffords criteria of naming a specific candidate within 60 days of the general election and that were judged by academic researchers to be true issue advocacy. Thus, the Snowe-Jeffords general election criteria were shown to have inaccurately captured only on tiny fraction of the political commercials aired in the 1998 election cycle. A follow-up study of the ads run in the 2000 federal election cycle came up with comparable results. This empirical evidence demonstrates that the Snowe-Jeffords criteria are not "substantially overbroad," which is

the constitutional test. The careful crafting of Snowe-Jeffords stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA.

In sum, it is constitutionally permissible for Congress to enact legislation that regulates ads that are intended to influence the electoral outcome of particular candidates, as long as the legislation does not unduly sweep within its reach ads that are intended to discuss issues only. The "magic words" test clearly does not accomplish this permissible objective in an acceptable manner. The Supreme Court does not purposely permit government to regulate in an area while imposing rules that make all attempts at regulation worthless. Congress has the power to pass legislation which remedies the vagueness and overbreadth problems that plagued the Federal Election Campaign Act by providing a better method for differentiating between electioneering and true "issue advocacy."

Closing the Soft Money Loophole

The Federal Election Campaign Act ("FECA") limits an individual's contributions to (1) $1,000 per election to a federal candidate; (2) $20,000 per year to national political party committees; and (3) $5,000 per year to any other political committee, such as a PAC or a state political party committee. *Id.* § 441a(a)(1). Individuals are also subject to a $25,000 annual limit on the total of all such contributions. *Id.* § 441a(a)(3). The money raised under these strictures is commonly referred to as "hard money." The McCain-Feingold Bill, as amended in the Senate, would raise these hard money limits substantially, in exchange for eliminating soft money entirely.

Regardless of whether Congress chooses to raise the hard money limits under FECA, it has the power to close the soft money loophole. Soft money, quite simply, is money that is raised by the political parties outside of the FECA requirements. With only certain very limited exceptions, Congress did not intend for political parties to raise money outside of the FECA limitations. The soft money loophole was created not by Congress, but by a Federal Election Commission ("FEC")

ruling in 1978 that permitted political parties to receive non-regulated contributions as long as the money was used for grassroots campaign activity, such as registering voters and get-out-the-vote efforts. In the years since the FEC's ruling, this modest opening has turned into an enormous loophole that threatens the integrity of the entire regulatory system.

In the recent presidential election, soft money contributions soared to the unprecedented figure of $487 million, which represented an 85 percent increase over the previous presidential election cycle (1995-96). It is not merely the total amount of soft money contributions that raises concerns, but the size of the contributions as well, with some donors contributing amounts of $100,000, $250,000, or more to gain preferred access to federal officials. This money is not being spent, for the most part, on the types of grassroots campaign activities that led to the original FEC advisory opinion. The largest single component of soft money spending, about 40 cents out of every soft money dollar, goes to media advertising that is intended to influence federal elections, although the ads refrain from using "express" words of advocacy. Only about 8 cents out of every soft money dollar is spent on grassroots activities like voter registration and voter mobilization. Soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials.

The McCain-Feingold Bill requires that all money spent on "federal election activities" by state or local parties be subject to the limitations, prohibitions, and reporting requirements of FECA. State parties are permitted to spend soft money on voter registration and get out the vote activity that does not mention a federal candidate as long as no single soft money donor gives more than $10,000 per year to the state party for such purposes. The Bill also bars federal officeholders and candidates for such offices from soliciting, receiving, or spending soft money.

These provisions are constitutional. The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. In *Buckley v. Valeo*, the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections. *See* 424 U.S. 1, 23-29 (1976). Significantly, the Court upheld the $25,000 annual limit on an individual's total contributions in connection with federal elections. *See id.* at 26-29, 38. In later cases, the Court rejected the argument that corporations have a right to use their general treasury funds to influence elections. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Under *Buckley* and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections.

Any suggestion that the Supreme Court's decision in *Colorado Republican Federal Campaign Committee v. FEC*, 1518 U.S. 604 (1996), casts doubt on the constitutionality of a soft money ban is flatly wrong. *Colorado Republican* did not address the constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA's limits. Indeed, the Court noted that it "could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." *Id.* at 617.

In fact, the most relevant Supreme Court decision is not *Colorado Republican*, but *Austin v. Michigan Chamber of Commerce*, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries. 494 U.S. at 657-61. Surely, the law cannot be that

Congress has the power to prevent corporations from giving money directly to a candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from pouring unlimited funds into a candidate's political party in order to buy preferred access to him after the election. *See also Nixon v. Shrink Missouri Govt. PAC*, 120 S. Ct. 897 (2000) (reaffirming *Buckley*'s holding that legislatures may enact limits on large campaign contributions to prevent corruption and the appearance of corruption).

In sum, closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.

The CHAIRMAN. Next, Mr. Gora.

STATEMENT OF JOEL M. GORA

Mr. GORA. Good morning, Chairman Ney. Thank you for holding these hearings, and thank you for introducing your remarks by reading from the text of the first amendment because I think the first amendment imposes a special injunction upon Members of Congress, because its first words are "Congress shall make no law abridging the freedom of speech," a special injunction on you that when you consider laws that do abridge the freedom of speech, the first amendment must be your guideline.

I am a professor of law at Brooklyn Law School, counsel to the ACLU, and I was one of the ACLU attorneys who challenged the campaign finance laws in *Buckley* v. *Valeo.* But even before the *Buckley* case, we got our first test of what it was like when the government wanted to regulate what we now call issue advocacy.

A group critical of then President Nixon ran an ad in The New York Times criticizing his foreign policy. Within a month, that group was visited by the Justice Department, which filed suit against the group on the ground that, since it was an election year and Richard Nixon was a candidate for reelection as President, that ad was for the purpose of influencing the outcome of the election and would subject that group to all of the regulations and controls of the Federal Election Campaign Act.

We defended that group in court, and we secured a ruling from the Second Circuit Court of Appeals which said, such issue advocacy, even though it mentions and criticizes incumbent officeholders, is protected wholly by the first amendment, and the government cannot be allowed to impose rules and regulations that would suppress that kind of citizen issue advocacy about government and politics and the politicians that run government. Issue advocacy was born.

Despite the injunction of that case, Congress passed a provision in the *Buckley* statute which regulated groups that simply reported voting records of Members of Congress. The D.C. Circuit struck down that provision as unconstitutional. A court which upheld every other feature of that bill struck that down. What they said was you cannot regulate groups simply because they put out public information about the records of Members of Congress.

Finally, just to be sure that the point was made, the Supreme Court said that any information that is communicated about the politician is completely free and immune from any governmental regulation, unless that communication expressly advocates the election or defeat of that politician. The Court knew that people would be able to come close to the line, as Ms. Mitchell said, and they draw that line clearly and high to allow people to remain on the nonregulated free speech side of that line. For 25 years, that line has stayed firm, and the bills before you now are efforts to obliterate that line.

The 300,000 members of the ACLU have long been devoted to trying to make sure that campaign finance reform is consistent with free speech and democratic values embodied in the first amendment. For that entire period of time, we have insisted that campaign finance laws must serve two vital goals: protecting free-

dom of political speech and association and expanding political opportunity and participation.

The bills before you, unfortunately, do neither of those things. They are fundamentally inconsistent with these goals. Instead, they are distractions from, really, the serious business of campaign finance reform.

Some people mistakenly think that the ACLU is not in favor of campaign finance reform. We certainly are. We support a comprehensive program of public financing of Federal campaigns consistent with the first amendment, a program which would develop programs for providing public resources, benefits and support for all qualified Federal political candidates.

Twenty-five years of experience that we have had with these campaign finance laws have shown that limits do not work and that what we must seek is a more first amendment-friendly way to deal with the problem that some people have more resources with which to get their message out than others. We think the first amendment, least drastic alternative is a system of public funding.

But McCain-Feingold contains nothing of that. McCain-Feingold, Shays-Meehan are basically about limits, limits and more limits. They limit issue advocacy in a way I think which is clearly unconstitutional, under Supreme Court guidelines and all of the lower court cases that have followed that, and even the cases that predated the Supreme Court. Simply putting out information about a Member of Congress, no matter how much you praise or criticize them, is privileged from any kind of governmental regulation unless it crosses that line into express advocacy.

Once again, the Court understood that people would tiptoe up to that line. But it put that line there so that speakers would feel free to criticize you, Members of Congress, without fear of retribution or regulation; and these bills basically fly in the face of over 30 years of doctrine that make it clear that issue advocacy cannot be regulated.

If I might just for a moment, the ACLU has not run TV ads recently that might fit my friend Josh's description, but the NAACP certainly has. It ran a series of television ads last fall harshly critical of then Governor George Bush and his record on hate crimes legislation, harshly critical. Those ads would be outlawed under the bill before you.

To my mind, any bill that would outlaw the ability of the NAACP to run ads like that is a bill that is flatly inconsistent with the first amendment. And if he answers, well, the NAACP can reorganize as a PAC and have its individual members run those ads and have their names disclosed, well, I hope the irony of that does not escape, since the most important first amendment precedent on the right of groups to speak for their members without having to disclose their members to the government is called *NAACP* v. *Alabama*.

So, yes indeed, television ads by issue advocacy groups would be interdicted and prohibited by this legislation; and that is why we think the issue advocacy provisions are flatly unconstitutional.

Secondly, the coordination issues. The coordination rules are so complicated and detailed that they do need a tax lawyer to understand them, but their basic practical effect is they make it impos-

sible for representatives of citizens' groups to have conversations with you, Members of Congress, for fear that those conversations a year from now, if those groups put out information about how you voted on the issue they discussed with you, will deem them in coordination with you, and then anything that they do that might be viewed as helping your cause will be viewed either as an illegal corporate contribution or as a limited individual contribution, and ensnare them in all of the campaign finance rules and regulations. These new provisions will set up almost a campaign finance witch-hunt to trace down every possible conversation that might lead to these new conclusions of coordination.

Finally—Mr. Chairman, I realize I have exceeded my time—these bills also cut to the heart of the ability of political parties to do the things that they do which are really the essence of democracy: registering voters, putting out issues, developing ideas, and the soft money bans would undercut the rights and the abilities of parties.

Finally, in conclusion, Mr. Chairman, I think the committee should make no mistake about the radical agenda that these bills promote and about the drastic departure from settled first amendment doctrine that they represent. It is the ACLU's hope that this committee will educate its colleagues in the House about the grave constitutional defects contained in McCain-Feingold and Shays-Meehan and that will help us turn away from those fatally flawed first amendment rights and perhaps that will help us turn toward what we believe at ACLU is a less drastic and constitutionally less offensive means to achieve reform, and that is public financing of political campaigns.

If I might just have one more moment, Mr. Chairman. I, too, was shocked when I heard a distinguished member of this House say that we had to choose between free speech or clean elections, we could not have both. Well, in my mind, under the first amendment, we cannot have one without the other.

Thank you.

[The statement of Mr. Gora follows:]

AMERICAN CIVIL LIBERTIES UNION

Statement on the Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech

Before the House Administration Committee

Presented by Joel M. Gora
On Behalf of the American Civil Liberties Union

June 14, 2001

Good morning. Chairman Ney, Members of the Committee, my name is Joel Gora, and I

am counsel to the American Civil Liberties Union. I am also a Professor of Law at Brooklyn Law School, where I teach Constitutional Law. I was one of the ACLU attorneys who challenged the campaign finance laws in Buckley v. Valeo, 424 U.S. 1 (1976). I am here on behalf of the American Civil Liberties Union, a non-profit corporation that is devoted to the advancement of civil rights and civil liberties. For over 80 years, the ACLU has been a nation-wide, non-profit, non-partisan membership organization of over 300,000 members devoted to protecting and advancing the rights and the principles of freedom and individual liberty set forth in the Bill of Rights and the Constitution. The ACLU and the ACLU Foundation are 501 (c)4 and 501 (c)3 respectively. We take no federal funds and we are financed through individual gifts, membership dues and/or foundation grants.

For almost 30 years, the ACLU has been at the forefront of the effort to insure that campaign finance reform is consistent with the free speech and democratic values embodied in the First Amendment to the Constitution. For that entire period of time, we have insisted that campaign finance laws must serve two vital goals: protecting freedom of political speech and association and expanding political opportunity and participation. Unfortunately, the McCain-Feingold bill (S. 27, the Bipartisan Campaign Reform Act of 2001) recently passed by the Senate, and its Shays-Meehan counterpart (H.R. 380, the Bipartisan Campaign Reform Act of 2001) introduced in the House earlier this year, are fundamentally inconsistent with these goals. Rather, they are destructive distractions from the serious business of meaningful campaign finance reform which entails easing, not tightening, the legislative controls on the financing of our political campaigns.

Contrary to what many think, the ACLU supports a comprehensive program of public financing of federal campaigns, consistent with the First Amendment. Meaningful campaign finance reform would develop comprehensive programs for providing public resources, benefits and support for all qualified federal political candidates. Because 25 years of experience have shown that limits on political funding simply won't work, constitutionally or practically, it is time to seek a more First Amendment-friendly way to expand political opportunity. As the ACLU has long argued, public financing for all qualified candidates is an option that provides the necessary support for candidacies without the imposition of burdensome and unconstitutional limits and restraints. But instead of being able to press this positive agenda, we must use our time today instead to condemn the ill-conceived provisions of McCain-Feingold and Shays-Meehan that are non-remedies to our national campaign finance problems and are wholly at odds with the essence of the First Amendment.

Simply put, these bills are a recipe for political repression because they egregiously violate longstanding rights of free speech and freedom of association in several ways:

(1) These bills unconstitutionally stifle issue advocacy. They drive a wedge between the people and their elected representatives by throttling the various advocacy groups and political parties that amplify the voices of average citizens. These bills achieve these egregious results by obliterating the clear constitutional dividing lines -- established

by 25 years of judicial precedent -- between "express advocacy" of electoral outcomes, which can be regulated, and issue advocacy involving electoral candidates and incumbent politicians, which cannot be subject to regulatory controls.

(2) These bills penalize constitutionally protected contacts that groups and individuals may have with candidates and elected officials. They would suppress effective criticism of government by significant organized entities -- labor unions, not-for-profit corporations, and business corporations -- with one exception: media corporations and conglomerates would be exempt from the bills' Draconian controls.

(3) These bills severely threaten the continued vitality of our political parties. Parties are not merely vehicles that help amplify the voices of their party representatives, they are also issue groups that engage in voter registration, voter education, issue and platform development and the like. The assertion that corporate and union contributions have a "corrupting influence, and that somehow is an adequate justification for the ban of such contributions to political parties is not supported by First Amendment jurisprudence.

These three major flaws in the bills will be addressed in turn. But in the meantime, this Committee should make no mistake about the radical agenda that these bills promote and about the drastic departure from settled First Amendment doctrine that they represent. It is the ACLU's hope that the Administration Committee will educate its colleagues in the House of Representatives about the grave constitutional defects contained in McCain-Feingold and Shays-Meehan.

I. These Bills Unconstitutionally Constrain Robust Citizen Speech (Issue Advocacy) Prior to Elections

As Virginia Woolf stated, "If we don't believe in freedom of expression for people we despise, we don't believe in it at all." Apparently, the supporters of McCain-Feingold and Shay-Meehan must despise any form of issue advocacy -- especially that which is critical of candidates -- that has the audacity to discuss the actions or proposals of public officials and candidates for public office, or even mention their name, because they have gone to such lengths to suppress it.

With minor differences in phrasing and coverage, the primary target of both bills is so-called "electioneering communications." An electioneering communication is any cable or satellite communication that refers to a clearly identified federal candidate and is made within 60 days of a general, special or runoff election or 30 days of a primary, convention or caucus, and is made to an audience that includes members of the electorate. It must be remembered that up to now such a communication has been absolutely free of any government regulation (unless it came within the Supreme Court's bright line test that it "expressly advocated" the election or defeat of such a candidate). Now, the mere mention of a candidate triggers the statute. Once that

happens the consequences are extreme: non-profit corporations, labor unions and trade associations are barred by the legislation from making such communications; individuals and associations may make them but are then subject to burdensome registration, reporting and disclosure requirements.

(The distinction between broadcast communication media and other media bears no relevance to the only recognized justification for campaign finance limitations or prohibitions, namely, the concern with corruption. The legislative goal is transparent: blatant censorship of what incumbents feel is the most effective medium of communication used to criticize them. But suppressing speech in one medium while permitting it in another is not a lesser form of censorship, just a different form.).

These prohibitions and restraints are accomplished in the Senate bill (S. 27) by creating this new legal category -- labeled "electioneering communication" -- and simply declaring that any communication that meets the new criteria comes within that new category. The House bill (H.R. 380) achieves the same result by a constitutional sleight of hand that gerrymanders the established boundary lines of the "express advocacy" doctrine by simply declaring, wholly in the face of clearly established law, that any broadcast mention of a federal candidate within the time and temporal stipulations comes within that definition. (The House bill also unconstitutionally and dramatically expands the definition of "express advocacy" by having it include any communication in any medium at any time of the year "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election." No direct link to electoral advocacy is required.). These new unconstitutional definitions bring with them the whole panoply of FECA regulations and restrictions, applicable to any individual or organization that comes within the new overbroad and vague guidelines.

