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**“McCain-Feingold”:
Analysis of S. 27 as Passed by the Senate**

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Introduction

As introduced, McCain-Feingold, S.27, was viewed by the Madison Center as a broad-based and pernicious attack on the rights of average citizens to participate in the democratic process, thereby enhancing the power of already powerful wealthy individuals, incumbent politicians, and large news corporations – the archetypal story of big guys enhancing their power to dominate the little guy.

That analysis remains true of the Senate passed version of McCain-Feingold, but the two weeks of Senate debate and action on amendments enhanced the overriding effect of this legislation: increasing the power of incumbent politicians. Amendments were adopted or defeated with one common thread throughout: did the amendment serve the Senators’ electoral self-interest. For example, increased contribution limits to candidates (Thompson amendment) and price controls for candidate broadcast advertisements (Toricelli amendment) were approved; they fill candidate campaign chests. The Domenici amendment was also adopted, which raises candidate contributions higher when a candidate is facing a wealthy opponent who substantially finances his or her own campaign.

Amendments were also defeated that would have reduced the flow of money to incumbent politicians. Thus, the Bennett amendment was defeated, which would ban the use of corporate and labor union treasury funds to pay the administrative expenses of connected PACs, and so was the Smith amendment, which would have banned contributions from lobbyists and

¹Additional information on the James Madison Center for Free Speech can be obtained by visiting its website <<http://www.jamesmadisoncenter.org>>.

PACs while Congress was in session. In each of these cases, the incumbent politicians' personal benefit ruled the day.

Finally, the Senate defeated efforts to delete McCain-Feingold's central provisions, which launch a major assault on the average citizen's ability to participate in the political process. These provisions target and impose severe restrictions on three key citizen groups, which serve as the only effective vehicles through which average citizens may pool their money to express themselves effectively: issue advocacy groups, labor unions, and political parties.

Issue advocacy groups, labor unions, and political parties are private organizations that provide a vehicle for average citizens to effectively participate in the political process by pooling their resources to enhance their individual voices. These organizations participate broadly in our democratic process by advocating issues of public concern, lobbying for legislation, and directly promoting the election of candidates.

Issue advocacy groups, labor unions and political parties enhance individual efforts by association. One individual of average means can accomplish little alone in the public arena, but thousands of average citizens who pool their resources with like-minded individuals can accomplish great things by working together. The right to associate, therefore, is so fundamental to our democratic Republic and the ability of average citizens to affect public policy is so important that the United States Supreme Court has recognized it as a fundamental right with powerful constitutional protection.

Furthermore, political parties are not just about electing candidates, particularly federal ones. Political parties constitute a vital way by which citizens come together around issues and values expressed in the planks of their party platforms – at all levels of government. Parties advocate these issues in the public forum in addition to lobbying for legislation and engaging in efforts to elect candidates. Parties are just as focused on the promotion of issues as are ideological corporations, such as the National Right to Life Committee or The Christian Coalition of America, and labor unions, such as the American Federation of Labor and Congress of Industrial Organizations, although with a broader spectrum of issues. McCain-Feingold ignores this reality and treats political parties as simply federal candidate election machines.

McCain-Feingold attacks the abilities of ordinary citizens to participate in the political process in two ways: (1) by focusing restrictive efforts on issue advocacy corporations, labor unions, and political parties – three organizations vital to the ability of average citizens to pool their resources to make their opinions heard, and (2) by imposing sweeping restrictions that reach broadly beyond direct participation in elections to restrict issue advocacy (limiting discussion of issues of public concern, the views of candidates on issues, and grassroots lobbying for favored legislation).

If McCain-Feingold succeeds, the influence of the average citizen would be drastically reduced because association with like-minded individuals is essential to effective participation in the public policy arena. With the little guys locked in the dungeon of nonparticipation, the rich and powerful will run politics, much as they did before the first and foremost campaign reform adopted by our Nation, the First Amendment, which protects the right of association and demands that “Congress . . . make no law . . . abridging the freedom of speech” – especially speech about those in power and on the critical issues of the day.

Campaign finance “reform” proposals, notably McCain-Feingold, do not, and could not, eliminate the power of the giant news media corporations, which are protected by the First Amendment from regulation of editorial content and news coverage. Neither may the wealthy be prohibited from spending their own money – either to express their views on public issues and candidates² or to advocate their own election. But the wealthy don’t need to pool their resources to be effective, they have all the money they need to pay for communications about the issues they care about. Furthermore, millionaire candidates are still advantaged under McCain-Feingold, despite the Domenici amendment because they need not rely on contributions from others (they can spend their own money to campaign), and officeholders of all stripes have the incredible power of incumbency to support their candidacy, which Senate action on McCain-Feingold further enhanced. Thus, campaign finance “reform,” as proposed by McCain-Feingold, strips power from the People and gives it to the already wealthy and powerful.

So there are winners and losers under McCain-Feingold. The losers are citizens of average means, citizen groups, issue advocacy organizations, labor unions, and political parties. The winners are the wealthy, major news corporations, and incumbent politicians. It is small wonder then that the wealthiest foundations and individuals are prime supporters of so-called campaign finance “reform,”³ that the mainstream media is the primary cheerleader for it, and that incumbent politicians are so attracted to it.⁴

²For example, billionaire New York financier Jerome Kohlberg formed and almost entirely bankrolled a nonprofit organization called Campaign for America, which expended over \$400,000 in the 1998 election to run independent expenditures attacking Republican Senate nominee Jim Bunning in Kentucky for opposing so-called campaign finance “reform.” Kohlberg is a long-time contributor to liberal Democratic causes and candidates. The Democratic candidate was Congressman Scotty Baesler, who has strongly advocated placing severe restrictions on the right of such advocacy groups (he calls them “special interests”) to spend money to praise or criticize federal politicians. Baesler’s own campaign “reform” bill (H.R. 1366, in 1998) would have prohibited such expenditures, but he hypocritically made no effort to oppose the expenditures on his behalf.

³For example, Public Campaign’s founder Ellen Miller has criticized the million-dollar contributions to political parties, yet she accepted “\$1 million from former Democratic representative Cecil Heftel of Hawaii and \$3 million from the foundation of philanthropist George Soros to pay for her crusade to have taxpayers finance congressional campaigns.” Chuck Raasch, *Big money, with interest*, USA Today, June 17, 1997, at A7. Such major donors helped Public Campaign to put together “a \$9.2 million, three-year push for the public financing of campaigns.” *Id.* Figures on such major donations are difficult to establish, however, because when asked to disclose donors (as S. 27 would require) groups like Public Citizen, Sierra Club Foundation, and the U.S. Public Interest Research Group all decline. *Id.*

The extended Gannett News Service article, from which the above article was derived, gave evidence that the major donor giving to campaign finance “reform” organizations is on the way up. Chuck Raasch, *Do public interest groups that push campaign reform really represent citizens?*, June 13, 1997, at 3. Raasch noted also that the Schumann Foundation (New Jersey) gave or pledged more than \$14 million to various campaign-finance reform causes (between 1994 and 1997) and that Robert Pambianco, a scholar of campaign-finance reform, stated that contributions to such efforts “had become trendy among foundations” and were expected to expand. *Id.* at 4.

⁴In a press release available on Sen. Thad Cochran’s website, Cochran provided some telling reasons why he had switched from opposing campaign finance “reform” to supporting it: “Candidates are unable to compete with independent groups . . .” Sen. Thad Cochran, *Senator Cochran’s Statement on Campaign Reform* (visited Feb. 20, 2001) <<http://www.senate.gov/~cochran/press/pr01040.html>>. He declares: “I think we have a system now that is too heavily influenced by fundraising and the spending of money not just by candidates, but other groups . . .” “I just think that the whole system has become overwhelmed by organizations which use enormous sums of money to

(continued...)

But in our Republic, founded by the People for the People, the right of the People to speak out on the most critical issues of the day in the political arena through issue advocacy and the right of the people to come together to pool their resources through associations may not be infringed without violating the Constitution. The United States Supreme Court and other federal courts have been stalwart in defense of the citizens' rights of free speech and association. If these unconstitutional measures pass, the Madison Center stands ready to promptly challenge them in the courts with a high probability of success.⁵

⁴(...continued)
influence campaigns." *Id.* Cochran apparently believes that the free speech and association rights of the People hinge on whether candidates can "compete." Ironically, he declares that "we should protect [political parties'] role," but supports McCain-Feingold, which does the opposite. *Id.*

⁵For instance, the author's law firm, BOPP, COLESON & BOSTROM, often with the funding assistance of the James Madison Center, has filed 52 cases challenging state and federal election laws on First Amendment grounds. Of the 35 cases completed to date, it has won 32 (91%) and has won 8 cases in a row against the Federal Election Commission – without a defeat.