Each bill has a "sham" safe harbor for issue advocacy. The Senate bill allows certain non-profits to make "electioneering communications" if they are not "targeted" to voters in the State where the "referred to" candidate is up for election. In other words, you can't criticize the McCain-Feingold bill in Arizona or Wisconsin if either sponsor is up for election; and perhaps in the entire country when Senator McCain is running for President. Under this "safe harbor" a group can urge citizens in Colorado to write a letter to a Senator from California, but if they urge people to write their own Senator -- who happens to be an incumbent up for reelection -- they could go to jail. The House bill would permit issue organizations to publish and disseminate voting record and guides only if they are "cleansed" of their editorial content.

These bills in effect silence issue advocacy by requiring accelerated and expanded disclosure of the funding of such advocacy, by penalizing issue advocacy as a prohibited contribution if it is "coordinated" in the loosest sense of that term with a federal candidate. They also ban issue advocacy all but completely if it is sponsored by a labor union, a corporation (including such non-profit corporations organized to advance a particular cause like the ACLU or the National Right to Life Committee or Planned Parenthood unless they are willing to obey the

government's stringent new rules) or other similar organized entity. Even an individual or organization that receives financial support from prohibited sources such as corporations, unions, or wealthy individuals, is barred from engaging in "electioneering communications."

These bills would impose these limitations on communications about issues regardless of whether the communication "expressly advocates" the election or defeat of a particular candidate. Nor is there any requirement of even showing a partisan purpose or intent. Instead, during 60 days before a primary or 30 days before a general election, any such communication is subject to the new controls simply by identifying any person who is a federal candidate, which will often be an incumbent politician.

During the floor debate of the McCain-Feingold bill, a majority of the Senate realized that the restrictions on issue advocacy discussed above would probably be struck down by the courts on constitutional grounds. Thus, they adopted the Specter Amendment, which would be a year-round ban on any broadcast ad that "promotes," supports," "attacks," or "opposes" a candidate, and that is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidates." This vague and over-broad "back-up" to Snowe-Jeffords is also unconstitutional. If the ACLU finances a broadcast ad criticizing a Democrat for supporting the constitutional amendment banning flag desecration, is it automatically telling voters that they should support the Democratic candidate's Republican opponent? Absolutely not! Congress cannot, and should not attempt to design a statute to ban or suppress issue groups' criticism or praise of them by name or likeness. Whether such ban is year round or before every single primary and general election, such proposals are nothing more than an attempt to stifle free speech.

A. These Issue Advocacy Restrictions Would Have Adverse, Real-Life Consequences

Had these provisions been law during the 2000 elections, for example, they would have effectively silenced messages from issue organizations across the entire political spectrum. The NAACP ads -- financed by a sole anonymous donor -- vigorously highlighting Governor Bush's failure to endorse hate crimes legislation is a classic example of robust and uninhibited public debate about the qualifications and actions of public officials. By the same token, when New York Mayor Rudy Giuliani was a candidate for the United States Senate, any broadcast criticism of his record on police brutality as mayor of New York undertaken by the New York Civil Liberties Union would have subjected that organization to the risk of severe legal sanctions and punishment under these proposals. These bills would have prevented the National Right to Life Committee from questioning the constitutionality of the McCain-Feingold bill during all the months when Senator McCain was a candidate for the Republican presidential nomination. The Supreme Court in cases from New York Times Co. v. Sullivan, 376 U.S. 254 (1964) through Buckley v. Valeo, 424 U.S. 1 (1976) to California Democratic Party v. Jones, 120 S.Ct. 2402 (2000) has repeatedly protected full and vigorous debate during an election season. The provisions of the pending bills would silence that debate.

Second, the ban on "electioneering communications" or the *ipse dixit* treatment of them as "express advocacy" would also stifle legislative advocacy on pending bills. The blackout periods coincide with crucial legislative periods, including the months of September and October as well as months during the Spring. During Presidential years, the blackout periods would include the entire presidential primary season, conceivably right up through the August national nominating conventions. For example, had this provision been law in 2000, for most of the year it would have been illegal for the ACLU or the National Right to Life Committee to criticize the "McCain-Feingold" bill as an example of unconstitutional campaign finance legislation or to urge elected officials to oppose that bill. The only time the blackout ban would be lifted would be in August, when many Americans are on vacation!

During the 106th Congress, for example, the ACLU identified at least ten major controversial bills that it worked on which were debated in either chamber of the Congress or in committee meetings within 60 days prior to the November 2000 general election. The various legislative issues cover an enormous range of critical issues, including freedom of speech (imposing internet filtering in schools and libraries), reproductive rights (restricting abortion in international family planning; attempting to define "human being" in the "born alive" bill and prohibiting funding of "morning-after pill" to minors on school premises), hate crimes (expanding the federal hate crimes law), privacy (restricting law enforcement use of electronic surveillance and enhancing privacy protections for individuals and preventing fraudulent misuse of Social Security numbers), criminal justice (providing grants to states to process backlog of DNA evidence), and secret evidence (making it harder for the INS to use secret evidence to deport immigrants or to deny them asylum). This pattern of legislating close to primary and general elections is repeated during the waning days of every legislative session. For example, Congress is always in a race to enact appropriations bills before the beginning of the federal fiscal year on October 1st. These bills, with their innumerable social policy amendments, are prime examples of legislation that will undoubtedly be debated in the last 60 days before a general election. Under the proposed campaign finance bills, Congress -- merely by adjusting the calendar -- could make controversial legislation immune from citizen criticism if such criticism dared to mention bill sponsors or supporters by name.

B. Why These Limitations Run Afoul of the First Amendment

Under the reasoning of Buckley v. Valeo and all the cases which have followed suit, the funding of any public speech that falls short of "express advocacy" is wholly immune from campaign finance laws. Speech which comments on, criticizes or praises, applauds or condemns the public records and actions of public officials and political candidates -- even though it mentions and discusses candidates, and even though it occurs during an election year or even an election season -- is entirely protected by the First Amendment.

The Court made that crystal clear in Buckley when it fashioned the express advocacy doctrine. That doctrine holds that the FECA can constitutionally regulate only "communications that in express terms advocate the election or defeat of a clearly identified candidate," and

include "explicit words of advocacy of election or defeat" 424 U.S. at 44, 45. The Court developed that doctrine because it was greatly concerned that giving a broad scope to FECA, and allowing it to control the funding of all discussion of policy and issues that even mentioned a public official or political candidate, would improperly deter and penalize vital criticism of government because speakers would fear running afoul of the FECA's prohibitions. "The distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical operation. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and government actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." Id. at 42-43. If any reference to a candidate in the context of advocacy of an issue rendered the speech or the speaker subject to campaign finance controls, the consequences for the First Amendment would be intolerable.

Issue advocacy is freed from government control through a number of other doctrines the courts have recognized as well. First, the constitutional right to engage in unfettered issue advocacy is not limited to individuals or cause organizations. Business corporations and unions can speak publicly and without limit on anything short of express advocacy of a candidate's election. See First National Bank of Boston v. Bellotti 435 U. S. 765 (1978). (Of course, media corporations can speak publicly and without limitation on any subject, including editorial endorsements of the election or defeat of candidates, i.e. "express advocacy," see Mills v. Alabama, 384 U.S. 214 (1966).)

Contributions to issue advocacy campaigns cannot be limited in any way, either. See Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981). Finally, issue advocacy may not even be subject to registration and disclosure. See McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995); Buckley v. Valeo, 519 F.2d 821, 843-44 (1975) (holding unconstitutional a portion of the FECA which required reporting and disclosure by issue organizations that publicized any voting record or other information "referring to a candidate.") The rationale for these principles is not just that these various groups have a right to speak, but also that the public has a right to know and a need to hear what they have to say. This freedom is essential to fostering an informed electorate capable of governing its own affairs.

Thus, no limits, no forced disclosure, no forms, no filings, no controls should inhibit any individual's or group's ability to support or oppose a tax cut, to argue for more or less regulation of tobacco, to support or oppose abortion, flag burning, campaign finance reform and to discuss the stands of candidates on those issues. That freedom must be preserved whether the speaker is a political party, an issue organization, a labor union, a corporation, a foundation, a newspaper or an individual. That is all protected "issue advocacy," and the money that funds it is all, in effect, "soft money." Those who advocate government controls on what they call "sham" or "phony" or "so-called" issue ads, and those who advocate outlawing or severely restricting "soft money" should realize how broad their proposals would sweep and how much First Amendment law they would run afoul of.

Finally, it is no answer to these principled objections that these flawed bills would permit certain non-profit organizations to sponsor "electioneering communications" if they in effect created a Political Action Committee to fund those messages and disclosed the identities of their significant contributors and supporters. Under governing constitutional case law, groups like the ACLU and others cannot be made to jump through the government's hoops in order to criticize the government's policies and those who make them. In addition, most non-profits would be unwilling to risk their tax status or incur legal expenses by engaging in what the IRS might view as partisan communications. Moreover, the groups would still be barred from using organizational or institutional resources for any such communications. They would have to rely solely on individual supporters, whose names would have to be disclosed, with the concomitant threat to the right of privacy and the right to contribute anonymously to controversial organizations that was upheld in landmark cases such as NAACP v. Alabama, 357 U.S. 449 (1958). This holding guaranteed the opportunities that donors now have to contribute anonymously -- a real concern when a cause is unpopular or divisive.

II. The Bills Chill and Unconstitutionally Regulate Citizen and Issue Group Contact with Candidates and Elected Officials

The second systemic defect in these bill is their grossly expanded concept of coordinated activity between politicians and citizens groups. Such "coordination" then taints and disables any later commentary by that citizen group about that politician. By treating all but the most insignificant contacts between candidates and citizens as potential campaign "coordination," the bills render any subsequent action which impacts those politicians as a regulated or prohibited "contribution" or "expenditure" to those candidates' campaigns. These provisions violate established principles of freedom of speech and association.

Under existing law, contact coordination between a candidate or campaign and an outside group can be regulated as coordinated activity only where the group takes some public action at the request or suggestion of the candidate or his representatives, i.e., where the candidate is the driving force behind the outside group's action. See Federal Election Commission v. Christian Coalition 52 F. Supp. 2d 45 (D. D.C. 1999). Under Shays-Meehan, however, the definition of coordination is expanded in dramatic ways with severe consequences, thereby prohibiting certain kinds of contact with candidates. A coordinated activity can be found whenever a group or individual provides "anything of value in connection with a Federal candidate's election" where that person or group has interacted with the candidate then or in the past in a number of ways. These include, for example, instances which the outside person or group has "previously participated in discussions" with the candidate or their representative, "about the candidate's campaign strategy...including a discussion about...message..."

The Shays-Meehan bill thus imposes a year-round prohibition on all communications that are deemed "of value" to a federal candidate. The bill wrongly asserts that issue groups are "coordinating" if they merely discuss elements of the lawmaker's message with the lawmaker or his or her staff anytime during a two-year election cycle. For example, if a veteran's group

suggests to a candidate how best to talk about the flag amendment in order to win the hearts and minds of voters, the group then can't run ads in Senator McCain's state praising him for protecting the flag. (The final version of the McCain-Feingold bill, though narrower than the Shays-Meehan approach, still deems as coordination any communication made by any person or group -- whether or not it constitutes express advocacy -- made "in connection with a candidate's" election or "pursuant to any general... understanding with" with a candidate.)

Once such so-called coordination is established it can trigger a total ban on issuing any communication to the public relating to the candidate by deeming such communication as an illegal corporate contribution (or subjecting it to burdensome regulation if made by an individual). These rules can act as a continuing prior restraint, which bars the individual or group from engaging in core First Amendment speech for the lawmaker's entire term of office. Even if such an organization has a connected PAC, it can no longer engage in any independent expenditure affecting the lawmaker because by merely speaking to the candidate or his or her staff it may have engaged in illegal "coordination." Here again, the bills attempt to impose another gag rule on issue advocacy organizations.

Translated into the way in which citizen advocacy groups work, this means that a group cannot urge a candidate to make a particular proposal a part of the candidate's platform if the group subsequently plans to engage in independent advocacy on that issue. Likewise, a group like the National Rifle Association could not discuss a gun control vote or position with a Representative or Senator if the NRA will subsequently produce a box score that praises or criticizes that official. Similar to the ban on "coordination" of "electioneering activity" resulting in a long blackout period when an outside group or individual can be blocked from broadcasting information about a candidate, the ban on coordination of "anything of value" can operate month in and month out throughout the entire two- or six-year term of office of the pertinent politician. That is why the AFL-CIO, among other groups, is so concerned about the treacherous sweep of the anti-coordination rules. See "Futile Labor: Why Are The Unions Against McCain-Feingold?" *The New Republic,* March 12, 2001, pp. 14-16.

Thus, these coordination rules will wreak havoc on the ability of the representatives of unions, corporations, non-profits and even citizen groups to interact in important ways with elected representatives for fear that the taint of coordination will silence the voices of those groups in the future. The First Amendment is designed to encourage and foster such face-to-face discussions of government and politics, see Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), not to drive a wedge between the people and their elected representatives.

III. The Bills Unconstitutionally Interfere with the First Amendment Rights of Political Parties

In addition to their disruptive and unconstitutional effect on issue groups and issue advocacy, these bills also would have a disruptive -- if not destructive -- effect on national

political parties in America by outlawing certain sources of funding that support party issue advocacy work. If the constraints embodied in these proposals become law, parties will have to rely solely on hard money contributions for their continued existence. The justifications for these limitations are the very similar ones used to restrict issue advocacy and, in fact, make it virtually impossible for parties to continue to engage in issue advocacy work such as grassroots educational activity, platform development, candidate recruitment and get-out-the-vote efforts.

A. The Bills Represent a Three-Pronged Attack on Political Parties

First, the bills completely eliminate all "soft money" funding for all national political parties and all of their constituent committees and component parts. This means that no corporate, union or large individual contributions would be permitted. Further, current federal law would be repealed, because these bills impose restrictions on the ability of national parties to share money with state and local parties. The bills regulate all state and local political parties and ban them from raising or spending soft money for any "Federal election activity" that has any bearing on a federal election. Under these bills, all of the funding for the bulk of party issue advocacy work described above would become illegal, unless it came only from individuals, in relatively small dollar amounts. In other words, political parties may only raise and spend highly regulated "hard money" for virtually everything they do.

The bills also prohibit any federal candidates or officeholders from having any contact whatsoever with the funding of any "federal election activity" by any organization unless that activity is funded strictly with hard money. The scope of "federal election activity" is extremely broad and encompasses the following activities if they have any connection to any federal election or candidate: (1) voter registration activity within 4 months of a federal election, (2) voter identification, get-out-the-vote activity or "generic campaign activity," (3) any significant "public communication" by broadcast, print or any other means that refers to a clearly identified federal candidate and "promotes," "supports," "attacks," or "opposes" a candidate for office (regardless of whether the communication contains "express advocacy"). Under this rule, a candidate would attend an NAACP Voters Rights benefit dinner at his or her peril if funds were being raised for any "federal election activity" such as getting people to the polls on election day. The same might be true for one who attended an ACLU Bill of Rights Day fundraiser when the ACLU produces a box score on civil liberties voting records during an election season.

B. Political Party Activity is Fully Protected by the First Amendment

Political funding by political parties is strongly protected by the First Amendment no less than political funding by candidates and committees. The only political funding that can be subject to control is either contributions given directly to candidates and their campaigns (or partisan expenditures explicitly coordinated with campaigns) or communications that constitute express advocacy. All other funding of political activity and communication is beyond presumptive constitutional control. That would include soft money activities by political parties. While it is true that parties are advocates for their candidates' electoral success, they are also

issue organizations that influence the public debate. Get-out-the-vote drives, voter registration drives, issue advocacy, policy discussion, grass-roots development and the like are all activities fundamentally protected by the First Amendment and engaged in by a wide variety of individuals and organizations. For example, an issue ad by the ACLU criticizing an incumbent mayor on police brutality is an example of soft money activity, in the broadest sense of that term, as is an editorial on the same subject in *The New York Times*. We need more of all such activity during an election season, not less, from political parties and others.

The right of individuals and organizations, corporate, union or otherwise, to support such issue advocacy traces back to the holding in Buckley that only those communications that "expressly advocate" the election or defeat of identified candidates can be subject to control. The Supreme Court in the 1996 case of Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) noted the varying uses of soft money by political parties. In the recent case, Nixon v. Shrink Missouri Governmental PAC, 528 U.S. 377 (2000), which upheld hard money contribution limits, the Court's opinion was silent on whether soft money could be regulated at all. Although certain individual Justices invited Congress to consider doing so, the case itself had nothing to do with soft money.

To be sure, to the extent soft money funds issue advocacy and political activities by political parties, it becomes something of a hybrid: it supports protected and unregulatable issue speech and activities, but by party organizations often more closely tied to candidates and officeholders. The organizational relationship between political parties and public officials might allow greater regulatory flexibility than would be true with respect to issue advocacy by other organizations. Thus, for example, disclosure of large soft money contributions to political parties, as is currently required by regulation, might be acceptable, even though it would be impermissible if imposed on non-party issue organizations. But the total ban on soft money contributions to political parties raises serious constitutional difficulties.

Just last year, the Supreme Court reminded us once again of the vital role that political parties play in our democratic life by serving as the primary vehicles for the political views and voices of millions and millions of Americans. "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting the electoral candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself." California Democratic Party v. Jones, 530 U.S. 567 2402, 2408 (2000). As Justice Anthony M. Kennedy put it in his separate opinion in Colorado Republican Federal Campaign Committee v. Federal Election Commission, 518 U. S. 604 (1996): "The First Amendment embodies a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs." Id. at 629.

While electing candidates is a central mission of political parties, they do so much more than that. They engage in issue formulation and advocacy on a daily basis, they mobilize their

members through voter registration drives, they organize get-out-the-vote efforts, they engage in generic party communications to the public. Much of these activities are supported by what these bills would deem soft money. They would dry up these significant sources of funding for those party activities. That would basically starve the parties' ability to engage in the grass roots and issue-advocacy work that makes American political parties so vital to American democracy.

C. The Bills Diminish the Ability of Political Parties to Compete Equitably with Others Who Choose to Speak During Campaigns

Finally, the law unfairly bans parties, but no other organizations, from raising or spending soft money. That would mean that any one else -- corporations, foundations, media organizations, labor unions, bar associations, wealthy individuals -- could use any resources without limit to attack a party and its programs, yet the party would be defenseless to respond except by using limited hard money dollars. The NRA could use unregulated funds to mount ferocious attacks on the Democratic Party's stand on gun control, and the Party would be effectively silenced and unable to respond. Conversely, NARAL could mercilessly attack the Republican Party's stand on abortion, using corporate and foundation funds galore, and that Party would likewise be stifled from responding in kind. A system which lets one side of a debate speak, while silencing the other, violates both the First Amendment and equality principles embodied in the Constitution.

D. The Bills Impedes the Creation of New Parties

As with issue organizations, fledgling parties that pose an alternative to Democratic and Republican parties often rely on large individual contributions and corporate contributions to get off the ground. Once newer parties have the ability to get their message out, it is then easier to attract supporters and solicit contributions from an expanded donor base. Thus, not only are Shays-Meehan and McCain-Feingold incumbent protection bills, these bills also enshrine the two major parties. The soft money prohibitions that are contained in these bills virtually guarantee that minor parties will not be competitive. Those voters who are disenchanted with the major parties will not have viable means of mounting third-party challenges to the status quo.

IV. Some Additional Problems

The Shays-Meehan bill contains a number of other provisions which we consider unconstitutional or ill-advised.

The Millionaires Amendment

The "millionaires amendment" the Senate added to the McCain-Feingold campaign finance bill is intended to protect Senate candidates facing wealthy, self-financed opponents. The primary element would be increases in "hard money" contributions to candidates from individuals and political action committees (PACs). According to the *Congressional Quarterly*,

here is how the proposal would work. In Louisiana, for example, if a Senate candidate put about $554,000 of personal funds into the race, the limits on contributions to his opponents would triple from $1,000 to $3,000 per person and from $5,000 to $15,000 from each PAC for each election, primary or general. What confounds us is the notion that the Senate is willing to say that massive increases in hard money contributions are permissible, as long as you are running against a millionaire. On the other hand, the Senate also says – with a straight face – that all other hard money contribution limits must remain low. The only reason that the Supreme Court approved contributions limits in the first place is to prevent the reality or the appearance of *quid pro quo* corruption. If the Senate has deemed that a $3000 contribution during the primary and a $3000 contribution to the same candidate during the general election are not corrupting, then what is the justification for not raising all contribution limits to $6000 per year?

Lowering the Contribution Reporting Threshold

Lowering the contribution reporting threshold from $200 down to as low as $50 will sacrifice a great deal of individual political privacy, chill the average citizen from making a modest contribution to the candidate or party of their choice and bears not the slightest relationship to any real concern with corruption from large contributions. This is an almost gratuitous assault on political privacy. Creating a Big Brother-style clearinghouse of all disclosure and reporting of political activity under a variety of laws strikes us as a similar assault on privacy. Whether or not reporting under any of these laws is valid, the sum total of that information is greater than the sum of its parts in terms of the threat to privacy.

Conclusion

Neither the House nor the Senate version of the Bipartisan Campaign Finance Reform Act of 2001 is real reform. They are both fatally flawed assaults on First Amendment rights. The ACLU believes that there is a less drastic and constitutionally offensive means to achieve reform: public financing.

If Congress believes that Congressional and Executive Branch deliberations are distorted by large individual, corporate and union contributions to parties, or by effective forms of issues advocacy, then Congress should help qualified candidates mount competitive campaigns. While we realize that many nay-sayers argue that public financing is dead on arrival, we should remember that this country once had a system where private citizens and political parties printed their own ballots. It later became clear that to protect the integrity of the electoral process ballots had to be printed and paid for by the government. For the same reasons, the public treasury pays for voting machines, polling booths, registrars and the salaries of elected officials (although certainly not on an equitable basis, according to the assertions in ACLU lawsuits and a recent report by the U.S. Commission on Civil Rights). We take it as a fundamental premise that elections are a public, not a private, process – a process at the very heart of democracy. If we as a nation are fed up with a system that allows too much private influence and personal and corporate wealth to prevail, then we should complete the task by making public elections publicly financed.

The CHAIRMAN. Our last witness on the panel is Mr. Gold.

STATEMENT OF LAURENCE E. GOLD

Mr. GOLD. Thank you, Mr. Chairman. Good afternoon, Mr. Hoyer and Mr. Linder.

I represent the AFL–CIO, a federation of 65 national and international unions with a total membership of more than 13 million men and women throughout the United States. We welcome this opportunity to comment on some of the constitutional issues implicated by the ongoing debate over whether and how to revise the Federal Election Campaign Act.

The AFL–CIO has articulated a comprehensive set of campaign finance reform principles to guide legislation that would best promote greater working family and overall civic involvement, promote the free flow of ideas and information, and minimize the raw influence of pure financial power on electoral outcomes. The key elements of our policy include the public financing of Federal election campaigns; elimination of soft money donations to national political parties; maintenance of the current limits on hard money contributions to candidates and parties, insofar as the privately financed campaign system remains in place; provision of free or reduced broadcast time to candidates; and vigilant protection of the speech and association all rights of individuals and organizations concerning issues and candidates. Unfortunately, the parameters of the Congress's current focus on campaign finance reform fall well short of embracing these goals and in several key aspects are antithetical to them. I will briefly address two of these aspects today.

In *Buckley* v. *Valeo*, the Supreme Court in 1976 made clear that political communications are entitled to the highest degree of protection afforded by the first amendment. The Court recognized that election-related speech often includes both partisan and issue commentary. In order to ensure that citizens would not be chilled from discussion of issues during an election campaign and recognizing that the discussion of public issues is often tied to discussion of candidates, particularly incumbents, the Court in *Buckley* insisted that any restriction of political expression be narrowly and clearly drawn. Essential to that specificity, the Court held, was a standard that depended entirely upon the text of the communication and did not delve into matters concerning the Speaker's intent, whether actual or as perceived by a listener. For these reasons, the Court established the express advocacy issued advocacy line between permissible and impermissible regulation under the act, a line that the court and the lower courts, particularly in recent years, have uniformly maintained.

The election time broadcast censorship provisions of S. 27, the McCain-Feingold bill, and the all-media, all-the-time censorship provisions of H.R. 380, the Shays-Meehan bill, are utterly in conflict with the substantial and one-sided case law. These provisions would preclude, for example, references to sponsors of legislation. In fact, the bills, would outlaw references to the McCain-Feingold or Shays-Meehan bills themselves. They would outlaw public appeals to name legislators to vote for or against a pending bill; voter guides or other comparisons of candidate positions; public statements intended to prompt candidates to address or to commit to

sponsor or vote for or against particular kinds of measures if they are elected; and a host of other messages, related and unrelated, to an election itself.

One of the fundamental flaws in the argument favoring these provisions is that the first amendment does or should tolerate a line of legality that distinguishes between all speech that concerns elections or candidates and all speech that does not. It is simply not so that "black letter law" says that corporations and unions cannot spend money in a way that might influence an election. That is the opposite of what *Buckley* plainly stated where it said, so long as persons and groups issue expenditures and in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. We urge the Congress to refrain from legislating the wishful thinking that would outlaw such speech and force affected groups to litigate to uphold their first amendment rights.

The provisions in these bills establishing new definitions of what conduct constitutes coordination with a candidate, rendering that conduct either unlawful or limited depending on who is doing it, also fail the first amendment test. The McCain-Feingold standard applies to coordinated expenditures and disbursements if they are made "in connection with an election, regardless of whether the expenditure or disbursement is for a communication that contains express advocacy." But the Supreme Court in the *Massachusetts Citizens for Life* case in 1986 construed the same language in FECA's prohibition of a corporate or union "expenditure in connection with any election" to be limited to express advocacy communications in order for it to meet the constitutional requirement of clarity. The same McCain-Feingold language cannot be applied any differently.

S. 27 also defines coordination to include, in part, "any general or particular understanding between the spender and the candidate or a party." That phrase, found nowhere else in the United States Code, invites civil and criminal enforcement against groups and candidates not on the basis of how they act but on how it is inferred that they have thought.

The Shays-Meehan coordination provisions are identical to those originally included in S. 27 and which Senators McCain and Feingold abandoned after they were convinced of their confusion and overbreadth. Indeed, they are so hopelessly convoluted that they would ban and, through any particular enforcement, could criminalize a broad range of political and legislative activity and advocacy, substantially chilling routine citizen and group contacts with Federal officeholders, candidates and political parties.

The AFL–CIO recommends that the censorship proposals in these bills be dropped entirely and that the coordination provisions either be dropped as well or revised to reflect the precisely tailored standard such as that set forth on pages 17 and 18 of my full testimony.

Thank you. I welcome your questions and comments.

The CHAIRMAN. Thank you.

[The statement of Mr. Gold follows:]

TESTIMONY OF LAURENCE E. GOLD
ON BEHALF OF
THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION,
UNITED STATES HOUSE OF REPRESENTATIVES
June 14, 2001

Mr. Chairman and Members of the Committee: My name is Laurence E. Gold, and I am Associate General Counsel of the AFL-CIO, the federation of 65 national and international unions with a total membership of 13 million men and women throughout the United States. The AFL-CIO welcomes this opportunity to comment on some of the constitutional issues implicated by the ongoing debate over whether and how to revise the Federal Election Campaign Act.

The AFL-CIO has articulated a comprehensive set of campaign finance reform principles following a thorough and thoughtful review of how our political system is operating and what legislative steps might best promote greater working family and overall civic involvement, promote the free flow of ideas and information, and minimize the raw influence of private financial power on electoral outcomes. The key elements of our policy include the public financing of federal election campaigns; elimination of soft money donations to national political parties; maintenance of the current limits on hard money contributions to candidates and parties, insofar as the privately financed campaign system remains in place; provision of free or reduced broadcast time to candidates; and vigilant protection of the speech and associational rights of individuals and organizations concerning issues and candidates.[1] Unfortunately, the parameters of the Congress's current focus on campaign finance reform fall well short of embracing these goals, and in several key respects are actually antithetical to them.

In identifying constitutional issues as the subject of its first hearing on campaign finance reform since the Senate passed S. 27, the McCain-Feingold bill two months ago, this Committee correctly recognizes that whatever Congress does, it must confine its choices to what is constitutionally permissible. Virtually every regulatory attempt to restrict or channel either the financing of campaigns for federal office or private conduct that might influence the outcome of federal elections implicates the First Amendment and, sometimes, the Equal Protection Clause of the Fourteenth Amendment, to the United States Constitution. Indeed, what appear to be sound policy and desirable goals in the campaign finance realm are often constitutionally unattainable, and rightly so if the cost in the currency of individual and associational freedom is too high. We hope that as Congress considers its legislative options that it will remain faithful to the applicable constitutional lines rather than enact legislation it knows will be stuck down after individuals and groups have been forced to undertake the expensive and time-consuming task of securing that judicial result.

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[1]The text of the AFL-CIO policy is available at www.aflcio.org/publ/estatements/may2000/fedelect.

In my testimony I would like to focus on two key issues involved in the current campaign finance debate: first, proposed regulation of so-called "issue advertising," and second, proposed regulation of so-called "coordination" between candidates and outside groups. In doing so, I will focus on the provisions dealing with these matters in the two principal pending legislative vehicles: S. 27, the McCain-Feingold bill as passed by the Senate, which many have proposed that the House itself adopt in under to avoid a conference committee, and S. 27's current companion bill in the House, H.R. 380, the Shays-Meehan bill.

The Political and Legislative Activities and Advocacy of the Labor Movement

The labor movement has a considerable stake in campaign finance regulation. Ever since the labor movement took shape in the Nineteenth Century, unions have been vitally involved in the political and legislative spheres. Unions give voice to millions of Americans who otherwise could not hope to match the power of corporations and other powerful interests in influencing public policy.

Specifically, the AFL-CIO, its 65 national and international union affiliates, and their tens of thousands of local union affiliates engage in substantial legislative and issue advocacy at the federal, state and local levels on matters of particular concern to working families, such as Social Security, Medicare, education, labor standards, health care, retirement plans, workplace safety and health, trade, immigration, the right to organize, regulation of union governance and the role of unions and corporations in electoral politics. Unions also make substantial efforts to familiarize union households with these and other issues, the performances of officeholders in addressing them, and the positions candidates for public office have taken on them. And, unions regularly pursue efforts to register and encourage our members to vote, including substantial non-partisan programs.

The labor movement uses every means of communication, including membership meetings, workplace leafleting, newsletters, mail, the Internet and both paid and "free" media, to articulate the issues of greatest concern to working families. We seek to build coalitions with allied organizations, such as civil rights groups, for advocacy on behalf of workers. And, we regularly communicate and work with incumbent legislators in pursuit of our policy goals.

Unions and working families have no less stake in public affairs then other institutions and citizens. "[U]nions ha[ve] historically expended funds in the support of political candidates and issues."[3] "It is not true in life," Justice Felix Frankfurter said, "that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labor."[4] Justice Frankfurter further observed, "[t]o write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated

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[3] Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435, 447 (1984).

[4] International Ass'n. of Machinists v. Street, 367 U.S. 740, 814-15 (1961) (dissenting opinion).

Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation."[5]

Citing Justice Frankfurter's observations, the Supreme Court has held that the National Labor Relations Act (NLRA)[6] protects workers when they engage in concerted political activity to protect their employment interests. As Justice Lewis Powell expressed it in his opinion for the Court, "Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," and "employees' appeals to legislators to protect their interests as employees" are among the forms of "mutual aid and protection" workers engage in through their unions under the protective mantle of the NLRA.[7] Indeed, unions have just as great and legitimate an interest in public elections involving candidates and ballot measures, which determine lawmaking and public policy, as they do in collective bargaining and the legislative process.

Over the years, the labor movement has led crusades for enactment of the minimum wage and the forty-hour work week, and for laws protecting occupational safety and health, assuring the security of pensions, and prohibiting invidious discrimination in employment. It has done so because union members, acting through the democratic processes of their unions, decided that it was right and proper to do so -- for the sake not just of union members but of all working Americans. Working class and middle class Americans in particular simply can't compete in the political arena with wealthy individuals and large corporations unless they band together through their own organizations. And, today, we in the labor movement continue to advance the interests of working families by leading the effort to preserve and strengthen employee-protective laws; to protect the system of social insurance on which workers and older Americans depend; to put a human face on globalization by promoting fair conditions on international trade; and to stand against proposals that would mute or intimidate the voices of working Americans.

Federal Regulation of Partisan Political Activity by Unions, Corporations and Other Membership Organizations

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[5] Id. at 800.

[6] 29 U.S.C. § 151 et seq.

[7] Eastex, Inc. v. NLRB, 437 U.S. 556, 565-66 (1978).