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Analysis⁶

I. McCain-Feingold Suppresses Rights of Average Citizens to Participate in the Political Arena by Pooling Resources.

“Many of the so-called reforms floating around Washington are in fact nothing more than incumbent protection acts.”⁷ “Many politicians feel threatened by negative advertisements and want to control what is said during campaigns.”⁸ Others want to reduce spending on campaigns, particularly by “outside” groups.⁹

Chief among these proposals is McCain-Feingold, the self-styled “Bipartisan Campaign Reform Act of 2001” (S. 27),¹⁰ sponsored principally by Senators John McCain and Russell Feingold. Though announced with the promise of reducing the corrupting influence of big money, McCain-Feingold is instead a broad attack on citizen participation in our democratic Republic. This bill shakes a fist at the First Amendment; if passed, it is destined for a court-ordered funeral.¹¹ The most egregious provisions and their infirmities are discussed below.

As noted in the introduction, average citizens must pool their resources to have an effect in the political sphere of issue advocacy, lobbying, and electoral activity. The wealthy and powerful have no such need. So ordinary people band together in ideological corporations, labor unions, and political parties to amplify their voices. This right to associate is a bedrock principle of our democratic Republic, powerfully protected by the U.S. Constitution. McCain-Feingold, however, would suppress this ability, along with the foundational constitutional right to free speech.

It should be noted at the outset of this analysis that political speech and association are at the heart of the First Amendment protections. As the United States Supreme Court has declared, “the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office*.”¹² Free expression in connection with elections is no second-class citizen, rather political expression is “at the core of our electoral

⁶Portions of this analysis are derived from a Heritage Foundation Backgrounder prepared by the author entitled *Campaign Finance “Reform”: The Good, The Bad, and The Unconstitutional*. The author expresses appreciation to attorney Richard E. Coleson and James R. Mason, III, of the law firm of BOPP, COLESON & BOSTROM, for assistance in preparing the present analysis.

⁷Comments of House Majority Whip Tom Delay, *Money & Politics Report*, Bureau of National Affairs, Inc., May 26, 1999, at 1.

⁸*Id.*

⁹See statement of Senator Russell Feingold (D-WI) upon the introduction of S. 26 (the McCain-Feingold campaign finance reform bill of 1999): “The prevalence—no—the dominance of money in our system of elections and our legislature will in the end cause them to crumble.” 145 CONG. REC. S422-23 (daily ed. Jan. 19, 1999).

¹⁰McCain-Feingold, S. 27 as passed by the Senate, is available online at the U.S. Congress’ website at <<http://thomas.loc.gov>>. Page cites in this analysis are to the PDF version (which is an actual “picture” of the original document and readable with Acrobat Reader, downloadable free at numerous Internet websites).

¹¹See generally Franz & Bopp, *The Nine Myths of Campaign Finance Reform*, 10 Stanford L. & Pol’y Rev. 63 (1998).

¹²*Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (emphasis added).

process and of the First Amendment freedoms.”¹³ Thus, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates.”¹⁴

Furthermore, the fundamental right of association was well articulated by the United States Supreme Court in the case of *NAACP v. Alabama*,¹⁵ when the Court reviewed a suit against the National Association for the Advancement of Colored People brought by the State of Alabama seeking disclosure of all its members.

The unanimous U. S. Supreme Court strongly affirmed the constitutional protection for the freedom of association:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.¹⁶

Thus, the Court held that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs,”¹⁷ and it, therefore, protected the identity of members of the NAACP from disclosure.

In *Buckley v. Valeo*, the Supreme Court reaffirmed the constitutional protection for association. “[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas.”¹⁸ The Court then noted that “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”¹⁹ This highest level of constitutional protection, of course, flows from the essential function of associations in allowing effective participation in our democratic Republic. Organizations, from political action committees (“PACs”) to ideological corporations to labor unions to political parties, exist to permit “amplified individual speech.”²⁰

¹³*Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

¹⁴*Mills v. Alabama*, 384 U.S. 214, 218 (1966).

¹⁵357 U.S. 449 (1958).

¹⁶*Id.* at 460-61 (citations omitted).

¹⁷*Id.* at 462.

¹⁸ *Buckley*, 424 U.S. at 15.

¹⁹*Id.* at 24.

²⁰*Democratic Party v. National Conservative PAC*, 578 F. Supp. 797, 820 (E.D. Pa. 1983).

A. McCain-Feingold Prohibits Effective Political Participation by Citizens of Average Means by Barring Corporations and Labor Unions from Engaging in any “Electioneering Communication.”

McCain-Feingold prohibits political participation by citizens of average means by broadly defining “electioneering communication” so that issue advocacy expenditures currently permitted become forbidden under federal law²¹ for corporations and labor unions.²²

1. “Electioneering communication” sweeps in protected issue advocacy, ignoring the bright-line “express advocacy” test.

McCain-Feingold restricts the issue advocacy of ideological, nonprofit corporations and labor unions by first defining “electioneering communication” to include issue advocacy, i.e., “electioneering communication” is “any broadcast, cable, or satellite communication” to “members of the electorate” that “refers to a clearly identified [federal] candidate” “within . . . 60 days before a general . . . election (30 days before primaries, conventions, or caucuses),” S. 27 at 17-18, and then adding it to the list of prohibited activities by corporations and labor unions. S. 27 at 21.

The broad definition of “electioneering communication” plainly sweeps in and prohibits a wide variety of issue advocacy communications traditionally engaged in by such organizations. First, Congress is often in session within 60 days before a general election and 30 days before a primary. As a result, grass-roots lobbying regarding a bill to be voted on during this 60 period would be prohibited if the broadcast communication named a candidate by referring to the bill in question (“the McCain-Feingold bill”) or by asking a constituent to lobby his or her Congressman or Senator. And because presidential races include ongoing primaries, caucuses, and conventions for months leading up to elections, broadcast ads asking constituents to lobby an official who is also a presidential candidate could be banned for most of an election year.

With corporations and labor unions prohibited from making such communications,²³ McCain-Feingold then requires those that may still do so, individuals and PACs, that spend over \$10,000 per year, to file reports with the FEC. Among other things, the reports must list every

²¹2 U.S.C. § 441b(a) makes “[i]t is unlawful for . . . any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election” McCain-Feingold adds to the definition of “contribution or expenditure” in § 441b(b)(2) “any applicable electioneering communication.” S. 27 at 21.

²²The AFL-CIO issued a position paper at its Los Angeles executive council meeting February 13-15, 2001, stating strong opposition to McCain-Feingold’s restrictions on “electioneering communication” and “coordinated activities” that would prohibit issue advocacy by labor unions. AFL-CIO, *S. 27 – McCain-Feingold Campaign Finance Reform Bill* (Feb. 2001).

²³An exception is made, however, for certain non-profits, i.e. organizations exempt under section 501(c)(4) and section 527, if the group creates a separate, segregated fund for such expenditures to which only individuals can contribute and with respect to which reports are filed on its contributors and expenditures, i.e., like a federal PAC. S. 27 at 22. However, this exception still means that the organization itself, using its existing resources, is still prohibited from making such communications. Furthermore, as explained infra, the disclosure of contributors violates the privacy of donors and discourages association. As a result, the U.S. Supreme Court has held that such disclosure cannot be required of issue advocacy groups. In any event, in the final version of S. 27, this exception applies only if an expenditure is not “targeted,” i.e., the “audience consists primarily of residents of the State for which the clearly identified candidate is seeking office.” S. 27 at 25.

disbursement over \$200 and to whom it was made, the candidate(s) to be identified, and the identity of all contributors aggregating \$1,000 or more during the year. S. 27 at 15-17. The \$10,000 triggering expenditure occurs when a *contract* is made to disburse the funds, which might be months in advance – allowing ample time for incumbent politicians, who object to the general public being informed of their voting record or positions on issues, to attempt to discourage the broadcast medium, or to intimidate the person or PAC paying for the ad, from actually running the ad. S. 27 at 20.