The Federal Election Campaign Act (FECA)[8] contains parallel provisions governing the political activities of unions and corporations in connection with federal elections, and to a substantial degree those rules also govern other kinds of membership organizations. FECA precludes unions and corporations from using their treasury funds to make contributions to federal candidates or to make independent expenditures expressly advocating election or defeat of clearly identified federal candidates. But FECA also -- in part in consequence of the Supreme Court's landmark decision in Buckley v. Valeo[9] -- expressly permits union or corporate treasury money to be used for the following activities: communications by a labor organization directed at its members, executive and administrative personnel, and their families on any subject, and the same communications right for a corporation to its shareholders, executive and administrative personnel, and their families; non-partisan voter registration and get-out-the-vote campaigns directed by unions and corporations at these same persons, respectively; and the establishment, administration and solicitation of contributions to a separate segregated fund -- commonly known as a political action committee, or PAC -- to be used by the union or corporation to make contributions or independent expenditures.[10]

Unmentioned in FECA, but equally as important as the lawful activities described above, unions and corporations can also use their treasury money to engage in public communications other than the express advocacy of the election or defeat of a clearly identified federal candidate. Commonly referred to as "issue advocacy," these communications may concern legislation, elections or both. The Supreme Court and the lower courts have properly recognized substantial protection for such advocacy,[11] as I discuss later in more detail.

The core associational relationships within a union between and among the union's officers and members enjoy constitutional protection. The Supreme Court recognized over 50 years ago that construing the Federal statutory prohibition on union treasury political contributions and expenditures to cover communications between a union and its members would create "the gravest doubt" as to the statute's constitutionality. Accordingly, the Court construed the law to exclude from its scope a union's expenditure of funds on its own internal newsletter urging union members to vote for a particular candidate for Congress.[12]

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[8] 2 U.S.C. §§ 431 et seq.

[9] 424 U.S. 1 (1976).

[10] 2 U.S.C. § 441b.

[11] See, e.g., Buckley v. Valeo, 424 U.S. at 43-44, 76-80; FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 249-50 (1986); FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997).

[12] U.S. v. C.I.O., 335 U.S. 106, 121 (1948).

And, almost 30 years ago, the Court plainly stated that this exemption "allowing [unions and corporations] to communicate freely with members and shareholders on any subject" by using their general treasuries -- and not just solicited "hard money" contributions, as federal law permits for use for *external* political activity -- was "'required by sound policy *and the Constitution*.'"[13] The Court elaborated:

[13] Pipefitters Local 502 v. U.S., 407 U.S. 385, 431 (1972), quoting Rep. Hansen (emphasis added).

> "Every organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect business and labor . . . . If an organization, whether it be the NAM, the AMA, or the AFL-CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to those members and stockholders. As fiduciaries for their members and stockholders, the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both union members and stockholders have a right to expect this expert guidance."[14]

A union engaged in political activities is "an archetype of an expressive association" protected by the First Amendment.[15]

It is important to note that the parallelism of treatment in FECA of unions and corporations does not mean that they must be regulated in the same manner in the campaign finance sphere. Because of the financial power of business corporations and their lack of internal democratic accountability, the Supreme Court ten years ago upheld a Michigan's statute barring corporations – but not unions – from using treasury funds to make political contributions. The Court concluded that Michigan had a compelling interest in counteracting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[16] According to the Court, the state's requirement that corporate political expenditures be made solely with specially solicited separate funds "ensures that expenditures reflect actual public support for the political ideas espoused by corporations" and, coupled with "the unique state-conferred corporate structure that facilitates the amassing of large treasuries,"

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[14] Id. at 431 n. 42, quoting Rep. Hansen.

[15] Kidwell v. Transportation Communications International Union, 946 F.2d 283, 301 (4th Cir. 1991), cert. denied, 503 U.S. 1005 (1982).

[16] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990).

this is "a sufficiently compelling rationale to support [the] restriction on independent expenditures by corporations."[17]

[17] Id.

The Court recognized "crucial differences between unions and corporations" because employees can decline to be union members and avoid paying for union political expenditures while still receiving the benefits of union representation; contrary to what a corporation may require of its shareholders, "a union may not compel employees to support financially 'union activities beyond those germane to collective bargaining, contract administration, and grievance adjustments'":[18]

> An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury.[19]

The Constitutional Principles Governing "Express Advocacy" and "Issue Advocacy"

In Buckley v. Valeo, the Supreme Court laid out the constitutional principles that govern Congressional efforts to regulate issue advocacy and coordination. The Court made clear that political communications are entitled to the highest degree of protection afforded by the First Amendment:

> [FECA's] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered

[18] Id. at 665, quoting Communications Workers of America v. Beck, 487 U.S. 735, 745 (1988).

[19] Austin v. Michigan Chamber of Commerce, 494 U.S. at 665-66 (emphasis added).

> interchange of ideas for the bringing about of political and social changes desired by the people."[20]

The Buckley Court recognized that election-related speech often involves both partisan and issue commentary:

[20] Id. at 14, quoting Roth v. United States, 354 U.S. 476, 484 (1957). See also 424 U.S. at 15 ("it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

> [T]he distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[21]

In Buckley, the Court addressed FECA's $1,000 annual limitation on what one could expend, independently of a candidate, "relative to a clearly identified candidate." In order to save that statutory language from complete invalidation as too vague under the First Amendment, the Court "construed [it] to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."[22] Even so construed, the Court explicitly recognized that the limitation itself could not be sustained. For, under the First Amendment, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."[23] And, the Court's constitutionally required narrowing construction "undermined the limitation's effectiveness as a loophole-closing provision":

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign.[24]

Accordingly, the Court concluded, "no substantial societal interest would be served" by limiting the one and not the other, yet the other could not be limited at all.[25] And, the Act already dealt with any such expenditures that were coordinated with a candidate by treating them as a contribution to that candidate.[26]

In order to ensure that citizens would not be chilled from discussion of issues during an election campaign, and recognizing that the discussion of public issues is often tied to discussion

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[21] 424 U.S. at 42 (footnote omitted).

[22] Id. at 44 (footnote omitted).

[23] Id. at 45.

[24] Id.

[25] Id.

[26] Id. at 46.

of candidates, particularly incumbents, the Court in Buckley insisted that any restriction of political expression be narrowly and clearly drawn:

> Close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties is an area permeated by First Amendment interests. The test is whether the language of [FECA] affords the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."[27]

Essential to that "specificity," the Court held, was a standard that depended entirely upon the *text* of the communication and did not delve into matters concerning the speaker's intent, whether actual or as perceived by a listener:

> "[W]hether words intended and designed to fall short of invitation [as to how to vote] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[28]

Since Buckley, and particularly in a spate of decisions in recent years, the lower federal courts have strongly confirmed the integrity and necessity of the express-issue advocacy line

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[27] Id. at 41-42, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).

[28] 424 U.S. at 45, quoting Thomas v. Collins, 323 U.S. 516, 535 (1945).

between permissible and impermissible regulation, under both FECA and state campaign finance laws.[29]

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[29] See, e.g., Citizens for Responsible Government v. Davidson, 236 F.3d 1174, 1187, 1194-95 (10th Cir. 2000); Perry v. Bartlett, 231 F.3d 155, 160-62 (4th Cir. 2000); Vermont Right to Life Committee v. Sorrell, 221 F.3d 376, 386-88 (2d Cir. 2000); Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963, 968-70 (8th Cir. 1999); F.E.C. v. Christian Action Network, 110 F.3d 1049, 1051 (4th Cir. 1997); Faucher v. FEC, 928 F.3d 468, 471 (1st Cir. 1991); Maine Right to Life Committee, Inc. v. F.E.C., 914 F. Supp. 8, 12 (D. Me. 1996), aff'd per curiam, 98 F.3d 1 (1st Cir. 1996), cert denied, 522 U.S. 810 (1997).

The Broadcast Censorship Provisions of S. 27, the McCain-Feingold Bill

Sections 201, 203 and 204 of S. 27, the McCain-Feingold bill, would censor unions, corporations, tax-exempt Section 501(c)(4) advocacy groups and Section 527 "soft money" political action committees from engaging in a broad range of vital public non-express advocacy communications. These provisions would prohibit unions and corporations from engaging in a new category of speech, labeled "electioneering communications," which the bill defines as "any broadcast, cable or satellite communication which . . . refers to a clearly identified candidate for federal office" within 60 days of a general election or 30 days of a primary or nominating convention, and whose audience includes some of the electorate. And, the bill would preclude Section 501(c)(4) groups and soft-money PACs as well if the audience of one of their broadcasts "consists primarily" of residents of the candidate's state.[9] The bill leaves wealthy individuals – such as the Wyly brothers of "Republicans for Clean Air" fame – completely unrestricted.

In light of the substantial legal authority described above, it seems strikingly clear that these provisions suffer from a paucity of constitutional support and a surfeit of wishful thinking. Indeed, on the strength of Buckley and later cases, virtually identical regulations adopted by the State of Michigan in 1998 for its own elections were swiftly and emphatically stuck down as unconstitutionally overbroad by two federal judges just days apart.[10] Such restrictions on

[9]The restrictions on unions and corporations are commonly referred to as the "Snowe-Jeffords" language, and the restrictions on the other groups as the "Wellstone amendment," after their respective Senate sponsors.

[10]See Right to Life of Michigan, Inc. v. Miller, 23 F. Supp. 2d 776 (W.D. Mich. 1998); Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998). These twin victories by ideological adversaries paradigmatically illustrate the sweep and unacceptability of such official censorship. See also West Virginians for Life in Smith, 960 F.

candidate-referent speech breach not only the express/issue advocacy line, but also longstanding authority, traceable to the Supreme Court's 1966 Mills v. Alabama decision, precluding restrictions on election-related speech just before an election "when it can be most effective."[11]

Supp 1036 (S.D. W. Va. 1996) (holding unconstitutional a presumption of express advocacy concerning any voter guide, scorecard or other analysis of a candidate's votes or positions distributed within 60 days of an election).

[11]384 U.S. 214, 219. See generally Jowers, Issue Advocacy: If It Cannot Be Regulated When It Is Least Valuable, It Cannot Be Regulated When It Is Most Valuable, 50 Cath. U. L. Rev. 65 (2000).

A law is constitutionally overbroad if it could cause persons "to refrain from constitutionally protected speech or expression" to a degree that is "not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[12] S. 27's proscription of candidate-mentioning broadcasts would preclude: references to sponsors of legislation – indeed, one could be barred from referring to the "McCain-Feingold" or "Shays-Meehan" bill; public appeals to named legislators to vote for or against a pending bill; voter guides or other comparisons of candidate positions; public statements intended to prompt candidates to address, or to commit to sponsor or vote for or against, particular kinds of measures; and a host of other kinds of messages unrelated to the election itself. Plainly, unions, corporations and other groups have engaged in all of these communications at election-proximate times, without using express advocacy language, but would be barred from doing so under S. 27.

Under S. 27, federal officeholders would have a strong incentive to schedule their consideration of legislation when unions and corporations are effectively silenced. Congress already customarily stays in session until just before general elections, considering important legislation and making major appropriations decisions. Primary elections and political conventions take place throughout every election year, covering much of an entire congressional session. But through S. 27, Congress would create multiple "blackout" zones and could then schedule votes on legislation just before an election or convention when those most affected by them are least able to speak out. For example, Congress could schedule a vote on a bill restricting the right to organize a union, or a bill imposing new taxes on selected industries. Or, because unions are effective proponents of worker protection legislation such as minimum wage increases and stronger health and safety standards, Congress could debate and decide those matters when the union voice is largely stilled. In 1996, union-paid broadcast advertising that named many incumbent members – all "clearly identified candidate[s]" – helped foster a political climate that led the then-all conservative Republican Congress to bring up and approve the last increase in the minimum wage. S. 27 would provide a powerful tool for Congress to escape such pressure.

S. 27's censorship provisions are also constitutionally flawed because they would accord federal candidates and the media a near-monopoly on the right to comment effectively on issues, elections and candidates. Indeed, S. 27 reflects a dangerous proposition that "too much" -- and, indeed, *any* -- speech from certain sources that addresses issues, mentions federal candidates or influences the public undermines the electoral process and should instead be the principal province of federal candidates and the media. Federal candidates should not have the prerogative of silencing commentary about themselves and their positions, *especially* just before elections when public interest and attention are at their peak. Nor should unions and corporations be excluded from the debates that determine what issues shape an election. Under the First Amendment and our democratic tradition, *all* citizens and groups have the right to express themselves and to be heard on these important matters. But under S. 27, unions and corporations

[12] Broadrick v. Oklahoma, 413 U.S. 601, 612, 615 (1973).

could not in an election period effectively seek to press candidates to address issues they have chosen to ignore. Or, just before an election a federal candidate could publicize as an election issue his opponent's allegedly improper relationship with a named corporation, or campaign on the need to curtail the power of a named union, yet neither the corporation nor the union could effectively respond.

S. 27's censorship provisions are also suspect under the Equal Protection Clause because they would exempt so-called "electioneering communications" in the form of a broadcasting station's own news stories, commentaries and editorials. S. 27 evidently includes this exemption for two reasons: it is obviously required by the First Amendment, and the powerful broadcast industry would otherwise oppose it. But the First Amendment does *not* distinguish among speakers who engage in issue advocacy -- *all* are protected.[13] Yet media conglomerates -- which are among the largest and most influential corporations -- would be free to broadcast references to federal candidates in order to advance their own commercial interests, while all other corporations, and all unions, would be silenced.

The fundamentally flawed rationale underlying the S. 27 censorship provisions – that corporations and unions must be stopped from exploiting the supposed "loophole" created by the Supreme Court's "express advocacy" standard -- necessarily extends to *non*-broadcast means of communications as well. But if S. 27 passes, these organization could, and likely would, dramatically increase their use of non-broadcast outlets -- such as newspaper and magazine ads, billboards, leaflets and even mail -- to influence legislation, public policy and electoral issues. Would these be censored next? And, if not, due to First Amendment concerns, how is the censorship provision in S. 27 any different -- because broadcast is a *more* effective means of communication?

In at least a tacit acknowledgment of the suspect constitutionality of the scope of proscribed "electioneering communications," the Senate adopted an amendment proposed by Senator Specter that would trigger an alternate definition of this concept if the basic Snowe-Jeffords formulation is struck down by a final judicial decision. This alternate definition includes:

> [A]ny broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against the candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in the

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[13] See generally First National Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978).

subsection shall be construed to affect the interpretation or application of Section 100.22(b) of Title 11, Code of Federal Regulations."[14]

The phrases "promotes or supports" and "attacks or opposes" are also found in the third prong of S. 27's definition of "Federal election activity," the key concept defining what activities state and local political parties cannot finance with soft money. We believe that these phrases are far too vague and subjective to withstand constitutional scrutiny, as there can be a considerable difference of opinion as to whether particular language so qualifies and no firm guidance as to how to couch language so as to avoid violating this supposed standard.

[14]S. 27, Section 201 (new 2 U.S.C. §434(f)(3)(A)(ii)).

The proponents of the Snowe-Jeffords restrictions on unions and corporations customarily raise several arguments in their constitutional defense,[15] which I now briefly address.

First, it is argued, Buckley didn't establish an exclusive "magic words" test for express advocacy, but merely formulated that test in order to save particular overly vague legislative language; Congress can always devise a different, more precise line. But the Buckley test, in fact, was a necessary construct to avoid vagueness and overbreadth. The Supreme Court's and the lower appellate courts' treatment of this issue since Buckley simply leave no room for Congress or any legislative body to draw a different line. And, although the Snowe-Jeffords line is indeed precise, as discussed above it is hopelessly overbroad.

Second, however, proponents of the S. 27 censorship provisions claim that they are narrowly written to ban only "sham issue ads." But the bill would eradicate union and corporate speech indiscriminately, merely because, during certain periods of time, a communication mentions a candidate -- regardless of the broadcast's actual message, its other content or the surrounding circumstances.

[15]These arguments are reflected, for example, in Wertheimer and Simon, "Memorandum on the Constitutionally of the McCain-Feingold Campaign Finance Reform Bill" (February 26, 2001); Scholars' Letter to Senators McCain and Feingold (March 12, 2001); Moramarco, "Regulating Electioneering: Distinguishing Between 'Express Advocacy' & 'Issue Advocacy'" (Brennan Center for Justice 1998).

Proponents of the "sham" notion have recently seized upon analyses of 1998 and 2000 broadcast advertising that utilized teams of "coders" to watch non-express advocacy ads and make admittedly "subjective" determinations as to the "purpose (to support a particular candidate or express a view on an issue) and tone (promote, attack, or contrast) of an ad."[16] Their conclusions: within the 60-day, pre-general election period in 1998, the incidence of "genuine" issue ads was 6.9%, comprising 13.8% of all ad airings and 19.3% of their cost; and the respective 2000 figures were 1.6%, 0.5% and 0.8%.[17] As even a sympathetic legal commentator acknowledged, the subjectivity of this "coding" renders these figures questionable as an empirical matter.[18]

More to the constitutional point, Buckley squarely rejected using subjective interpretations of political speech as a legitimate basis for regulation.[19] And, fundamentally, the assumption that an ad that is supportive or critical of a named candidate is an "electioneering" or "sham issue" ad, whereas one that is somehow "neutral" marks a line between the illegitimate discussion of candidates and the legitimate discussion of issues simply ignores the unavoidable reality, recognized in Buckley, that this distinction often "dissolves in practical application." It is notable that one of the few "genuine" so-called issue ads identified in the studies just described was a television broadcast that urged viewers to tell both named U.S. Senate candidates in

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[16]Krasmo and Goldstein, "Facts About Television Advertising and the McCain-Feingold Bill." See also Krasmo and Seltz, "Buying Time: Television Advertising in the 1998 Congressional Elections" (Brennan Center for Justice 2000).

[17]Hasen, "Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy," Minn. L. Rev. 2001 at 19-21 (forthcoming).

[18]Id. at 16-17, 21, 22.

[19]See 424 U.S. at 45.

Nevada "no matter who goes to Washington you want them to cut your taxes"[20] – S. 27, of course, would outlaw this ad because it referred to the candidates by name.

Third, S. 27's proponents argue that since the Supreme Court has already held that corporate and union contributions and expenditures can be prohibited, further restrictions on their election-influencing issue advocacy are constitutional as well. But that facile conclusion fails for the same reason as do the other arguments: a bright-line test is necessary, and only express advocacy by these institutions may be restricted, even if some of their non-express advocacy is intended to or does influence an election in some manner.

[20]Quoted in Hasen, supra, at 18.

Finally, S. 27's proponents contend that unions and corporations would still have the option of spending PAC money on broadcast communications. But broadcast time is very expensive, and PAC money must be separately raised as individual contributions from union members or corporate shareholders and executives. Forcing resort to such measures, "while . . . not an absolute restriction on speech, is a substantial one."[21] Also, PAC money is principally used for lawful candidate and party contributions closely regulated by the FEC; in fact, under federal tax law, unless PAC spending is used solely to influence elections, not legislation or public policy, it is subject to a 36% tax levy.[22] Also, under federal law, a national union and all of its local union affiliates together can sponsor only a single federal PAC, with strict limits on contributions to it; and, similar rules apply to a corporation and all of its subsidiaries.[23] Many unions and corporations don't even have a PAC, or the means or desire to create one. The consequence of confining issue advocacy to PACs would be a dramatic national silencing of many thousands, if not millions, of unions, corporations and other groups.

The Censorship Provisions of H.R. 380, the Shays-Meehan Bill

Section 201 of the Shays-Meehan bill takes an even broader approach to S. 27 in banning certain issue advocacy, presenting three alternative definitions of express advocacy in order to expand its scope and, therefore, the scope of what FECA precludes unions and corporations from engaging in.

First, express advocacy is defined as a reference to "one or more clearly identified candidates in a paid advertisement" broadcast on radio or television within 60 days of an election. This version is unconstitutionally overbroad for the reasons stated earlier.

Second, express advocacy is defined as "a phrase such as 'vote for', 're-elect', 'support', 'cast your ballot for', '(name of candidate) for Congress', '(name of candidate) in 1997', 'vote against', 'defeat', 'reject', or a campaign slogan or words that in context can have no reasonable meaning other than to advocate the election or defeat of one or more clearly identified candidates." This alternative is *not* limited to broadcasts or any other medium. The enumerated phrases in the first clause are constitutional definitions under Buckley.[24] But the second clause ("or words that in context . . .") is a slight variation of an FEC regulation, 11 C.F.R. §100.22(b),

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[21] FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. at 252. The Supreme Court rejected the same argument when it was raised to justify FECA's prohibition of non-profit, non-shareholder ideological corporations from spending their treasury funds on independent expenditures.

[22] See 26 U.S.C. §527.

[23] See 2 U.S.C. §§441a(a)(2) and (5).

[24] See 424 U.S. at 44 and n. 52.

that the federal courts have repeatedly (and uniformly) concluded is unconstitutionally vague or overbroad.[25]

Finally, express advocacy is defined, also without limitation to any medium, as "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as whole and with limited reference to external events, such as proximity to an election." This alternative, also modeled on 11 C.F.R. §100.22(b), suffers from the same constitutional flaws as the second alternative.

The Constitutional Principles Governing Regulation of "Coordination" Between Candidates and Outside Groups

The constitutional principles that public political communications are entitled to the highest degree of protection under the First Amendment, and that any restriction imposed on such communications therefore must be narrowly and precisely drawn must also guide any legislative effort to regulate public political communications "coordinated" with candidates. The dangers inherent in overbroad regulation of political communications are just as applicable to coordinated communications as they are to the independent expenditures involved in Buckley, if not more so.

In fact, introduction of the element of "coordination" adds a second level of uncertainty that not only may chill the communications themselves but may also inhibit the equally important First Amendment right of citizens to meet with their elected officials. As the First Circuit recognized in rejecting the Federal Election Commission's overly broad regulatory definition of coordination as applied to voter guides and voting records:

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[25]See FEC v. Christian Action Network; Maine Right to Life Committee, Inc. v. FEC; Virginia Society for Human Life, Inc. v. FEC, 83 F. Supp. 2d 668, 675-78 (E.D. Va. 2000); Right to Life of Dutchess County, Inc. v. FEC, 6 F. Supp. 2d 248 (S.D.N.Y. 1998). The only arguably contrary authority, FEC v. Furgatch, 807 F. 2d 857, 864-65 (9th Cir.), cert. denied, 484 U.S. 850 (1987), has been interpreted too broadly by the FEC in promulgating this regulation – and now apparently, by the Shays-Meehan bill in redefining express advocacy – as the Fourth Circuit convincingly discussed in FEC v. Christian Action Network, 110 F. 3d at 1052-55.

> We think [the FEC rule prohibiting oral contact with candidates] is patently offensive to the First Amendment in a different aspect: it treads heavily upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office... It is hard to find direct precedent only because efforts to restrict this right to communicate freely are so rare. But we think that it is beyond reasonable belief that, to prevent corruption or illicit coordination, the government could prohibit voluntary discussions between citizens and their legislators and candidates on public issues... It is no business of executive branch agencies to dictate the form in which free citizens can confer with their legislative representatives.[26]

In addition to having the potential to chill the exercise of free speech and free association, the regulation of "coordinated" communications — under which communications may be found to violate federal criminal and civil law because of the speaker's activities and relationships *external* to the communications themselves — poses a far greater threat of government intrusion into protected political activities than a regulation based solely on the content of the political communications. In its investigation into alleged "coordination," the Commission has used its subpoena power to seek to identify, and inquire into the details of, virtually every contact between a corporation or union, acting through its officers, directors, members and allies, and a candidate, political party, or anyone else who might be acting on the candidate's behalf.[27]

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[26] Clifton v. F.E.C., 114 F.3d 1309, 1314 (1st Cir. 1997), cert. denied, 522 U.S. 1108 (1998).

[27] For example, the Commission adopted the so-called "common vendor" theory under which the opportunity for coordination may be shown simply by a corporation's or union's use of a political consultant, pollster, media buyer or other vendor who also has ties to a candidate or party. See, e.g., Advisory Opinion 1979-80. The Commission has relied on this theory of coordination to seek access to all communications between corporations or unions and their political consultants in an effort to determine whether coordination has occurred. See, e.g.,

Democratic Senatorial Campaign Committee v. F.E.C., 745 F. Supp. 742 (D.D.C. 1990) (FEC's General Counsel recommended that the Commission open a full investigation into possible coordination between trade association PAC and Senate candidate because of "unanswered questions regarding possible connections between the [candidate] committee and [association] and the two common vendors").

The dangers to the First Amendment posed by such broad government investigations of political activity have been recognized time and again by the federal courts. "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas."[28] Indeed, one federal appellate court held that FECA did not apply to so-called "draft committees" principally because this would allow a dramatic expansion of the FEC's authority to intrude into citizens' First Amendment activities:

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. . . . [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.[29]

In a recent highly influential decision, Judge Joyce Hens Green analyzed the FEC's enforcement of its coordination theories during an exhaustive investigation of the Christian Coalition, concluding that the definition of "coordination" applicable to general public communications under FECA "must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative *quid pro quo* palpable without chilling protected contact between candidates and corporations and unions."[30] Judge Green adopted the following standard:

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[28] Sweezy v. New Hampshire, 354 U.S. 234, 245 (1957) (Frankfurter, J., concurring).

[29] FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 388 (D.C. Cir.) (footnote omitted), cert denied, 454 U.S. 897 (1981). See also FEC v. LaRouche Campaign, 817 F.2d 233, 234 (2d Cir. 1987).

[30] FEC v. Christian Coalition, 52 F. Supp. 2d 45, 88-89 (D.D.C. 1999).

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g. choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots).[31]

The FEC decided not to appeal this decision and, instead, essentially embraced it in a rulemaking that just a few weeks ago resulted in a first-ever regulatory definition of "coordination."[32] And, the FEC's acquiescence in the decision led last year to its terminating -- without a finding of probable cause to believe that FECA was violated -- lengthy and intrusive investigations of the 1996 political advocacy and associational activities of the AFL-CIO and various Democratic Party committees; and, just this week it was reported that the FEC has since dropped a similar investigation into the 1996 activities of various business groups and Republican Party committees.[33]

In light of the controlling constitutional authority described above, the AFL-CIO believes that a lawful and practically workable "coordination" standard under FECA requires that a finding of coordination:

1. Arise only from an individual's or group's actual contacts with a federal candidate:

- *In his or her capacity as a candidate (**not** as a legislator or other incumbent officeholder) and*
- *Where the candidate requests, suggests or authorizes, or the candidate negotiates and agrees with the group -- **not** has contacts that merely provide information or that might be interpreted to generate an unarticulated "understanding" -- concerning particular public communications that the group might undertake; **and***

*2. Apply only to an individual's or group's public communications (**not** vaguely described "activities" or "payments" of unbounded scope) that:*

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[31] Id. at 92.

[32] 66 Fed. Reg. 23537 (May 9, 2001); 65 Fed. Reg. 76138 (December 6, 2000).

[33] Bureau of National Affairs, Money & Politics Report, "FEC Closes Long-Running Probe of GOP Links to Business Groups" (June 11, 2001).

- *Refer either to a candidate in his capacity as a candidate or to the election otherwise,* ***not*** *to communications addressing legislative and other matters; and*

- *Are directed, in whole or in part, to the candidate's electorate;* ***and***

3. Exempt contacts with a federal candidate concerning legislative and other policy matters or the candidate's positions on public issues, regardless of whether the group utilizes the contacts for lobbying; preparation of published voting records and voter guides; or other uses, so long as there are no overt dealings with the candidate (as described just above) concerning the group's potential public communications.

The "Coordination" Provisions of S. 27

The coordination provisions in S. 27, the McCain-Feingold bill as originally introduced last January, are identical to those in H.R. 380, the Shays-Meehan bill. In the face of substantial criticism of those provisions from groups spanning the political spectrum, S. 27's sponsors proposed a substitute amendment containing a different coordination standard and regulatory disposition. As passed, S. 27 defines a "coordinated expenditure or other disbursement" as a payment made "in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with" a candidate or party; rejects any requirement of "collaboration or agreement" as a component of coordination; repeals the new FEC coordination regulations; and directs the FEC to undertake a new rulemaking that conforms with S. 27 and addresses at least five specific topics.[34]

Although this replacement language marks a significant improvement over the original amendment, at least two significant First Amendment issues lurk. The first arises from the S. 27 standard's application to coordinate expenditures and disbursements if they are made "in connection with an election, regardless of whether the expenditure or disbursement is for a communication that contains express advocacy." The phrase "in connection with an election" contains strong echoes of two phrases in the original FECA: the $1,000 annual limitation on private expenditures "relative to a clearly identified candidate," and compelled disclosure of private expenditures made "for the purpose of . . . influencing" the nomination or election of candidates. The Buckley Court construed both phrases to apply only to express advocacy communications in order to save these phrases from complete invalidation due to unconstitutional overbreadth.[35] Relying on Buckley, the Court in FEC v. Massachusetts Citizens

[34]S. 27, Sec. 214(a)(1), (proposed 2 U.S.C. §431(8)(A)(iv).

[35]Buckley v. Valeo, 424 U.S. at 40-45, 76-80.

for Life for the same reasons construed FECA's prohibition of a corporate (or union) "expenditure in connection with any election" to be limited to express advocacy communications.[36]

In apparently irreconcilable contrast, however, the new S. 27 language -- identical to that in Massachusetts Citizens for Life -- specifically rejects such a saving limitation. This raises the very real possibility that it will be invalidated entirely on the ground that it has no constitutionally valid meaning whatsoever.

[36] 479 U.S. at 248-49.

Second, S. 27 defines coordination to include, in part, "any general or particular understanding" between the spender and a candidate or a party. Although the Supreme Court used this phase in Colorado Republic Federal Campaign Committee v. FEC,[37] it did so only in passing to describe the particular communication at issue. The Court did not propose this phrase as a standard to define coordination, in whole or in part. Unlike action words like "concert", "cooperation", "request" and "suggestion", the word "understanding" imports notions of intent and unspoken agreements not attributable to overt dealings between parties. Such a standard potentially chills ordinary communications between candidates and outside groups. These considerations rightly led the district court in the Christian Coalition case to reject what it called the FEC's "insider trading" or "conspiracy" standard under which, as the court described it, "any consultation between a potential spender and a federal candidate's campaign organization about the candidate's plans, projects, or needs renders any subsequent expenditures made for the purposes of influencing the election 'coordinated,' i.e., contributions."[38] The court found this theory overbroad because it could "sweep[] in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters."[39] Because "discussion of campaign strategy and discussion of policy issues are hardly two easy distinguishable subjects," the court held that the FEC's approach would burden and threaten the ability of candidates and constituents to confer without triggering adverse conclusions about unlawful coordination.[40] We suggest that the same analysis squarely applies to the undefined phrase "general or particular understanding."[41]

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[37] 518 U.S. 604, 614 (1996).

[38] FEC v. Christian Coalition, Inc., 52 F. Supp. 2d at 89 (footnote omitted).

[39] Id. at 90.

[40] Id.

[41] Notably, a Lexis search of the U.S. Code finds no statute that uses the phrases "general or particular understanding" or "particular understanding," and just one that uses the phrase

"general understanding," but with the completely distinct meaning of comprehension of a scientific phenomenon. See 16 U.S.C. §1361 (notes concerning history and ancillary laws and directives).

I should also mention one other point about the S. 27 coordination provision. It lists five topics for the FEC to address in a new rulemaking, although, in Senator Feingold's words, "it doesn't require the FEC to come out in any certain way or come to any definite conclusion one way or another."[42] One of the topics to be addressed is "the impact of coordinating internal communications by any person to its restricted class has on any subsequent 'Federal election activity'" as defined in FECA, as amended. As noted earlier, under FECA it is lawful for a union or corporation to coordinate partisan communications with its restricted class with the candidate. For some years, however, the FEC has had a regulation stating that such coordinated internal communications "may be considered evidence that could negate the independence of subsequent communications to those outside the restricted class by the corporation, labor organization or its separate segregated fund." 11 C.F.R. §114.2(c). This provision has always been constitutionally suspect, given its inherent deterrence of lawful internal communications. Now, however, S. 27 would link this with a new concept, "Federal election activity," which S. 27 defines quite broadly to include a host of political activities, both nonpartisan and partisan, including voter registration within 120 days of a federal election; voter identification, get-out-the-vote activities and generic party promotion activities at any time; and any public communication that refer to clearly identified candidates and that "promotes or supports a candidate . . . or attacks or opposes a candidate," regardless of whether it includes express advocacy.[43] This instruction to the FEC should be dropped.

The "Coordination" Provisions of H.R. 380

Let me now turn to the "coordination" provisions in Section 206 of H.R. 380, the Shays-Meehan bill, which are identical to those originally included in S. 27. Section 206 defines a "[c]oordinated activity" as "anything of value" (regardless whether it involves express advocacy) provided in connection with a federal candidate's election by an individual or entity that has acted in the same election cycle in coordination with the candidate or a candidate' agent on any campaign activity in connection with the election. Coordinated activity is both a contribution to the candidate and a (reportable) expenditure by the candidate. A "coordinated activity" includes a "payment made" by an individual or entity:

a. "[I]n cooperation, consultation or concert with, at the request or suggestion of, or pursuant to any general or particular understanding with" a candidate, the candidate's authorized committee or the candidate's party, or any agent of any of them;

[42] 147 Cong. Rec. S 3185 (daily ed. March 30, 2001).

[43] S. 27, Section 101 (new, FECA Section 323(b)).

b. To reproduce or distribute a candidate's campaign materials, *except* republication of website material costing less than $1,000;

c. That during the same election cycle has served as the candidate's employee, fundraiser or agent in an executive or policymaking capacity, *or* that has discussed with the candidate, the candidate's agent or a political party that's coordinating with the candidate the candidate's "campaign strategy and tactics, including a discussion about advertising, message, allocation of resources, fundraising or campaign operations," on more than incidental basis; *or*

d. For "professional services" (polling, media advice, fundraising, research, political advice or direct mail) related to a candidate's campaign performed by an individual or entity that in same election cycle has performed such services for the candidate.