Anticipating that the federal courts will strike down a provision that bans any *reference* to a candidate during a 30/60 day pre-election period, the Senate adopted an even more egregious definition of “electioneering communication” (the Specter amendment) to spring into effect if the 30/60 day no-reference ban is stricken. Under the replacement definition, the communications must “promote or support” or “attack or oppose” the candidate and be “suggestive of no plausible meaning other than an exhortation to vote for or against that candidate.” S. 27 at 18-19. Notably this definition applies all the time, not just for 30/60 days before an election and it blatantly assaults a holding of the U.S. Supreme Court (as described next below) by declaring that its definition applies “regardless of whether the communication expressly advocates a vote for or against a candidate.” S. 27 at 18.

In sum, the issue advocacy communications of nonprofit corporations and labor unions, are treated like express advocacy communications, and organizations doing such issue advocacy are treated like PACs. However, as seen next, there is no constitutional warrant for Congress to regulate issue advocacy or the organizations that primarily engage in it. Period.

2. The bright-line “express advocacy” test protects issue advocacy from regulation.

To protect First Amendment freedom, the Supreme Court has created a bright line between permitted and proscribed regulation of political speech. Government may only regulate a communication that “expressly advocates the election or defeat of a clearly identified candidate” (“express advocacy”), by “explicit words” or “in express terms,” such as “vote for,” “support,” or “defeat.” Election-related speech that discusses candidates’ views on issues is known by the legal term of art “issue advocacy.” Although issue advocacy undoubtedly influences elections, it is absolutely protected from regulation – even if done by corporations, labor unions, or political parties.

Although the First Amendment says that “Congress shall make *no* law . . . abridging the freedom of speech” (emphasis added), the “reformers,” and the incumbent politicians that their efforts would protect, have refused to take “no” as an answer. But the federal courts have consistently enforced the First Amendment against all attempts to regulate issue advocacy.

The Supreme Court has recognized that the freedom of speech is both an inherent liberty and a necessary instrument for limited representative government,²⁴ The Court observed that “[i]n a republic where the people[, not their legislators,] are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those

²⁴*Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (“*MCFL*”).

elected will inevitably shape the course that we follow as a nation.”²⁵ As a result, “it can hardly be doubted that the constitutional guarantee [of the freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.”²⁶

The seminal case is the 1976 decision of *Buckley v. Valeo*, where the Supreme Court was faced with constitutional questions regarding the post-Watergate amendments to the Federal Election Campaign Act (“FECA”) – which was by far the most comprehensive attempt to regulate election-related communications and spending²⁷ to date. One of the more nettlesome problems with which the Court struggled was the question of what speech could be constitutionally subject to government regulation. The post-Watergate FECA was written broadly, subjecting any speech to regulation that was made “relative to a clearly identified candidate”²⁸ or “for the purpose of . . . influencing” the nomination or election of candidates for public office.²⁹

In considering this question, the Court recognized that the difference between issue and candidate advocacy often dissipated in the real world:

[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.³⁰

Thus, the Court was faced with a dilemma – whether to allow regulation of issue advocacy because it might influence an election or to protect issue advocacy because it is vital to the conduct of our representative democracy, *even though it would influence elections*.

The Court resolved this dilemma decisively in favor of protection of issue advocacy. First, the Court recognized that “a major purpose of [the First Amendment] was to protect the

²⁵*Buckley*, 424 U.S. at 14-15.

²⁶*Id.* at 15 (citation omitted).

²⁷The fact that laws regulate the spending of money on speech, rather than the speech itself, does not change the constitutional calculus. As the Court explained in *Buckley*,

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number or issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money.

Id. at 18-19. Thus, “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* at 19 n.18.

²⁸Section 608(e)(1) limited expenditures by individuals and groups “relative to a clearly identified candidate” to \$1,000 per year.

²⁹Section 431(e) and (f) defined the terms “contribution” and “expenditure” for the purposes of FECA’s disclosure requirements in then Section 434(e).

³⁰*Buckley*, 424 U.S. at 42-3.

free discussion of governmental affairs . . . of course includ[ing] discussions of candidates.”³¹
Thus, the Court concluded that issue advocacy was constitutionally sacrosanct:

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 interchange of ideas for the bringing about of political and social changes desired by the people.”³²

Second, in order to provide this broad protection to issue advocacy, the Court adopted the bright-line “express advocacy” test which limited government regulation to only those communications which “expressly advocate the election or defeat of a clearly identified candidate,” in “explicit words” or by “express terms.”³³ In so doing, the Court narrowed the reach of the FECA’s disclosure provisions to cover only “express advocacy.”³⁴ A decade later, the Court reaffirmed the express advocacy standard and applied it to the ban on corporate and labor union contributions and expenditures in connection with federal elections.³⁵

Finally, not even the interest in preventing actual or apparent corruption of candidates, which was found sufficiently compelling to justify contribution limits, was deemed adequate to regulate issue advocacy. The Court rejected this interest even though it recognized that issue advocacy could potentially be abused to obtain improper benefits from candidates.³⁶

In adopting a test that focused on the words actually spoken by the speaker, the Court expressly rejected the argument that the test should focus on the *intent* of the speaker or whether the *effect* of the message would be to influence an election:

[W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] 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.

³¹*Id.* (citation omitted).

³²*Id.* at 14 (citation omitted) (emphasis added).

³³*Id.* at 43, 44. To ensure that there was not any confusion about the meaning of “express advocacy,” the Court gave examples of such “express terms” – “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Id.* at 44 n.52.

³⁴*Id.* at 80; *see also* Bopp & Coleson, *The First Amendment is not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 U.W.L.A. LAW REV. 1, 11-15 (1997).

³⁵*MCFL*, 479 U.S. at 249 (“We therefore hold that an expenditure must constitute ‘express advocacy’ in order to be subject to the prohibition in § 441b.”); *see also id.* (“finding of express advocacy depend[s] upon the use of language such as ‘vote for,’ ‘elect,’ ‘support,’ etc.”) (citations omitted).

³⁶*Buckley*, 424 U.S. at 45.

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.³⁷

Some “reformers” claim that the Court was not sufficiently farsighted to see the effect that issue advocacy would eventually have in influencing elections and, if we only bring this to their attention, then the Court will allow government regulation of it. However, the Court made clear that it was not so naive:

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, as well as more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.³⁸

As a result, the Court explicitly endorsed the use of issue advocacy to influence elections:

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.³⁹

The several lower federal courts and state courts that have been faced with restrictions on issue advocacy have faithfully adhered to the “explicit” or “express” words of advocacy test according to its plain terms.⁴⁰

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.⁴¹ Consequently, if passed, McCain-Feingold’s materially identical “electioneering communication” definition is dead on arrival in the federal courts.

The weight of authority is indeed heavy; the express advocacy test means exactly what it says. Campaign finance statutes regulating more than explicit words of advocacy of the election

³⁷*Id.* at 43 (citation omitted). While “reformers” often espouse the view that the express advocacy test was intended only to fix the vagueness problem, which this passage addresses, they ignore the Court’s confirmation that the express advocacy limitation was also imposed on the FECA “to avoid problems of overbreadth.” *MCFL*, 479 U.S. at 248 (citing *Buckley*, 424 U.S. at 80).

³⁸*Buckley*, 424 U.S. at 43 n.50 (citation omitted).

³⁹*Id.* at 45. Some argue that the “express advocacy” test was ill considered by the Supreme Court. The evidence does not admit this conclusion. The Court reiterated the “express advocacy” test in eight different passages throughout its opinion. *Id.* at 43, 44, 44 n.52, 45 (twice), 80 (thrice). Others, contend that the “express advocacy” test is a “magic words” test – that so long as the words used in *Buckley*’s footnote 52 are avoided, political speakers avoid regulation. Footnote 52 belies this view: “This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, *such as* ‘vote for,’” (Emphasis added.) Thus, the Court adopted an “explicit words of advocacy” test, not a “magic words” test.

⁴⁰*See Appendix A.*

⁴¹*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).

or defeat of clearly identified candidates are “impermissibly broad”⁴² under the First Amendment.⁴³

3. The minor exception for certain nonprofits – practically eliminated by amendment – requires them to act like quasi-PACs, in violation of constitutional rights.

McCain-Feingold makes a very minor exception for nonprofits that (1) permits expenditures for “electioneering communication,” (2) applies only to those organizations tax exempt under §§ 501(c)(4) or 527 of the Internal Revenue Code, and (3) applies only if they are made by a quasi-PAC established by the corporation, to which contributions can only be made by individuals and with respect to which all receipts and disbursements must be reported.⁴⁴ S. 27 at 22.⁴⁵

The first thing to be noted about this minor exception is that it only applies to 501(c)(4) and 527 organizations. That means all other nonprofits are excluded from engaging in issue advocacy for a couple of months before an election, including 501(c)(3)s, veterans groups, trade associations, and labor unions.