This proposed coordination standard is hopelessly convoluted and, the AFL-CIO believes, constitutionally infirm, banning and even criminalizing as it would a broad range of political and legislative activity and advocacy, and substantially chilling routine citizen and group contacts with federal officeholders, candidates and political parties.

Instead of predicating a "coordination" finding on a group's or individual's actual contact with a federal candidate about a particular public communication, Section 206 adopts an irrebuttable presumption that any act of "coordination" during an election cycle automatically converts a broad and loosely defined range of subsequent activities into "coordinated activity," regardless of whether the group or individual actually had any contact with the candidate about them. But the Supreme Court has squarely rejected the notion that coordination may simply be presumed and thereby regulated, holding in the Colorado Republican case that no such presumption could be made about the electoral activities of political parties and their candidates.[44] If the presumption in that context could not be made, there seems no possibility of its legal validity in the context of the political relationship between candidates and outside groups.

Section 206 would also erect artificial and undesirable walls separating individuals, non-profit organizations, unions, corporations and charities from federal officeholders, candidates and political parties because of the risk contacts between them would pose to a group's or individual's subsequent actions. Section 206 also equates -- again, directly contrary to Colorado Republican -- a "political party that is coordinating with the candidate" with the candidate himself. That means an individual or group that met with a party official about any significant aspect of a federal candidate's campaign would become entangled in all of the consequences described above -- chilling a broad range of ordinary and essential contacts between citizens and groups and political parties.

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[44]Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. at 619-23.

Let me illustrate, with two hypothetical examples, how Section 206 could undermine the speech and associational freedoms of unions, other membership organizations and corporations.

Example A: An official from a non-profit organization, a union or a corporation speaks with a newly elected U.S. Senator about the Senator's plans and the record she hopes to present to voters when she runs for reelection six years later. As a result of this conversation, *for the remainder of her six-year term,* the non-profit organization, union or corporation would be barred from -- and risk criminal prosecution for -- doing any of the following:

- Engaging in joint public efforts with the Senator to advance important legislative and policy goals.
- Undertaking non-partisan voter registration or get-out-the-vote activity in her state.
- Distributing a voter guide comparing her and her opponent's positions on key issues.
- Distributing a voting record listing the Senator's votes on key issues.
- Providing the candidate with the organization's written policy analyses and legislative recommendations for the candidate's consideration in taking campaign positions.
- Publicly advocating that the Senator or another candidate in the election address or commit to take positions on particular issues during the next campaign.
- Publicly praising, criticizing or otherwise commenting on the Senator's legislative actions and positions.
- Posting anything on its website that does any of the above.

Example B: The state branch of a national civic organization meets in the state with a U.S. Senator's in-state staff about whether the state branch will endorse the Senator for reelection the following year. Eight months later, and before an endorsement is made, a national officer of the organization meets with the Senator in Washington and learns that the Senator intends to vote against an important bill that the group supports and on which the Senate appears closely divided. Because of the group's initial meeting in the state, the organization would be barred from, and risk criminal prosecution until the next election for, *all of the activities and advocacy listed above,* and, more specifically:

- Holding rallies and financing ads in state newspapers promoting the bill and urging the public to call on the Senator to support the bill.

- Criticizing the Senator publicly for voting against the bill, or praising her opponent's position in favor of the bill.

- Circulating a voter's guide comparing the candidate's positions on this (and any other) bill, or circulating a voting record that highlights this (and any other) vote.

Section 206 would also have a chilling effect on a group's lawfully coordinated internal membership communications because they would trigger unlawful "coordinated activity" status of the group's subsequent actions. Under federal law, a union or other non-profit membership group can lawfully coordinate with a federal candidate when the group engages in internal membership communications, such as newsletters containing electoral advocacy or sponsorship of the candidate's appearance at a membership meeting. Business corporations likewise can

coordinate with federal candidates in their communications with shareholders and executives.[45] But under Section 206, any such internal "coordinated activity" would render unlawful all future conduct that might be regarded, even in part, to have any "connection" with the next election. That exacts a constitutionally untenable price.

In light of the FECA enforcement scheme, Section 206 would expose a dramatically broaden array of ordinary political and legislative activities and public advocacy to intrusive government investigations and the risk of criminal penalties. The new "coordination" rules would invite harassment of individuals, unions, non-profit organizations, corporations, charities and other groups by their critics and political adversaries, any of whom could file a complaint with the FEC alleging unlawful coordination. An FEC investigation could then probe all aspects of both the organization's contacts with federal candidates and its internal workings in order to ferret out whether improper "coordination" occurred. And, because FECA provides for both civil and criminal enforcement against violators, Section 206 would criminalize basic and routine political and legislative conduct.

The AFL-CIO recommends that the House, like the Senate, reject the approach to coordination embodied in Section 206.

Conclusion

The AFL-CIO fully supports the legislative goal of revising our campaign finance laws to address real problems. We urge the Congress to do so without imposing unconstitutional and ill-conceived barriers on the speech and associational activities of working families and their unions.

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[45]See 2 U.S.C. §441b(b)(2)(A); 11 C.F.R. §114.2(c).

The CHAIRMAN. Again, all additional statements we have, without objection, will be entered into the record.

We will start with Mr. Linder.

Mr. LINDER. Thank you, Mr. Chairman.

Mr. Gold, you favor the elimination or the use of soft money for political parties. Do you favor the inability to use soft money for unions?

Mr. GOLD. Well, I think there is a substantial difference between these two concepts. The words "soft money"——

Mr. LINDER. I just asked you a question. Do you favor the elimination or the use of unregulated money for unions as you do for political parties?

Mr. GOLD. Well, if you are saying we cannot spend our money on anything, of course I do not favor it.

Mr. LINDER. I am saying, you want to eliminate what political parties can use—in fact, you want to say that they cannot use unregulated dollars in political activity. That is what you are in favor of, according to your testimony. Are you willing to say that unions should not be able to use unregulated dollars in political activity, also?

Mr. GOLD. No, Mr. Linder. If you are referring to our own treasury money and our own ability to communicate with our members on political issues and other issues, our ability to talk to the public about what we believe and to promote legislation and that sort of thing, we certainly do not favor that. But we are talking about—we are comparing apples and oranges here.

Mr. LINDER. Political parties cannot do it, unions can.

Mr. GOLD. What we favor is that private donations of soft money to national political parties be banned. We do not favor the same with respect to State and local parties, and we have some issues to raise with the pending legislation that we have not covered yet today.

Mr. LINDER. There are three exceptions for the use of soft money in political parties and other interested parties, and that is you can use it to administer your PAC, which I assume the union does, use treasury money; you can use it for party billing activities such as turn out the vote and voter education and voter registration; and you can use it for communicating with your membership. The union uses all three of those categories.

Why do you want to eliminate those opportunities for political parties when you are charged with the responsibility, it seems, to put together the system, and you want to continue to use it for yourself?

Mr. GOLD. Well, there is a difference between our own ability—a union's ability to spend money that it derives from dues, per capita taxes, and I guess, whatever interest is earned on accounts. That is the money flow that arises from the union's existence as an associational voluntary membership organization.

Mr. LINDER. Is it voluntary?

Mr. GOLD. We believe—if I may finish, we believe that there is a difference between that and mass and unlimited transfers of cash from private interests to political parties or to committees that are controlled by candidates. We believe that in regulating elections and regulating campaign finance you can draw a line that says

that that can be limited, but when you are talking about a union or any other membership organization—I mean, unions and membership organizations are very much the same here. If you are talking about their own ability to raise money from their own members through the ordinary course of their own operations and spend their money on all sorts of matters, not including contributions to candidates and parties, because we are, of course, barred from using that money in a contribution to a candidate or a party, that is entirely proper, and it is very different than the circumstance I believe you are describing.

Mr. LINDER. Well, I would suggest that most union members do not make voluntary contributions in their dues. I expect that is pretty mandatory. You have about an $8.5 billion cash flow when you take all the unions together and you use it as you see fit, including using it for voting against candidates that 42 percent of your membership votes for.

Mr. Gora, you said my favorite five words in the Constitution: "Congress shall make no law." We could stop right there.

Mr. GORA. Pretty much.

Mr. LINDER. You said the Second Circuit Court decided on the Nixon ad. Has any other court overruled that since then?

Mr. GORA. No. In fact, that case was followed in other lower court decisions prior to *Buckley*. It was followed in the decision I mentioned to Congressman Hoyer, where we knocked out the disclosure provision of the *Buckley* bill, and it was cited in *Buckley* as part of the Court's reasoning for developing the express advocacy doctrine that says, any speech about politicians other than expressly advocating their election or defeat is completely free.

One other point—and it has been followed by dozens of cases. Mr. Bopp's testimony contains a list of dozens of cases ever since. I mean, if there is any doctrine in this area that is clear, it is that doctrine.

Mr. LINDER. You talked about the illegal coordination of outside groups in writing legislation. Would that have applied to the environmental groups in the 1980s when they sat down with the members of the Resources Committee and drafted the environmental laws?

Mr. GORA. I think it would, Mr. Linder. I think the language on coordination, once one can fathom it, is so broad in the kinds of contexts between citizens' groups and members that would render the contacts coordination, that any kind of discussion—I mean, I think that is one of the most pernicious parts of the bill. The part that bans ads on television, we can all get the sense that that is a ban and probably violates the first amendment. I think that will pretty clearly be declared unconstitutional. But it is hard to understand the perniciousness of the coordination rules.

But when I speak to our full-time legislative representatives here in Washington, for the ACLU, and they describe to me what this bill would do to them and how it would chill and structure conversations they have with Members of Congress about civil liberties legislation, it really is frightening. I am glad I am not a lobbyist to have to live under this bill were it enacted.

Mr. LINDER. You mentioned the NAACP ad, which is probably one of the most egregious affronts that I have seen in my 27 years

of this business. I do not think I know a single person who paid for that ad. Was it ever reported anywhere?

Mr. GORA. I am not aware of the funding of the ad, nor should I be entitled to know the funding of the ad.

Mr. LINDER. Would this bill force the disclosure of the funding of that ad?

Mr. GORA. I think the bill would do two things. As written, it would make it a crime for the NAACP to sponsor an ad, because it is a corporation and corporations are barred from running ads that are deemed to be election ads by this new definition. But even were there some way that you could reconfigure the NAACP into a PAC, then the first requirement would be disclosure of anybody who gives more than $200 and, of course, anybody who gives excessive amounts to fund an ad like that would have to have their name disclosed.

Again, I think the irony, you could cut it with a knife, that it was the NAACP that established through Supreme Court decisions the right of associational privacy, that the government cannot learn who members of issue groups are because it might chill and deter people from wanting to join those groups and make those contributions for fear of harm from the disclosure of their association.

Mr. LINDER. Ms. Mitchell, you mentioned $73 million spent to pass laws. I have seen some of your writing on this. We have talked about it once or twice. Are those dollars subject to disclosure and regulation?

Ms. MITCHELL. Part of them. The dollars that are given to—they are not subject to any kind of regulation. The dollars that are given, the bulk of the dollars were given by private charitable foundations to 501(c)(3) entities, and those are disclosed really by looking at the annual reports of the charitable donors, not the recipients.

Some of them do actually disclose who they get money from. The campaign finance groups will say who they get money from. Common Cause will tell you they have spent X amount over a period of years, but it is not required to be disclosed, no. In fact, while you are required—a charitable entity, a 501(c)(3) or (4), has to tell the IRS if they get a contribution of over $5,000 and who it is from. They are not required to make that information public.

Mr. LINDER. Thank you.

Mr. Simon, you said that the provisions in this bill are clearly constitutional. Have they even been held to be constitutional, and is that not the job of a court?

Mr. SIMON. Well, I said that the soft money provisions in my opinion were clearly constitutional. I think the *Buckley* case and the *Shrink Missouri* case clearly do stand for the proposition that contributions to the political parties can be limited because those limits are compelling public purposes.

Mr. LINDER. Thank you.

Mr. Gold, one more point, if I might.

Dr. Troy at Rutgers has followed union spending for some time. I am sure you heard his name before——

Mr. GOLD. Yes. I testified with him last year before Senator McConnell.

Mr. LINDER [continuing]. And I believe he suggested that over the last several cycles unions have spent somewhere in the range of $500 million to $600 million each cycle of soft money influencing elections.

I can tell you from personal experience that in several districts across the country you folks paid for 15 or 20 young people—you paid their room and board and salaries and travel expenses—to spend all year and three months in one person's district to influence that election under party-building activities. Did you ever report that?

Mr. GOLD. Sir, that was not party-building activities. That is under a provision of the Federal Election Campaign Act that says unions and corporations and membership organizations cannot be and are not restrained in their ability to spend their resources to communicate with their members on any subject, political or otherwise.

Mr. LINDER. So going door to door in a community is communicating with members?

Mr. GOLD. We do not go door to door communicating with the community; we may go door to door, but it is with our own members. The premise of your question is factually incorrect.

If I may say about unions, we are voluntary membership organizations. Dr. Troy's figures are purely of his own imagination. I do not know what the figures are, and what he calls political I think way overstates what truly is.

Unions are operated—all of our officers are elected by secret ballot. Our members have legally enforceable Federal rights to participate in our organizations. These are rules that do not apply to any other membership organizations, most of which operate with self-perpetuating boards, and they certainly do not apply to corporations, which are funded in a completely different manner and whose soft money, I should point out, dwarfs that of the entire labor movement probably thousands of times over. We are not looking to restrict their ability to speak, their ability to communicate, their ability to lobby, as these bills do, any more than we think we should be restricted

Mr. LINDER. Let me point out that it is against the law for corporations to demand dues from their membership in order to put it to action into political activity. They can get voluntary contributions only, not dues.

Mr. GOLD. And we do the same.

Mr. LINDER. Let me just point out that I was, in 1998, in maybe three or four districts where you had young people on the ground going door to door and they seemed to not know which door was always owned by a union member, because they were going to a lot of other doors, too.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Hoyer.

Mr. HOYER. I do not have time to fully develop what I think you said there, comparing whatever unions spend and what corporations spend in advocacy, however one might describe it. I am not going to get into a legal definition, but it is at least 10 to 1 at a very minimum. You said maybe 1,000 times, I do not know if that is a case, but do we have a figure on that? I think I'll recall it——

Mr. GOLD. Well, yes. The figure I was referring to, when I say dwarfed by a factor of thousands to 1, I am referring to available assets. I do not know that the figures have been added up, although I think the Labor Department has them.

Mr. HOYER. It is an interesting theory, but there is an extraordinary discrepancy between what corporations who have a fiduciary responsibility to their stockholders and who do not ask individual stockholders how that money is to be spent, and an extraordinary difference between what corporations spend in advocacy and what labor unions spend in advocacy, and labor unions pale almost, not quite, luckily, when that comparison is made.

Mr. GOLD. I think that is exactly right, Mr. Hoyer.

Mr. HOYER. Now, let me ask a question about these bills. First of all, let me thank all of you for coming. I have heard some of your testimony before. I think it is all very thoughtful testimony. I have said before I think there are significant honest differences of opinion on these issues. Very frankly, I will make an observation that this Congress and previous Congresses have not necessarily been too persuaded in passing legislation because they were thought to be unconstitutional. Some of your groups advocate legislation that is clearly, from my perspective, unconstitutional, if I may say so as respectfully as I can. Ultimately, none of us are going to know, whether it is a flag amendment, partial birth, or campaign finance, until the Supreme Court makes a decision. I think any of us who voted on the bill that we clearly believe it was unconstitutional would not be appropriate. I would hope that our oaths of office would dissuade us from doing that.

However, clearly we have some very bright, able people at this table.

Now, Mr. Gora, let me ask you a question. Is Mr. Rosenkranz correct when he represents that there are literally a large score of former presidents of the ACLU and other officials who disagree with your conclusion?

Mr. GORA. Well, there are people——

Mr. HOYER. Is that correct?

Mr. GORA. Yes, he is correct that there are people who used to be officials of the ACLU, many of them are my friends, and many are my mentors, who disagree with the current position of the ACLU.

Mr. HOYER. Do you believe that those opinions are honestly held?

Mr. GORA. Oh, they may very well be honestly held, they are quite wrong and, more importantly——

Mr. HOYER. Mr. Gora, if I can get by your self-confidence, which I admire, the point I want to make is am I correct then in concluding that because their opinions are honestly held and your opinions are honestly held, that there is an honest disagreement to your conclusion?

Mr. GORA. Well, I think there is a disagreement. I certainly would not want to characterize it as honest or dishonest, but as lawyers, we can read the law and read the decisions and get some sense of what the law is. That is what we tell our students.

Mr. HOYER. Mr. Rosenkranz and Mr. Simon have done that as well.

Mr. GORA. I understand. Well, but let me just finish my point about the ACLU.

Mr. HOYER. Yes, sir.

Mr. GORA. The leadership of the ACLU, the democratically-elected members of the board of directors of the 300,000-member organization, have looked at this issue several times for more than 25 years, and each time they have taken the position that is reflected in my testimony. And they looked at it most recently 2 or 3 years ago and some of the officials that signed the letter you are referring to appeared before the board and presented their case, and the board, even though it is concerned about many of the imbalances of funding, was not willing to say that the way to deal with our campaign finance problems is to sell out the first amendment.