Furthermore, this quasi-PAC is required to report all of its contributors of \$1,000 or more. S. 27 at 16-17. This is a very substantial burden because it exposes contributors to harassment and intimidation by ideological foes.⁴⁶ The United States Supreme Court in *Buckley*

⁴²*Buckley*, 424 U.S. at 80.

⁴³Furthermore, nonprofit ideological corporations, which do not serve as conduits for business corporation contributions, cannot even be prohibited from making independent expenditures or contributions to candidates. *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986); see case listed in *Appendix C*. It is inconceivable that they can be prohibited from engaging in issue advocacy.

⁴⁴Furthermore, if the “electioneering communication” is “coordinated” with a candidate, it is subject to candidate contribution limits. S. 27 at 30-33.

⁴⁵Moreover, a 501(c)(4) organization that “derives amounts from business activities or receives funds from any [corporation] shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of [the quasi-PAC fund].” S. 27 at 23. This applies regardless of whether the business income flows from sale of items closely related to the ideological issue of the nonprofit (e.g., sale of pro-life literature by the National Right to Life Committee), how minimal the corporate contributions are, whether “electioneering communication” is the major purpose of the organization, and whether the organization poses any threat of quid pro quo corruption, contrary to the teaching of the federal courts in several cases. See cases cited in *Appendices B* and *C*.

⁴⁶Campaign finance “reformer” organizations accept major donations (e.g., Public Campaign accepted “\$1 million from former Democratic representative Cecil Heftel of Hawaii and \$3 million from the foundation of philanthropist George Soros”), but then decline to disclose their donors. Chuck Raasch, *Big money, with interest*, USA Today, June 17, 1997, at A7.

The extended Gannett News Service article from which the above article was derived gave the reasons stated by these organizations for not wanting to disclose their donors. Note the irony of the answers given in light of the donor disclosure requirements that McCain-Feingold would impose on other citizen advocacy groups that obviously have similar rights and interests:

Top officials in Public Citizen and the Sierra Club Foundation, a separate tax-exempt offshoot of the environmental organization, argued that divulging their donor list either would give an unfair

(continued...)

held that such burdens could not be applied to issue-oriented groups, as McCain-Feingold does, because disclosure of private associations is an unconstitutional burden.⁴⁷

And what McCain-Feingold initially seemed to offer, it promptly withdrew with the adoption of the Wellstone amendment. As amended, the preceding exception applies only where the communication is not “targeted,” i.e., the broadcast ads are not aimed “primarily [at] residents of the State for which the . . . candidate is seeking office.” S. 27 at 25.

B. McCain-Feingold Also Prohibits Corporations and Labor Unions from Engaging in Any “Coordinated Expenditure.”

McCain-Feingold also prohibits corporations and labor unions for funding any “coordinated expenditure.” S. 27 at 30.⁴⁸ Originally the bill banned “coordinated activity,” but even Sen. McCain acknowledged that it was unconstitutionally overbroad and submitted a successful amendment to alter the language. The new language yet uses overbroad and vague terminology, so that it would still convert many constitutionally permissible expenditures into forbidden “contributions.”

“Coordinated expenditure” is

a payment made in concert or cooperation with, at the request or suggestion of, or pursuant to any general or particular understanding with, such candidate, the candidate’s authorized committee, or their agents, or a political party committee or its agents.

S. 27 at 32.

⁴⁶(...continued)
advantage to competitors or unfairly expose identities of their members.

“As I’m sure you are aware, citizens have a First Amendment right to form organizations to advance their common goals without fear of investigation or harassment.” Public Citizen President Joan Claybrook told GNS. “. . . We respect our members’ right to freely and privately associate with others who share their beliefs, and we do not reveal their identities. We will not violate their trust simply to satisfy the curiosity of Congress, or even the press.”

. . . .

Bruce Hamilton, national conservation director for the Sierra Club Foundation, said . . . “[t]hat is basically like saying . . . ‘give us your membership’ In effect, it is saying, ‘we want public disclosure of the 650,000 members of the Sierra Club,’ which is a valuable resource, coveted by others, because they can turn around and make their own list.”

“And it can also be turned around and used against them. We have members in small towns in Wyoming, Alaska, (who could be hurt) if word got out they belonged to the Sierra Club.”

Chuck Raasch, *Do public interest groups that push campaign reform really represent citizens?*, June 13, 1997, at 3.

⁴⁷ 424 U.S. at 42-45.

⁴⁸McCain-Feingold further amends the corporate and labor union prohibition on “contributions or expenditures,” § 441b(a), by incorporating in § 441b(b)(2)’s definition of these terms, the definition of “contribution” in § 431(8). S. 27 at 31. Section 431(8) is amended by the bill to add the definition of “coordinated activity.” S. 27 at 26-30. A further consequence of adding the expanded definition of “coordinated activity” to the definition of “contribution” in § 431(8) is that an organization whose major purpose becomes “coordinated activity” is deemed to be a federal PAC, subject to all PAC the limitations and regulations. Of course, issue advocacy cannot be counted as political speech that deems an organization to be a PAC. See cases listed in *Appendix B*.

McCain-Feingold then instructs the Federal Election Commission to come up with new regulations to implement this definition, specifying that the new regulations “shall not require collaboration or agreement to establish coordination.” S. 27 at 32.

1. “General understanding” is overly broad.

A “coordinated expenditure” includes “a payment made . . . pursuant to any general . . . understanding with [a] candidate.” This definition is overly broad and vague, as must be any regulations established under this standard. It provides no limit or notice to organizations subject to civil and criminal sanctions for coordinating it with a candidate.

Furthermore, with respect to communications, it is not limited to express advocacy and thus clearly encompasses issue advocacy by an organization. While the courts are currently divided on whether a coordinated communication must contain express advocacy to be subject to regulation or prohibition,⁴⁹ no court has suggested that any and all communications are so subject.⁵⁰

2. “Coordination” without “collaboration or agreement” is overly broad.

Under current law, coordination between a candidate and a citizen group exists only when there is actually prior communication about a specific expenditure for a specific project that effectively puts the expenditure under the candidate’s control or is made based on information provided by the candidate about the candidate’s needs or plans.⁵¹ However, McCain-Feingold expands “coordination” to include undefined activity absent such “collaboration or agreement.” S. 27 at 32.

For example, if an incorporated ideological organization praised Sen. McCain for his work on campaign finance “reform” early in a session of Congress and worked with him on promoting such “reform” legislation, then “coordination” could be established as a result of this “general understanding,” and expenditures by the organization would be deemed “coordinated,” would be a “contribution” to his campaign, and would be illegal because corporations cannot make contributions to candidates.⁵²

However, the very notion that American citizens should be punished for communicating, or even working, with their elected officials on a wide range of public issues important to the official and his constituency by having any subsequent efforts to praise the candidate’s issue position or to support the candidate in his or her campaign considered a coordinated activity is repugnant to our constitutional scheme of participatory government in a democratic Republic run

⁴⁹*Compare Clifton v. FEC*, 927 F. Supp. 493 (D. Me. 1996), with *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999).

⁵⁰*See Appendix D.*

⁵¹*See id.* The FEC has also published final rules governing coordinated expenditures that defines “coordination” narrowly. 65 Fed. Reg. 76146 (daily ed. December 6, 2000). McCain-Feingold repeals these. S. 27 at 33.

⁵²This “contribution” must also be reported by the candidate, here Senator McCain, even if he did not know about it. 2 U.S.C. § 434. It is a potential crime if Sen. McCain does not. 2 U.S.C. § 437g(d) (if the violation is found to be “knowing and willful” despite the candidate’s assertion of no knowledge).

by and answerable to the People. In a conceptually related context, in *Clifton v. FEC*,⁵³ the First Circuit struck down the FEC's voter guide regulations which prohibited any oral communications with candidates in preparation of voter guides.⁵⁴ The court held that this rule is "patently offensive to the First Amendment" and 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."⁵⁵

And coordination would also have been presumed, under McCain-Feingold as introduced, if the ideological corporation used the same vendor of "professional services," including "polling, media advice, fundraising, campaign research, political advice, or direct mail services (except for mailhouse services)" if the vendor had worked for a candidate and if the vendor is retained to do work related to that candidate's election. Under the Senate-passed version, FEC regulations would be required to address the issue of "a common vendor" and similar presumably "coordinated" activities.