So the ACLU's position is as I have stated it.

Now, honest differences of opinion? Yes.

Mr. HOYER. To throw out the first amendment, an intellectual argument, or——

Mr. GORA. Well, I am trying to be pithy in my response. But on the honest difference of opinion, I think, for example, the case law governing the express advocacy I think is extremely clear, and I think most people honestly, if you asked them off the record, would say the chances of that provision being upheld are very remote.

Now, in all honesty, the soft money issues are a little different. Not that the principle is different, but there are not 30 years of precedent saying that Congress cannot regulate soft money activity. So on that I think maybe one might say there might be more of a difference of opinion. But I do not think there is really a well-founded difference of opinion on issue advocacy.

Mr. HOYER. Mr. Rosenkranz, do you want to respond?

Mr. ROSENKRANZ. Yes, thank you, Congressman Hoyer. Two very brief points. First, just to be clear, this is not just a few former leaders of the ACLU, this is every living former president, executive director, legal director and legislative director of the ACLU who was living at the time that this letter was written.

Secondly, on sort of reasonable differences of opinion, I think the best evidence of the differences of opinion on the issue advocacy provision and the openness of the question is an ally of the ACLU and the Right to Life Committee, Yon Baron, who recently submitted a brief to the Supreme Court requesting them to review the case that came out of Mississippi involving issue advocacy, sham issue advocacy, listing all of the cases that go both ways, claiming it is an open issue that needs the Supreme Court's resolution, and saying that the courts are increasingly going in the other direction; that is to say, the direction that Mr. Simon and I have been supporting.

Mr. HOYER. Let me go to some specific questions. Mr. Rosenkranz, first to you. What effect to you think the elimination of soft money will have on political parties? That is obviously one of the issue that has been raised in this debate.

Mr. ROSENKRANZ. Congressman, it is a great question, and I think it is one of the big red herrings in this entire debate. The argument we hear from the other side constantly is that soft money is necessary for the health of political parties.

I believe very ardently in strong political parties. Political parties are very important to our democracy; they play an important mediating role between individuals and the legislature and elected office. But to say that enormous infusions of monies from special interests is equivalent to healthy political parties is like saying that eating mountains and mountains of fat-saturated french fries is equivalent to creating healthy bodies.

What you have to be looking at is the reasons that we want political parties to be strong, and that has to do with mobilizing people to—actually mobilizing them to join political parties, which has very little to do with bombarding people on the airwaves, which is what 40 percent of soft money is used for.

A final point, just to look at the numbers. In the 2000 election cycle we had about half a billion dollars of money spent by the political parties, that is soft money spent, compared to 1988 where it was 1/11th of that amount. I do not think that there is a significant difference in the health of the political parties that is demonstrated by that 11 to 1 disparity. Political parties have been vibrant in American democracy with and without the ability to spend soft money.

Finally, 40 percent of the money that political parties spend, that is the soft money, is spent on the airwaves. Only 80 percent is spent on the grass-roots organizing, get-out-the-vote efforts which, in my mind, is far more critical to what we believe as being a function of strong political parties.

Mr. HOYER. Ms. Mitchell, you seem to be motivated to comment.

Ms. MITCHELL. Mr. Hoyer, thank you for allowing me to comment.

First of all, I think that because of the limits, the coordinated party expenditure limits on hard dollars that parties are limited to only spending so much to help their candidates with hard dollars, that it creates an enormous pressure in finding other ways to help support the candidates. Now, we can all hope, I hope certainly that the Supreme Court, either on Monday or the following Monday, will strike down those hard dollar limits, and I think if that happens, and even if it does not happen, I would urge Congress to remove those expenditure limits, because once those hard dollar limits would be removed, I think what we would see again is the parties would proceed to help the candidates in the amount that they felt was important, and you would not have this kind of attempt to circumvent if one exists.

But I would urge you, Mr. Hoyer, to look at the bullet points I put together on the impact of McCain-Feingold on State and local parties. It is basically the same, with a few changes, in Shays-Meehan. But Federal election activity is defined as all sorts of activity, grass-roots activity, absentee ballots, slate cards, I mean it includes the mail-in programs, the generic party building, voter identification, the generic things like the RGA, the Republican Governors' Association, Democratic Governors' Association, the Young Republicans, Young Democrats. All of these things are covered and paid for by soft dollars, and they will no longer be available to do that. Even if a Federal candidate is never mentioned, it is still defined as Federal election activity. So it nationalizes, federalizes all of the State and local political parties. Even a local county political party

is suddenly subject to reporting at the FEC, and it supercedes and circumvents supplants, the State campaign finance laws of all 50 States.

I will give you one example. A political party in a given State with which I am familiar, they operate under the laws of the State, they have one guy who is a rich guy who just loves the party, and so for years, he has paid out of his pocket for their headquarters and phones and all of this kind of thing. Under McCain-Feingold, he would be limited to giving his State party $10,000, and his contributions to the State party would now be subject to his aggregate limits for Federal giving. So right now he can give as much money as he wants to the State party under the laws of his particular State. Now he is going to have to include his contributions to his State party in his aggregate limits for what he contributes to his candidates for Congress, the Senate or the President, or Federal PACs.

I think that is what I am saying about look and see what is in the Kool-Aid. Look at the practical applications. I deal with this every day, and I promise you that there are things in this bill that anyone who has run for office and has been involved in everyday politics knows that these things are impractical, they have a chilling effect on the people who want to participate in the process, and I urge you to pay close attention to the realities, not the rhetoric but the realities.

Mr. HOYER. Mr. Chairman, if I can ask one additional question. I have an appropriations——

Mr. CHAIRMAN. Happy birthday, by the way, Mr. Hoyer.

Mr. HOYER. Thank you so much.

Ms. MITCHELL. You do not look a day over 38, but he told us you were 39.

Mr. HOYER. Well, that is in the interest of full disclosure. I do not know what the Supreme Court has said on the issue of 39, but I would be glad to be advised on that.

Ms. Mitchell, let me say something as an aside. This Kool-Aid has been around a long time. This Kool-Aid has been subject to review for a long time. It was passed, as you know, pretty handily in this House twice, and in the Senate. So it is not as if Mr. Jones just took the Kool-Aid out of his pocket. So I think the analogy falls short somewhat in that respect.

Let me tell you something, and all of you that have heard me talk before, and Mr. Gora, you will want to speak to this, that I am very concerned. I have the absolute right in my opinion to write something on this sheet of paper and hand it out as extensively as I want and put it anyplace in our country that I want to. But when I use the airwaves, as you said, the FCC does make a requirement that the American public know who is talking to them over their airwaves. The two gentlemen in Texas became known after they spent 2½ million savaging Mr. McCain; that is my word, not anybody else's. I think it is a very significant concern to democracy that we know who is talking to one another, through the public airwaves. Private communication, obviously, that can be known as a nondisclosed source.

I would like your comments on that, I think that is of great concern to every American who participates in this democracy, because

the Citizens for Better Government do not tell any citizen who is talking to them—and you have heard my analogy before. If the Citizens for Better Government are the oil companies or the Citizens for Better Government are the environmentalists of the world, there is a different hearing, there is a different perspective, there is a different communication, I suggest to you.

Now, I understand the NAACP Alabama case, and I am not sure how you work that out in terms of membership. I am not saying that the entire membership has to be made aware, but I do believe that there is a very important question to the sanctity of our democracy and communication for voters, prospective voters, to know who is talking to them and making representations.

Now, you indicated, Ms. Mitchell, as I understand it, in your comments that they ought to be able or are obviously required to do the FCC disclosure. But I think I would like to hear all of your views on that, because I think it is a very critical issue in our democracy.

Mr. GORA. Well, it is a big question, Mr. Hoyer, and I am only able to give you a small answer, and I think the answer is we do have slightly different constitutional framework surrounding broadcasting, but on the other hand, broadcasters and people that communicate on broadcasting have significant first amendment rights. I am not sure that we can easily balance those two things; namely, the additional regulatory authority, if you will, of the government because of the airwaves versus the fact that these are still basically people and institutions with first amendment rights. Whether it comes down to the kind of disclosure of the sponsor because it is on television requirement that Ms. Mitchell was talking about, whether that would be permissible, I am not sure. But that is a far cry. Mr. Hoyer, from the kind of ban that these bills have.

Mr. HOYER. I understand. I did not ask you about the ban. What I am saying is, if the ban does not do it, is this an issue of importance and if so, how do we get at it? I think it is an issue of great importance, because I think it impacts very substantially on the ability in a democracy of citizens to make a rational decision.

Mr. BOPP. Could I comment on that?

Mr. HOYER. Sure.

Mr. BOPP. I think that is a serious question, and I agree with Mr. Gora on that. We do have, to a limited degree, a different constitutional contest. However, I am persuaded, as the Supreme Court was in *McIntyre,* that this is really up to the listener. In other words, it seems to me that a person who puts an ad on TV, coming up with a new name, something that nobody recognizes or without disclosing who they are, they, the speaker, runs the risk, and that is—the people, as McIntyre said, people will take that into account. The listener knows that they do not know who the Citizens for Good Government are. The listener knows whether or not they recognize the group and are prepared to listen to the group and, therefore, consider that as part of whether or not they listen to the ad, are persuaded by the ad, or simply click the ad or ignore it.

So it is actually a risk that the speaker is running by proceeding anonymously, that the listener will simply ignore or turn off, because they consider the source to be important.

Now, the other part of the analysis was that while this is a risk for the speaker to take, it is in our proud tradition that people are able to communicate anonymously because often the Speaker does not—in many cases the Speaker does not want his, the force of his argument to be affected by who is making the argument. The Federalist Papers were published anonymously, because they did not want the arguments to be taken away from by identifying the source, and people could decide on the merit of the argument rather than to whom it was from.

Mr. HOYER. I apologize to others who want to respond. As you heard, my beeper has gone off three times. They are in a vote now, so I have to go.

Mr. Chairman, I have a number of other questions, if I could submit them and get some answers. Again, I think your testimony has been thoughtful and helpful, and I appreciate it.

Mr. LINDER. Mr. Chairman, may I ask you to yield for a moment? Mr. Hoyer asked a question I would like an answer to.

You said you could influence anything you want on a piece of paper, but on the airwaves, that is public airwaves and people deserve the right to know who is using them. The Christian Coalition, Mr. Bopp, who you, I understand, represent?

Mr. BOPP. One of my clients.

Mr. LINDER. Uses voter guides that go around in paper in churches before an election. Would they be in any way impinged upon because it was not on the airwaves?

Mr. BOPP. Oh, sure, because other provisions of McCain-Feingold and Shays-Meehan would make it unlawful to engage in that sort of issue advocacy. There is year-round prohibitions on any communication that would be unambiguous—you know, in the opinion of the bureaucrats, unambiguously support a candidate, while not using express advocacy. So furthermore, there is the coordination trap that is applied year round to all communications.

Mr. LINDER. So the notion that we can write down anything we want on a piece of paper and disseminate it as broadly as we like in any way we like is simply not correct?

Mr. BOPP. That is correct. Under McCain-Feingold, there are numerous restrictions, and if you look at exhibit C, or appendix C of my testimony, anybody that is going to engage in an issue advocacy-type communication, these are all the tests and trip wires and hoops that you have to jump through before you finally get to the other end here, which says it is either allowed, prohibited or subject to some sort of reporting or contribution limits. I mean only the wealthy can afford to hire experts in order to work their way through this maze, and only the wealthy would have the audacity to take that risk.

Mr. SIMON. Could I respond to that, Mr. Chairman, just to sort of narrow the focus of discussion so we can have a discussion about it, but I think it will actually be before the House. The provisions that I think Mr. Bopp is characterizing are provisions that are not in the McCain-Feingold bill and I anticipate will not be in the Shays-Meehan bill that is ultimately introduced and brought to the floor.

The CHAIRMAN. Well, I think just looking at the two bills, not to interrupt, but I think the groups, at least what I have looked at

and what I have heard, the groups are gotten on one end by coordination; if not that, they are gotten on the other end by direct language.

Mr. BOPP. And both are in McCain-Feingold or Shays-Meehan.

The CHAIRMAN. Either bill wraps around somehow to stop the payments, because this was a huge issue for debate last time. They both have some type of wrap-around language.

Mr. SIMON. Well, if I could just respond to that, I think in both areas on the regulation of so-called sham issue advocacy and on coordination, there are very significant differences between the Shays-Meehan bill that has previously been considered by the House and the Senate bill, the McCain-Feingold bill that was passed in April and that will be brought to the House next month.

In terms of the Snowe-Jeffords provision, which is the applicable regulation of sham issue advocacy, as I said in my opening statement, that applies only to broadcast ads, it does not apply to nonbroadcast ads or the kind of voter guides that Mr. Linder was referring to.

In terms of the coordination provisions, there were very extensive coordination provisions of the sort that Mr. Bopp was referring to that were in the Shays-Meehan bill previously, that were in the original McCain-Feingold bill, and that were taken out during the floor consideration of McCain-Feingold, and that again I anticipate will not appear in the bill that is before the House next month.

Mr. BOPP. Mr. Chairman, there is a provision of McCain-Feingold called the electioneering communication provision that is a year-round ban on corporations, labor unions from communications that go way beyond express advocacy. Mr. Simon is simply not familiar with the bill he supports.

Mr. GOLD. Also, I think it is important to note that the Shays-Meehan bill as introduced this year, not 2 years ago or more, contains that very intrusive and hopelessly, in our view, oppressive and unconstitutional language that the McCain-Feingold bill did abandon a few months ago. This is the bill that is pending, and nobody has changed it yet, so that is what we have to deal with.

The CHAIRMAN. All of you, all of you on either side of the issue raise a point and I have stated, along with a Member of Congress who testified here, that we should have done this in two weeks, this bill should have been out, and I said to that member, what do you think about the millionaire clause? His answer was, I think my quote is correct, I do not know, we haven't looked at that yet. One person wanted it in 2 weeks, one person wanted it in 3 weeks. Exactly all of the statements of all of you on either side proves I think these bills have changed.

Plus, I want to make this public point. We have newly elected Members of Congress who have not served here before. Whether Republican or Democrat, everybody has a right to their day before this podium here to testify and their day of debate. I just wanted to throw that out, because I think the debate of the last 5 minutes shows that there are differences, there have been differences. Maybe some of the substantive points are still there, but there has been some change.

I have a couple of questions I wanted to ask, one of Mr. Simon. The AFL–CIO has about 13 million members. Do you deem the

AFL–CIO a special interest group or a public interest group? What membership do you become the public in versus the special interests? And you know why I am asking this question, because their money in some people's minds is tainted because they are the special interests. They have 13 million people.

Mr. SIMON. Those obviously are nonprecise and somewhat rhetorical terms. I think the point of the legislation is that money that is used to influence Federal elections should be subject to Federal fund-raising rules which are intended to ensure that corruption and the appearance of corruption is not created by the use of that money from whatever group it comes from.

The CHAIRMAN. But do you, the AFL–CIO, view them as a special interest, just as Common Cause is viewed as a special interest group?

Mr. SIMON. I guess Common Cause does, and probably a lot of people view Common Cause as a special interest group

The CHAIRMAN. But you are deemed to be a public interest group?

Mr. SIMON. We are deemed to be a public interest group by those who call us that and we are deemed to be a special interest group by those who call us that. Again, these are not totally imprecise terms.

The CHAIRMAN. This weighs on the discussion because what happens in this bill that bothers me significantly is that the 60 days before the election, the AFL–CIO cannot use its money because it is "tainted and soft," and soft means dirty money, although it is coming from 13 million people. But it cannot go on the radio and it cannot go on television.

Now, a person worth $50 million, one person, not 13 million people, can launch a tirade, let's say in my district, about how good Right to Work would be and how bad supporting a labor union would be. That is one person. And they then, without any restrictions, launch $1 million worth of ads up to the minute the polls close. But the AFL–CIO in fact could not defend its position on Right to Work, which is very dear issue, because its money is tainted. So you still have money in the system. Now you have the millionaire controlling free speech without the other side being able to come into it, and that is juxtaposed to Right to Work, and I use that as just one issue. I could use Right to Life. I am just saying, what—the thing I cannot clarify in my mind, what makes their money so different in what they want to say versus one human being who is loaded with money that can do whatever they want.

Mr. SIMON. Well, basically what makes the difference are precisely the lines laid down by the Supreme Court that have reviewed campaign finance regulations in light of the first amendment restrictions, and the Court has said, and did say in *Buckley,* that when you are talking about campaign-related speech, electioneering speech, the amount of money an individual can spend cannot be limited. When you are talking about speech by a union or a corporation, that money comes through a Political Action Committee which the AFL–CIO has and from when it can raise money for its member to engage in this speech.

The CHAIRMAN. And can be limited by Congress, as we know. It can limit amounts spent.