Such presumptions are fatally infirm because coordination must be proven. In *Colorado Republican Federal Campaign Comm. v. FEC*, the FEC took the position that party expenditures were presumed to be coordinated with their candidates as a matter of law. The Supreme Court rejected this view: "An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one. . . . [T]he government cannot foreclose the exercise of constitutional rights by mere labels."⁵⁶ The Court held that there must be "actual coordination as a matter of fact."⁵⁷ Congress or the FEC, therefore, cannot merely recite some factual scenarios wherein it might be possible, or even probable, that coordination with candidates takes place and then presume as a matter of law that it has occurred in such instances. To do so, would allow the government to drastically curtail independent expenditures by mere labels, which cannot be constitutionally limited.⁵⁸

McCain-Feingold's finding of "coordination" if there is any "general understanding" with the candidate about the expenditure, S. 27 at 32, goes way beyond the narrow understanding that the courts have on what is "coordination." Consistent with other federal courts, the District Court in *FEC v. Christian Coalition*⁵⁹ held that a communication

⁵³114 F.3d 1309 (1st Cir. 1997).

⁵⁴11 CFR § 114.4(c)(5).

⁵⁵*Clifton*, 114 F.3d at 1314. Furthermore, as if this provision has not driven a big enough wedge between officeholders and citizens groups, McCain-Feingold also prohibits officeholders from assisting citizens groups in their fundraising, unless it is for their PAC. S. 27 at 5-6.

⁵⁶518 U.S. 604, 622 (1996) (Breyer, J., plurality opinion).

⁵⁷*Id.* at 617.

⁵⁸*Id.* at 626; *id.* at 2321 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *id.* at 644-45 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); see also *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985); *Buckley*, 424 U.S. at 47, 51; *New Hampshire Right To Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18-19 (1st Cir. 1996); *Georgia Right To Life v. Reid*, No. 1:94-cv-2744-RLV (N.D. Ga. Jan. 22, 1996); *Common Cause v. Schmitt*, 512 F. Supp. 489 (D. D.C. 1980).

⁵⁹52 F. Supp. 2d 45, 92 (D.D.C. 1999).

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). ‘Substantial discussion’ or ‘negotiation’ is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

This is a far cry from a “general understanding.”

3. A bright-line definition is necessary to protect the issue advocacy of citizens groups.

While it may be theoretically possible to do issue advocacy without running afoul of it being a prohibited “electioneering communication” or “coordinated expenditure,” only the reckless, foolish, or wealthy and powerful are likely to try. Particularly in Washington, D.C., the punishment is in the process. Any organization that does something that could be deemed of value to a candidate can expect to be the subject of an FEC complaint and investigation to ferret out whether the activity was “coordinated.” Thus, publicly praising an officeholder for her vote on a bill invites investigation by the FEC. Daring to tell constituents to get an incumbent to change his position on an upcoming vote could provoke an FEC investigation. This is the world of ubiquitous FEC investigations that all advocacy groups can expect.

And these “mere” investigations themselves violate the First Amendment. As the U.S. Supreme Court explained when Congress was busy investigating Communist influence in the 1940’s and 50’s, “[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” with First Amendment freedoms.⁶⁰

4. PACs could do a “coordinated activity,” but are severely limited by contribution limits, eliminating most independent expenditures.

For any individual, and for any organization that can actually do a “coordinated expenditure,” which seems to be only a federal PAC, the “coordinated expenditure” would be limited by contribution limits. So a substantial amount of traditional “independent expenditures” by PACs are now swept under the control of McCain-Feingold and limited because a multi-candidate PAC can only make a contribution of \$5,000 per election to a candidate.

5. For the few independent expenditures not trapped by other provisions, disclosure must be made when contracting for media time, creating opportunity for mischief by opposing candidates.

The small number of independent expenditures that are not trapped by the coordination problem are yet hammered by McCain-Feingold because the report of the independent expenditure must be made when a contract is made for broadcast time, not when the communication is

⁶⁰*Watkins v. United States*, 354 U.S. 178, 196 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

made as under current law. S. 27 at 20. This advances substantially when reporting is due and creates a window of opportunity during which incumbent politicians can try to kill the communication by, e.g., threatening the broadcaster or organization's donors with retaliation, contacting corporate board members to use their influence, or threatening to oppose legislation favored by the contracting organization or broadcasting corporation.

C. The news media exception highlights the expanded power McCain-Feingold gives powerful news corporations and the wealthy.

McCain-Feingold contains an exception from the definition of "electioneering communication" for "a news story, commentary, or editorial distributed through the facilities of any broadcasting station," provided the station is not "owned or controlled by any political party, political committee, or candidate . . ." S. 27 at 19. And biased news coverage, whether by slant, tone, manipulation of images, volume of coverage, or even outright advocacy of election or defeat of a candidate by a news corporation, is nowhere restricted by McCain-Feingold. While the news media is protected by the same First Amendment as are other citizen groups, as it should be, this exception makes plain that McCain-Feingold is a direct attack only on the average citizen, who needs to exercise his constitutional right of association in order to effectively participate in the political arena.

Similarly, wealthy individuals don't care about the McCain-Feingold restrictions. First, if they choose, they can start or buy a media outlet and use it with impunity to support the issues and candidates they choose. Furthermore, as individuals, they can do what is forbidden to corporations and labor unions. Likewise, they don't care about the donor reporting requirements because there are no donors to disclose but themselves.

Finally, however, wealthy individuals should care about the passage of McCain-Feingold because its passage will greatly increase their power vis-a-vis citizens of average means.⁶¹ The wealthy should be for its passage. Thus, it appears that the multi-million dollar contributions that the wealthiest individuals and private foundations are making to "reformer" groups is money well spent.

D. McCain-Feingold 2001 Further Limits Average Citizen Participation in the Political Arena by Restricting the Activities of Political Parties.

McCain-Feingold 2001 reflects the Senate's woeful ignorance of – or outright disdain for – the constitutionally protected role political parties play in our republican democracy. With its misguided goal of eliminating so-called "soft money," S. 27 at 3-12, McCain-Feingold 2001 has two dramatic adverse effects on political party activity: (1) it imposes federal election law limits on the state and local political party activities, and (2) it dramatically limits the issue advocacy, legislative, and organizational activities of political parties. Neither of these effects are desirable

⁶¹Even as candidates, McCain-Feingold increases the power of the wealthy, since it includes a provision prohibiting candidates from using campaign funds for personal expenses. S. 27 at 34-36. After all, the wealthy already have the funds to pay living expenses while campaigning full time. Citizens of average means, however, are faced with a dilemma – do they campaign only at night and on weekends in order to keep their job to feed their family or do they quit their job to campaign full time and face this crippling loss of family income. Furthermore, this provision benefits all incumbents, whether wealthy or not, since the government continues to pay them a salary, even though they are campaigning full time.

or constitutional. The Supreme Court has said “[w]e are not aware of any special dangers of corruption associated with political parties”⁶² That assertion is backed both by the case law and by the overwhelming political science evidence of how political parties operate.

Haley Barbour, the former Chairman of the Republican National Committee, defined a political party as:

an association of like-minded people who debate issues, who attempt to influence government policy, and who work together to elect like-minded people to local, State and Federal office.⁶³

Political parties are primarily an association of people; they are not simply repositories for campaign contributions, or “super-PAC’s.” Second, political parties have a legitimate role in debating issues, promoting ideas and in formulating public policy. Third, national parties have significant local and state components; they are “national” not “federal” committees. National parties exist for the purpose of electing federal and state candidates and for effecting federal and state public policy. National parties have considerable, constitutionally protected interests to participate in state and local elections.

In many contexts the U. S. Supreme Court has recognized the constitutionally significant role played by political parties in our republican democracy. Just last term the High Court struck down California’s blanket primary law because it unconstitutionally interfered with political parties’ protected political association. As Justice Scalia wrote for seven Justices: “Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.”⁶⁴ As Justice O’Connor has recognized:

There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.⁶⁵

⁶²*Colorado Republican*, 518 U.S. at 616.

⁶³*Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 10-11 (1995) (statement of Haley S. Barbour, former chairman, Republican National Committee).

⁶⁴*California Democratic Party v. Jones*, 120 S. Ct. 2402, 2407 (2000). Moreover, the Supreme Court’s holding has a long and distinguished pedigree:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

A. de Tocqueville, 2 *Democracy in America* 203 (Bradley, ed.1954).

⁶⁵*Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O’Connor, J., concurring). See also, *Eu v. San* (continued...)

Of course, “measured change” is not often the goal of incumbent politicians before most elections. This realization could go a long way toward explaining why the incumbent politicians in the Senate favor reducing the impact political parties traditionally have in mobilizing voters to support challengers in competitive races. Political scientists have long recognized that political parties are the most influential institution in the electoral process for creating greater turnover in legislatures.⁶⁶ Indeed, *increasing* the role of political parties is the practical formula for improving many of the ills McCain-Feingold 2001 purports to address.⁶⁷

In 1972 a diverse group of over 300 professional political scientists and political practitioners formed the Committee for Party Renewal. In 1984 the Committee adopted a manifesto entitled “Principles of Strong Party Organization,”⁶⁸ which, based on the consensus views of these political scientists, advocated that:

Political parties should govern themselves.

Political party organizations should be open and broadly based at the local level.

Political parties should advance a public agenda.

Political parties should be effective campaign organizations.

Political parties should be a major financier of candidate campaigns.

Election law should encourage strong political parties.

McCain-Feingold 2001 violates each of these principles, weakening political parties to the detriment of the Republic. Thus, McCain-Feingold 2001 is not only unconstitutional, it is irrational.

1. McCain-Feingold 2001 federalizes many activities of state and local political parties.

McCain-Feingold 2001 federalizes many activities of state and local political parties. Under McCain-Feingold, if there is a federal candidate on the ballot, any “federal election activity” must be paid for with money raised under the limits of federal law, not with money

⁶⁵(...continued)
Francisco Democratic Central Committee, 489 U.S. 214, 244 (1989); *Republican Party of Connecticut v. Tashjian*, 479 U.S. 208, 214-15(1986); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975); *Storer v. Brown*, 415 U.S. 724, 728-29 (1974); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

⁶⁶Malbin & Gais, *THE DAY AFTER REFORM: SOBERING CAMPAIGN FINANCE LESSONS FROM THE AMERICAN STATES* 145-158 (1998) (“Political parties . . . consistently gave disproportionately to candidates who were in close races, especially challengers and open-seat candidates. Party spending, therefore, seems to be an important vehicle for satisfying one of the two major goals of campaign finance reform: encouraging electoral competition.”) *Id.* at 158.

⁶⁷Gierzynski and Breaux, “The Role of Parties in Legislative Campaign Financing,” 15 *The American Review of Politics* 171-189 (1994) (“Increasing the party role would reduce the gap between incumbent revenues and challenger revenues.”) Furthermore, “a larger role for parties in financing elections would result in more equitable distribution of campaign money and a greater level of competition in legislative campaigns.” *Id.* at 172.

⁶⁸Attached as *Appendix F*.

raised lawfully under state law. “Federal election activity” includes “voter registration” during the 120 days before an election, “voter identification, get-out-the-vote activity, or [any activity promoting a political party].” S. 27 at 9. Therefore, if state and local political parties do “federal election activity,” they must use “hard money,” i.e., money subject to FECA restrictions, for such activity if a federal candidate is on the ballot.

These activities are traditional activities that state and local parties have always done and the national political parties have supported. The fact that there is a federal candidate on the ballot, along with the state and local candidates for whom state and local parties have the greater concern, does not justify federalizing and limiting these activities.

2. McCain-Feingold 2001 prohibits national political parties from using “soft money” to pursue issue advocacy, legislative, and organizational activities.

Because McCain-Feingold 2001 prohibits the raising of “soft money” by national political parties, S. 27 at 3, they have no such money available for issue advocacy, legislative, and organizational activities. It treats national political parties as if they were just federal-candidate election machines. As a result, McCain-Feingold 2001 has effectively amputated these other important, historical activities of political parties.

Yet, these restrictions fail constitutional muster. Political parties enjoy the same unfettered right to issue advocacy as other entities, which is especially appropriate because advancing a broad range of issues is their *raison d’etre*. “Reforms” banning political parties from receiving and spending so-called “soft money” cannot be justified as preventing corruption, since the Supreme Court has already held that interest insufficient for restricting issue advocacy in *Buckley*.

If individuals and narrow interest groups enjoy the basic First Amendment freedom to discuss issues and the position of candidates on those issues, how can political parties, which have wide bases of interests that are necessarily tempered and diffused, be deprived of the right to engage in such issue advocacy?

However, proponents of abolishing “soft money” argue that this is simply a “contribution limit.”⁶⁹ The fallacy of that argument, of course, is that the Supreme Court has justified contribution limits only on the ground that large contributions create the reality or appearance of *quid pro quo* corruption,⁷⁰ which, as discussed above, cannot justify a limit on issue advocacy.⁷¹

Furthermore, the proposed ban on soft money contributions cannot be justified on the theory that political parties corrupt federal candidates, which the Supreme Court has already rejected. In *Colorado Republican*, the FEC took the position that independent, uncoordinated

⁶⁹Brief of Amici Curiae U.S. Sens. Carl Levin, John D. McCain and Russell D. Feingold at 9, *Republican National Committee v. FEC*, 1998 U.S. App. LEXIS 28505 (D.C. Cir. 1998) (Nos. 98-5263, 98-5364).

⁷⁰See generally Bopp, *Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. L. REV. 235 (1998-99).

⁷¹*Buckley*, 424 U.S. at 45.

expenditures by political parties ought to be treated as contributions to the benefitted candidate.⁷² Such treatment would have resulted in allowing individuals, candidates, and political action committees to spend unlimited amounts of money on independent expenditures to advocate the election of a candidate, while limiting the amount a political party could spend for the same purpose.

The Supreme Court disagreed with the FEC, noting that “[w]e are not aware of any special dangers of corruption associated with political parties” and, after observing that individuals could contribute more money to political parties (\$20,000) than to candidates (\$1,000) and PACs (\$5,000) and that the “FECA permits unregulated ‘soft money’ contributions to a party for certain activities,” the Court concluded that the “opportunity for corruption posed by these greater opportunities for contributions is, at best, attenuated.”⁷³ The Court continued in this vein with respect to the FEC’s proposed ban on political party independent expenditures, which has direct application to McCain-Feingold’s ban on soft money contributions:

[R]ather than indicating a special fear of the corruptive influence of political parties, the legislative history [of the Act] demonstrates Congress’ general desire to enhance what was seen as an important and legitimate role for political parties in American elections. . . .

We therefore believe that this Court’s prior case law controls the outcome here. We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.⁷⁴

The concurring justices also found little, if any, opportunity for party corruption of candidates because of their very nature and structure.⁷⁵

The Supreme Court echoed the same theme with respect to the independent expenditures of political action committees:

The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.⁷⁶

If this is true of PACs, then *a fortiori* there can be no corruption or appearance of corruption resulting from issue advocacy by political parties.

In addition, the Supreme Court in *MCFL* provided further guidance on whether the threat of corruption is posed by an organization such as a political party. The Court considered the ban on independent expenditures by corporations under 2 U.S.C. § 441b. The *MCFL* Court evaluated

⁷²518 U.S. at 619.

⁷³*Id.* at 616.

⁷⁴*Id.* at 618.

⁷⁵*Id.* at 626 (Kennedy, J., Rehnquist, C.J., Scalia, J., concurring in the judgment); *see also id.* at 631 (Thomas, J., Rehnquist, C.J., Scalia, J., concurring in the judgment).

⁷⁶*FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

whether there was any risk of corruption with regard to an MCFL-type organization that would justify such a ban on its political speech. While *MCFL* considered whether an ideological corporation was sufficiently like a business corporation to justify the ban on using corporate dollars for independent expenditures, there are several transferable concepts to evaluating the threat of corruption posed by a political party.

The concern raised by the FEC in *MCFL* was that § 441b served to prevent corruption by “prevent[ing] an organization from using an individual’s money for purposes that the individual may not support.”⁷⁷ The Court found that “[t]his rationale for regulation is not compelling with respect” to MCFL-type organizations because “[i]ndividuals who contribute to [an MCFL-type organization] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.”⁷⁸ “[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction.”⁷⁹ “Finally, a contributor dissatisfied with how funds are used can simply stop contributing.”⁸⁰ Thus, the Court held that the prohibitions on corporate contributions and expenditures in § 441b could not be constitutionally applied to non-profit ideological corporations which do not serve as a conduit for business corporation contributions.⁸¹

Political parties similarly pose no risk of corruption because people give money to parties precisely because they support what the political party stands for. A contribution to a political party is for the purpose of enhancing advocacy of the issues the party represents. Any individual unhappy with the use of the money may simply quit contributing and leave the political party. In sum, the threat of corruption cannot justify a limit on issue advocacy and, even if it could, political parties pose no threat of corruption to their candidates.