What I am saying is—I am not saying that you shut off the multimillionaire from free speech. I am not saying that. But the system is not fair when you allow that multimillionaire, the wealthy, the rich, the influential—the numbers in this body have grown; in fact, some of the caucuses seek out millionaires to run in this institution, and I think we need diversity here of all income structures and all racial backgrounds. But it has become sort of a wealthy—you cannot restrict, I understand, the millionaire from speaking, but the counter to that is to allow the other groups to speak also. So we hide I think behind well, you cannot restrict the speech of the millionaire, well then why come over and restrict NOW or Right to Life or the AFL–CIO or the corporation? That is my question. Why do that?

Mr. SIMON. Well, when you are talking about speech relating to issues that do not mention candidates, there is no restriction, not in this bill and not otherwise in Federal law. When you are talking about speech relating to campaigns, the restrictions laid out by Congress previously and approved by the Court is that corporations and labor unions speak through their political committees, and there is no limit on the amount of spending that those political committees can engage in for such speech.

Mr. BOPP. Mr. Chairman, thank you. I challenged Mr. Simon and the other witnesses on the other side to name one case, one case that supports their argument, one case that supports any of the provisions of McCain-Feingold or Shays-Meehan. In fact, this is not a matter of subjective opinion or simply hand-raising.

The CHAIRMAN. I think Mr. Rosenkranz——

Mr. BOPP. I know——

Mr. ROSENKRANZ. I thought there was a challenge.

The CHAIRMAN. Go ahead.

Mr. BOPP. And of course—and they cited no such testimony in their written testimony, and in fact we have cited 40 cases that ha held, as has been testified, that it has to be express advocacy. That is equally true and most importantly true with corporations and labor unions.

First National Bank of Boston v. *Bellotti,* Supreme Court, 1972, and *Citizens Against Rent Control* v. *Berkeley,* both hold that corporations and inferentially labor unions, have an absolute right to issue advocacy. *Buckley* said that issue advocacy encompasses talking about candidates, what their positions are on issues, what incumbents have done to us and for us while in office. Only express advocacy is limited. And then the Supreme Court in 1996 went so far as to say that for a not-for-profit idealogical corporation; i.e. *Mass Citizens for Life* v. *FEC* said that even express advocacy could not be limited, even though they are a corporation and segregated into a PAC, and, of course, what Shays-Meehan and McCain-Feingold does is take issue advocacy that is considered by the Court absolutely protected and tries to force it under a PAC when you cannot even do that with express advocacy for certain corporations.

Mr. ROSENKRANZ. Mr. Chairman, I would be happy to take up the challenge and I will multiply it by 3. Furgatch in the 9th circuit upheld a line that was very different from magic words. *Crumpton.* v. *Keesling*, out of Oregon, and the Supreme Court stat-

ed emphatically, while striking down an overly broad provision, that it seemed different from the magic words test.

Ultimately, this will be a Supreme Court case and only the Supreme Court will decide, but if I may finish, *Bellotti* was not a case that had anything to do with elections and, in fact, the Supreme Court distinguished *Bellotti* on the ground that this was, in fact, a pure issue advocacy case about a ballot proposition.

The CHAIRMAN. There might be a vote coming up.

The GOLD. I want to say I appreciate the chairman's example of the AFL–CIO and the line of questioning throughout, but I think the proponents of this are operating on a real utterly false legal distinction, which Mr. Bopp just described, and that is that somehow you draw a line between something that discusses a nonelection-related issue and noncandidates and that you discuss candidates and elections on the other side, and that somehow draws a line of legal invalidity. That is totally contrary to what *Buckley* expressly says, and it would be terrible public policy for the law to take that direction. We do not believe it will. We believe even if Congress were to go that route, the Court certainly would strike it down, regardless of what an old 9th Circuit decision says, which is in the distinct minority and also I think pumped up a little more than what it says by the proponents in two State court decisions.

The CHAIRMAN. I want to ask a couple of other questions, because we have talked about the Supreme Court today. If this bill is well thought out and this bill has been around for a long time and we should just pass it the first 2 weeks we are over there, why are proponents of the bill afraid of nonseverability? Why are they opposed to nonseverability?

Mr. ROSENKRANZ. I have a very easy answer. The easy answer is *Buckley* v. *Valeo*, in which the Supreme Court took, you know, a wide variety of issues and cut them up in various different ways. No one here, I think, would be prepared to say with 100 percent certainty that every single provision in the McCain-Feingold bill or whatever version passes is absolutely 100 percent constitutional.

Courts are unpredictable.

The CHAIRMAN. But what you get is, the proponents of this would say voluntary. I have talked to the other side of the aisle, I have talked to unbiased individuals from the legal aspects. I think there is a great percentage that think that parts of this would be found unconstitutional, and that happens in our country. But you are trying to craft a bill that you can follow through the campaign process and major components are all of a sudden evaporated, and what do you have left?

And here is my real worry about this—because this bill does not affect my reelection, it does not effect one dot or paragraph of any money I can raise or not raise, it does not do anything to me. In fact, I think we probably, as incumbent protection thinkers, should just pass McCain-Reingold or Shays-Meehan, or both of them, and combine them, and we can live here another decade having groups not say anything about us. But heaven help a Member of Congress that somebody dares to says something about them 60 days before the election. You can say something some amount of time before that, but not the last 60 days.

My point is, this bill does not have a bearing on reelection. Now, having said that, though, it does affect people across this country who are trying to run for Congress. I came from the State Senate. I was elected 21 years ago. I had been in office my third year out of college, the house and the Senate, and had been around a while. I had the ability to have attorneys, accountants, a press secretary, a campaign manager. I had some advantages. You also have disadvantages as an incumbent because you have a record that can be attacked. I understand that.

But I think we have a structure that potentially, because so much of it is loose, goes to the Supreme Court, you have bits and pieces. You are going to have the FEC making all kinds of rules and regulations, because they do it and it has force of law. And you have people running all over this country that are going to be challenging, and we are probably going to end up in court and in jail with the party chairmen of all the political parties.

This question of nonserverability. Why can't we try to craft something that is more solid? People that support this bill say we know that is—I think part of this is a litany I have given you. I understand that, but——

Mr. SIMON. If I might, just on the specific nonseverability point. Part of the problem with that is that it sort of invites a sand-bag tactic, that a nonseverability is put on the bill and opponents of the bill have an incentive to put in a provision regulating internal communications that would be unconstitutional, precisely for the sake of bringing the whole bill down. And I think that is a risk that the sponsors of the legislation do not want to open themselves up to.

I assure you that in all likelihood, the day after this bill is signed into law, that it will be challenged in court, probably by four of the lawyers sitting to Mr. Rosenkranz's left. This is a case, as Mr. Rosenkranz said, is a case that will get to the Supreme Court. And the bill has provisions for an expedited review, and we will get a definitive and, I believe, quick Supreme Court decision about these very contentious legal issues.

The CHAIRMAN. Isn't that sort of a "take what we can get" philosophy and we do not care about the consequences? Because no matter what that Court decides, no matter what pieces all of a sudden are taken out of the McCain-Feingold, Shays-Meehan bill that has 10 major points to it, now you have three, who knows how the FEC is going to rule on it? It does not affect the incumbent. It does not. We have attorneys, we have campaign funds, we can hire attorneys, you can hire accountants, lawyers. But it affects the challengers, I think.

So it just goes back to my point again. Things have changed in this bill. And for those who said we should have passed it in 2 weeks, I think we are being as expeditious as we can. But I think it is the duty of this committee to at least look at some really outstanding unconstitutional—admittedly unconstitutional by proponents of the bill—clauses of the bill to see what we can do to clean them up.

I have one question, and I will get to you, Ms. Mitchell. The AFO-CIO suit. Do you oppose both McCain-Feingold and Shays-Meehan in their current form?

Mr. GOLD. In their current form, we don't believe they should be passed. We believe that there are elements of both that are meritorious, and, as I said, we are very much for campaign finance reform and a principled approach to it.

Ms. MITCHELL. Mr. Chairman, I want to return to something that you said. I really want to applaud you again for holding these hearings. I know that there has been enormous pressure on this committee and on you as Chairman to not hold hearings and just whisk these bills through to the floor. So we know that you have done a very, very great service by having hearings.

I want to go back to something and hope that you will perhaps consider having a hearing specifically on the coordination issue. One of the things that McCain-Feingold does is that it repeals, even before final enactment, the coordination rule that the Federal Election Committee has spent the last 18 months or longer trying to promulgate. And it directs the Commission to promulgate new regulations on coordination and sets out some parameters, and in some cases doesn't even say what it is that Congress wants them to decide, but says look at this and decide if this or this can be done.

I would urge the committee to spend a lot of time looking at some of the things that the Commission has already been doing in this coordination realm. And in particular in my testimony, I refer specifically to the investigation conducted by the Commission over 5 years, first against the AFL-CIO, which was closed last August. There were 11 separate complaints filed against the AFL-CIO, various people associated with the AFL-CIO, and the most egregious for the ad campaign that the AFL-CIO ran in the 1995–1996 time frame, which were issue ads which mentioned at that particular time various Republican Members of the House.

The CHAIRMAN. I was subject to the AFL-CIO's myself.

Ms. MITCHELL. And I disagreed with the content of those ads. But I believe the first amendment protects the right of the AFL-CIO to run those ads. And one of the most outrageous things to me in the general counsel's report in closing that case after 5 years and 35,000 documents and after 28 Democratic House candidates were interviewed, subpoenas, depositions, the works, the comment there is a part of that report that talks about how the FEC sent investigators out to investigate the Wyden for Senate campaign in January 1996, the special election. And the Federal investigators went and interviewed union members and/or their spouses who had volunteered for what were called "labor walks" in that campaign.

I think it is incumbent upon the Congress to stop and think about what that means. It means you volunteer in a campaign—you are a working person. You volunteer in a campaign and you get a letter from a Federal investigative agency saying, we are going to come and interrogate you. And I don't think that is what the United States of America is all about. But that is happening today. It is happening today.

And I would urge the committee to spend some time on this coordination issue, because it is an egregious assault on the rights of citizens to participate in the process.

The CHAIRMAN. The AFL–CIO was, you know, involved with the 1996 election, for example. I have never argued about that. They

have a right to do it. They were wrong in the ads, but they have a right to be involved in the election. But I knew they were involved. I do like disclosure.

But my whole point is the AFL–CIO has that right. And somebody coming and running our campaign ads to say they were wrong, we have that right, too. In 1996 they ran ads against me. We are going to shut them off 60 days before the election because their money is now tainted. But the millionaire can come in, let's say, to my favor, without any coordination, but some millionaire likes what I do and they can run all kinds of ads. That is fair, and it is fair for the AFL–CIO, or Right to Life or NOW or Gun Control Incorporated or NRA, if everybody is in the mix, there is where I personally think it is fair. I don't understand where it is not fair.

The bells rang. A couple more questions, if anybody would want to answer these. Can you explain to me why all of a sudden the tainted money can't be used on just radio or TV?

Mr. ROSENKRANZ. I can, Mr. Chairman.

Mr. CHAIRMAN. What about newspapers?

Mr. ROSENKRANZ. I think this is a perfect example of exactly how carefully drawn this provision was. The drafters of the provision have changed it over the years to focus specifically on the areas where, you know, the authority to regulate is at its height. Broadcasters, we have already heard from Ms. Mitchell, is a place which is much more heavily regulated. Clearly identified candidate is another example. A threshold of $10,000 is yet another example. And the targeting is yet another example.

All of these are designed to tailor this as narrowly as possible so that nobody can claim, A, to be caught off guard by a regulation; or B, that their intent was actually other than to engage in electioneering—directly intended, predominantly intended to influence the election. I haven't heard anyone yet, except for Mr. Gora, take up my challenge to claim that any of these ads are not intended to engage in electioneering. Mr. Gora took it up by saying, no, in fact the ACLU never ran such ads.

The CHAIRMAN. The bells rang. I have one other question that is also bothering me about the bill. What is wrong with the Republican, Democrat parties, Natural Law, whoever's party, what is wrong with those parties receiving support from unions or corporations and taking that money and registering people to vote?

Now, you know, 120 days before, you can't do it. I don't understand what is wrong with that.

Mr. SIMON. Well, if I may, Mr. Chairman. What is wrong is that since 1907 there has been a Federal law, which has been sustained multiple times by the Supreme Court, which says corporate money should not be spent to influence elections. There is a comparable law for union money.

The CHAIRMAN. I should clarify. If corporations or unions would like to make donations and this is not influencing elections but registering people to vote, just registering people. We all want young people to vote. They do not vote.

Mr. SIMON. They can conduct their own vote or registration drives. The problem comes in donating the money to political parties and having that money solicited by Federal officeholders raises

the concerns about corruption and the appearance of corruption——

The CHAIRMAN. I don't think the Federal officeholders should solicit that money to give to them to use for that purpose. I am saying you take a company and if they have contributed into a political party of any type, then all of a sudden they cannot use that money for voter registration.

Mr. BOPP. You know, the thing about that provision, too, Mr. Chairman, is that it applies to State and local parties. And State and local parties in over 20 States lawfully can receive corporate and labor union contributions and the expenditure of those funds for voter registration is 100 percent legal under State law.

But, because of the obsession by some people about Federal elections as opposed to State and local elections, because there is one Federal candidate on the ballot, one candidate, then it is now unlawful under Federal law to use lawfully raised State and local money under State law.

The CHAIRMAN. That is the point. That is the point I have made about the fact that this is also federalizing the local elections. It says we don't care what your law says in these States, this is what you will follow, because I happen to be on the ballot when Governor Taft is on the ballot and all of a sudden my election makes the whole difference for the statewide executive officeholders in Ohio. And somebody says, no, there is a $10,000 per county kick-in right now, that they can spend X amount soft money, sort of $10,000 per county. That is not really accurate because of the fact that if anybody happens to be a volunteer and knocks on a door and happens to say, gee, I am supporting Bob Ney, or I am running against Bob Ney, all of a sudden they or the party chairman of the political party is going to be dragged to Washington, D.C., and stand before the FEC.

We have now put our fingers in State elections, all because one of us are on the ballot. And all of us are always on the ballot after 2 years in these elections.

Mr. BOPP. State and local parties really care much more about State and local elections than the Federal elections.

The CHAIRMAN. Twenty-one years ago I ran against the former chairman of this committee. When I went into the incumbent structure to try to run—he was very well liked in our area, and when I went to that structure, I couldn't get assistance. Either I wasn't the right type of Republican or, in fact, it was hopeless for me to win. The only people who would take a look at me was the party structure itself, who never asked me for anything, didn't ask me for a vote, didn't worry how I was going to vote. They were willing to take a look at me as a chance.

I think if this bill were in existence 21 years ago, I think a lot of people like me would not be sitting here. We would have to go to the good old boy network and do the litmus test and see if I am the kind of candidate for them. The parties are more generous in looking at picking up seats versus your background, where you come from, and what kind of votes are you going to cast.

I view these bills as also gutting the political ability of the two political parties and all other blossoming parties in the country.

Ms. MITCHELL. Mr. Chairman, can I make one comment about your question that I think Mr. Simon or Mr. Rosenkranz failed to consider? Under existing law, a corporation or a labor union cannot spend its treasury funds registering voters on a partisan basis. If the AFL-CIO wants to register people to vote, under the law they are supposed to register people Republicans or Democrats. Corporations, the same thing. So if they want to be able to affiliate and use some of their treasury funds to encourage more registration in the Democratic Party or the Republican Party, they have to give that money to the party to do it. And that is one of the things that bothers me, is that people do not know how the current law will work with the proposals and the practical—again, the practical implications.

And I would close with responding to Mr. Hoyer. This bill may have been around for a while, but I do not think—I think that a lot of people thought it would die in the Senate, so they did not pay much attention to its contents. When it comes from the Senate and the President says I will sign it, now is the time I think to start looking at what it does.

The CHAIRMAN. Again, it is not my intent or the committee's intent in fact to kill this bill. I said that from day one. There are those who think we have this nefarious plot to all of a sudden not have a vote. That is not going to happen. We are going to do something. If it makes people feel good, we want to do some things. If it makes people more confident in the system, then Congress ought to act.

I am just saying there are a couple of provisions that we need to have a serious debate on and hopefully construct a bill that will take care of some of the problems, some of the perceptions, but also not gag the groups that we do not think maybe we like their form of money that they have been able to raise.

I want to thank each and every one of you. It has been very interesting testimony from everybody concerned. And I want to thank you.

I ask unanimous consent the witnesses be allowed to submit their statements for the record and members have 7 legislative days to insert extraneous material into the record and that those statements and materials are to be entered into the appropriate place in the record.

Without objection, the material will be entered.

The CHAIRMAN. I also ask unanimous consent that staff be authorized to make technical and conforming changes to all matters considered at today's hearing.

Without objection, so ordered.

Having completed our hearing today on campaign finance reform, the committee is now adjourned.

[Whereupon, at 1:22 p.m., the committee was adjourned.]

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