Finally, the Supreme Court also found that, just as independent expenditures of interest groups pose no danger of corrupting candidates, neither do those of political parties. And while no one disputes that expenditures on express advocacy actually coordinated with candidates are properly contributions to the candidate because of the possibility of *quid pro quo* corruption, the Court held that coordination must be proven as a matter of fact; it cannot be presumed. “Reforms” may not presume coordination where it does not actually exist.

Those who would attempt to justify the new restrictions on political parties in McCain-Feingold 2001 on the ground that the Supreme Court upheld limits on individual and political committee contributions to candidates in *Shrink Missouri Government PAC v. Nixon*,⁸² are wrong. Following the Supreme Court’s numerous precedents recognizing the unique associational interests embraced by political parties, four lower federal court’s have struck down restrictions on political party financing *since* the *Shrink Missouri* case was decided.

⁷⁷*MCFL*, 479 U.S. at 260.

⁷⁸*Id.* at 260-61.

⁷⁹*Id.* at 261.

⁸⁰*Id.*; *see also Day v. Hollahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994).

⁸¹*See Appendix C.*

⁸²120 S. Ct 897 (2000).

Indeed, even as the U. S. Senate fiddled with McCain-Feingold, Rome began to burn. On April 10, 2001, the United States District Court for the District of Alaska held that a state statute was unconstitutional as applied to state “soft money” contributions to political parties. The Court held that political parties have a constitutional right to maintain separate accounts to fund issue advocacy and voter mobilization programs. Furthermore, it held that the government has no interest sufficiently important to justify the imposition of limits on contributions to those accounts.⁸³ So-called “soft money” bans are unconstitutional.⁸⁴

The Tenth Circuit Court of Appeals went a step farther last year and struck down the federal limit on party coordinated expenditures in 2 U.S.C. § 441a(d) on First Amendment grounds. It held that the government had “not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process.”⁸⁵ The Supreme Court has heard oral argument in that case and a decision is expected by July 2001.

Extending the recognition that political parties are a positive (rather than corrupting) influence on the electoral process to its logical end, the Eighth Circuit Court of Appeals and the United States District Court for the District of Vermont each held that state law limits on political party monetary contributions to candidates violate the First Amendment. The Eighth Circuit held that because a political party speaks through its candidates, limits on a party’s contributions impose unconstitutional burdens on the party’s speech. The First Amendment rights at stake in the context of party contribution limits are “different from, and weightier than, those that were involved in *Buckley*.”⁸⁶

The main object of a political party is to elect its candidates to office, and, in large measure, the speech of its candidates is its own speech. While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. In fact, parties and their candidates are often virtual alter egos.⁸⁷

Based on a fully developed record after a ten day bench trial, the District Court in Vermont likewise struck down recently enacted political party contribution limits and echoed the Eighth Circuit’s view that contributions from political parties to their own candidates enjoy a high degree of constitutional protection:

Political parties speak with a different voice than individuals. Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper. For the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past.⁸⁸

⁸³*Jacobus v. Alaska*, No. A97-0272 CV (JKS) (D. Ak., April 10, 2001).

⁸⁴See Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition On A Soft Money Ban*, 24 J. Legis. 179 (1998).

⁸⁵*FEC v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1233 (10th Cir.), cert. granted, 121 S. Ct. 296 (2000) (“*Colorado II*”)(footnote omitted).

⁸⁶*Missouri Republican Party v. Lamb*, 227 F.3d 1070, 1072 (8th Cir. 2000).

⁸⁷*Id.*

⁸⁸*Landell v. Sorrell*, 118 F. Supp. 2d 459, 487 (2000)

The post-*Shrink* decisions of these four federal courts demonstrate that McCain-Feingold is a move in the wrong direction. Furthermore, they demonstrate that not only is the proposed soft money ban unconstitutional, but that other already-existing restrictions on political parties are also unconstitutional.⁸⁹

In addition to being unconstitutional, the soft money ban in McCain-Feingold is actually counter-productive in the eyes of political scientists based on the unique role political parties play in the electoral process. In a college political science text book about campaign finance published in 2000, the author, himself a proponent of other reforms, praised the effects of soft money for creating increased voter turnout:

Party soft money can be spent on issue advertisements—the “air war”—or on identifying, registering, and getting voters to the polling places—the “ground war.” Both of these uses—especially the latter—should be seen as positive developments. Issue advertisements can strengthen the parties by allowing the parties a role in setting the electoral agenda. Identifying, registering, and getting voters to the polls increases participation—including groups underrepresented in the pluralist system—and cannot be seen as anything but a positive development.⁹⁰

Thus, because of the unique, constitutionally important role played by political parties, any effort to improve the electoral process ought to “steer money to the political parties and encourage them to use that money for activities that reinvigorate U.S. elections.”⁹¹ Furthermore, as one prominent proponent of campaign finance reform has conceded, political parties are the solution rather than the problem:

For political parties, there seems little alternative to simply legitimize what has already happened de facto: the abolition of all limits. . . . [S]uch an outcome is not to be lamented. Political parties *deserve* more fundraising freedom, which would give these critical institutions a more substantial role in elections.⁹²

Thus, there is no justification, in either policy or law, for the severe limits on national, state, and local political parties that McCain-Feingold imposes.

⁸⁹See James Bopp, Jr., *All Contribution Limits Are Not Created Equal: New Hope in the Political Speech Wars*, 49 Cath. L. Rev. 11, 21-26 (1999) (arguing that contribution limits to political parties are unconstitutional because they impose direct restrictions on the parties’ speech).

⁹⁰Anthony Gierzynski, MONEY RULES: FINANCING ELECTIONS IN AMERICA 125 (2000). This current view of political parties is nothing new. See Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 133 (1970):

Political parties, with all of their well-known human and structural shortcomings, are the only devices thus far invented by the wit of Western man which with some effectiveness can generate countervailing collective power on behalf of the many individuals powerless against the relatively few who are individually— or organizationally—powerful.

⁹¹Gierzynski, MONEY RULES at 125..

⁹²LARRY J. SABATO AND GLENN R. SIMPSON, *DIRTY LITTLE SECRETS* 334 (1996) (emphasis in original)(referring specifically to “soft” money contributions.)

Conclusion

Issue advocacy in the context of electoral politics enjoys absolute First Amendment protection. The Supreme Court has defined only a narrow scope of non-issue advocacy that can be regulated – only explicit words of advocacy of the election or defeat of a clearly identified candidate. Congress cannot eviscerate this bright line test with a “no-advocacy” name-or-likeness test without running afoul of the First Amendment. Further, political parties are not exempt from the enjoyment of this protection and, therefore, cannot be constitutionally forbidden from receiving and expending soft money. Nor is there a need to. Because of their nature, political parties are incapable of corrupting their own candidates.

Congress also cannot take away the constitutional right to engage in unfettered issue advocacy and unlimited independent expenditures by simply presuming that coordination with candidates exists. Legislatively created labels cannot obviate the freedom of speech. McCain-Feingold, therefore, will fail a court test.

“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.”⁹³

McCain-Feingold seeks to strip this right from the People.

The First Amendment is not a loophole to be plugged by unconstitutional legislation in misguided efforts to “reform” campaign finance. Free political speech was the first and is the best campaign finance reform, and it is the very core of what James Madison drafted and the Framers adopted when they guaranteed the People that “Congress shall make no law . . . abridging the freedom of speech.”⁹⁴

⁹³*Buckley*, 424 U.S. at 57.

⁹⁴U.S. CONST. amend. I. For further reading on the issues discussed in this memorandum, *see Appendix E*.

APPENDIX A

Cases Recognizing First Amendment Protection of Issue Advocacy

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1 (1976)

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)

Lower Federal Cases:

Florida Right to Life v. Mortham, 98-770-CIV-ORL-19A, 11 n.8, 9 (M.D.Fla. Dec. 15, 1999),
aff'd per curiam, *Florida Right to Life v. Lamar*, 2001 U.S. App. LEXIS 613 (11th Cir.
Jan. 17, 2001)

Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 2000 U.S. App.
LEXIS 33727, *22-26 (10th Cir. Dec. 26, 2000)

Perry v. Bartlett, 231 F.3d 155, 160-162 (4th Cir. 2000)

Vermont Right to Life Comm. v. Sorrell, 216 F.3d 264, 275-77 (2d Cir. 2000);

Iowa Right to Life Comm. v. Williams, 187 F.3d 963, 969-970 (8th Cir. 1999)

North Carolina Right To Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 506 (7th Cir. 1998)

Virginia Soc'y For Human Life v. Caldwell, 152 F. 3d 268 (4th Cir. 1998)

FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997) (*CAN II*)

FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd per curiam*, 92 F.3d
1178 (4th Cir. 1996) (*CAN I*)

Maine Right To Life Comm., 914 F. Supp. 8, 12 (D. Me. 1996), *aff'd per curiam*, 98 F.3d 1 (1st
Cir. 1996)

Faucher v. FEC, 928 F.2d 468, 472 (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*)

North Carolina Right to Life v. Leake, 108 F. Supp. 2d 498 (E.D. N.C. 2000)

Richey v. Tyson, 120 F. Supp. 2d 1298, 1309 (S.D. Ala. 2000)

South Carolina Citizens for Life v. Davis, C.A. No. 3:00-124-19 (D.S.C. Feb. 9, 2000)

Virginia Society for Human Life v. FEC, 83 F. Supp. 2d 668 (E.D. Va. 2000)

FEC v. Freedom's Heritage Forum, Civil Action No. 3:98 CV-549-S, slip op. at *5-*8 (W.D. KY Sept. 29, 1999)

FEC v. Christian Coalition, 52 F. Supp. 2d 45, 62 (D.D.C. 1999)

Kansans for Life v. Gaede, 38 F. Supp. 2d 928 (D. Kan. 1999)

Planned Parenthood Affiliates of Mich. v. Miller, 21 F. Supp. 2d 740 (E.D. Mich. 1998)

Right To Life of Dutchess County v. FEC, 6 F. Supp. 2d 248 (S.D. N.Y. 1998)

Right to Life of Mich. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich. 1998)

Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996), *aff'd on other grounds*, 114 F.3d 1309 (1st Cir. 1997)

West Virginians For Life v. Smith, 919 F. Supp. 954 (S.D. W. Va. 1996)

FEC v. Survival Educ. Fund, 1994 WL 9658, (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 (D. Colo. 1993), *rev'd* 59 F.3d 1015 (10th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 604 (1996)

FEC v. NOW, 713 F. Supp. 428 (1989)

FEC v. AFSCME, 471 F. Supp. 315, 317 (D. D.C. 1979)

State Cases:

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)

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)

APPENDIX B

Cases Recognizing Major Purpose Test

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1, 75-80 (1976)

FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 248-249 (1986)

FEC v. Akins, 524 U.S. 11, 26-29 (1998)

Lower Federal Cases:

Florida Right to Life v. Lamar, 2001 U.S. App. LEXIS 613 (11th Cir. January 17, 2001), *aff'g Florida Right to Life v. Mortham*, 98-770-CIV-ORL-19A, *10-*17 (M.D.FL Dec. 15, 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 1999 U.S. App. LEXIS 23325, *2 (7th Cir. Sept. 17, 1999)

North Carolina Right to Life v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999)

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 505 n.5 (7th Cir. 1998)

FEC v. Survival Educ. Fund, 65 F.3d 285, 294-95 (2d Cir. 1995)

FEC v. Florida for Kennedy Comm., 681 F.2d 1281, 1286-1287 (11th Cir. 1982)

FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 391-393 (D.C. Cir. 1981)

United States v. National Comm. for Impeachment, 469 F.2d 1135, 1141-42 (2d Cir. 1972)

Richey v. Tyson, 120 F. Supp. 2d 1298, 1315-1318 (S.D. Ala. 2000)

Perry v. Bartlett, 1999 U.S. Dist. LEXIS 5881, *9 (E.D. N.C. March 8, 1999)

Volle v. Webster, 69 F. Supp. 2d 171, 174-75 (D. Me. 1999)

Florida Right to Life v. Mortham, 1998 U.S. Dist. LEXIS 16694, *15 (M.D. Fla. Sept. 30, 1998)

Wisconsin Manufacturers & Commerce v. Wisconsin Elections Bd., 978 F. Supp. 1200 (W.D. Wisc. 1997)

FEC v. GOPAC, 917 F. Supp. 851, 858-862 (D. D.C. 1996)

New York Civil Liberties Union v. Acito, 459 F. Supp. 75, 89 (S.D. N.Y. 1978)

Buckley v. Valeo, 519 F.2d 821, 869-878 (D.C. Cir. 1975)

ACLU v. Jennings, 366 F. Supp. 1041, 1055-56 (D.D.C. 1973)

APPENDIX C

Cases Recognizing First Amendment Protection of Ideological Corporations

Supreme Court Cases:

Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986)

Lower Federal Cases:

North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999)

Minnesota Concerned Citizens for Life v. FEC, 113 F.3d 129 (8th Cir. 1997)

FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995)

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994)

Beaumont v. FEC, No. 2:00-CV-2-BO(2) (E.D.N.C., October 3, 2000)

Iowa Right to Life Committee v. Williams, No. 4-98-CV-10399 (S.D. Iowa, Oct. 26, 1999)

Montana Right to Life Ass'n v. Eddleman, 999 F. Supp. 1380 (D. Mont. 1999)

State Cases:

State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999)

Community Advocate v. Ohio Elections Comm'n, 705 N.E.2d 414 (Ohio App. 1997)

APPENDIX D

Cases Recognizing “Coordinated Expenditures” Require Considerable Control, Cooperation, or Prearrangement with a Candidate

Supreme Court Cases:

Buckley v. Valeo, 424 U.S. 1, 46-7 (1976)

FEC v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 498 (1985)

Colorado Republican Fed. Campaign Comm., v. FEC, 518 U.S. 604, 617-18 (1996)

Lower Federal Cases:

Iowa Right to Life Comm., Inc v. Williams, 187 F.3d 963, 968 (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. Freedom’s Heritage Forum, Civil Action No. 3:98 CV-549-S, slip op. at *3-*5 (W.D. Ky. Sep. 29, 1999)

FEC v. Public Citizen, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999)

Republican Party of Minnesota v. Pauly, 63 F. Supp. 2d 1008, 1015 (D. Minn. 1999)

Clifton v. FEC, 927 F. Supp. 493 (D. Me. 1996)

FEC v. Colorado Republican Fed. Campaign Comm., 839 F. Supp. 1448 (D. Col. 1993)

State Case:

Wisconsin Coalition for Voter Participation, v. Wisconsin Elections Board, 605 N.W.2d 654, 662 n.10 (Wis. Ct. App. 1999)

APPENDIX E

Other Reading Materials

- Bopp, *All Contribution Limits Are Not Created Equal: New Hope In The Political Speech Wars*, 49 CATHOLIC U. LAW REV. 11 (1999)
- Bopp, *The Constitutional Limits on Campaign Contribution Limits*, 11 REGENT U. LAW REV. 235 (1998-99);
- Franz & Bopp, *The Nine Myths of Campaign Finance Reform*, 9 STANFORD LAW & POL. REV. 63 (1998)
- Bopp & Coleson, *The First Amendment is Not a Loophole: Protecting Free Expression in the Election Campaign Context*, 28 UWLA LAW REV. 1 (1997)
- Bopp & Meyer, *Free Speech and the Christian Coalition Case*, Free Speech and Election Law News, Summer 1999, at 1
- Bopp, *Campaign Finance "Reform": The Good, The Bad, and the Unconstitutional*, The Heritage Foundation Backgrounder, No. 1308, July 19, 1999
- Bopp, *All in the Name of Campaign Reform*, Washington Post, August 29, 1997, at A23
- Bopp, *Needed: More, Not Less, Political Free Speech*, Washington Times, December 10, 1996, at A19
- Bopp, *The FEC's Assault on the First Amendment*, Free Speech and Election Law News, Fall 1996, at 7

APPENDIX F

COMMITTEE FOR PARTY RENEWAL

Principles of Strong Party Organization *

* This position paper was prepared by Jerome Mileur, Executive Director of the Committee for Party Renewal, reviewed by the Committee's executive committee, submitted to the full membership for comment, and approved at the Committee's annual business meeting, September 1, 1984.

"A political party is the instrument of the people's will. It exists not just to win elections but to move a country. Its purpose is not to placate a cacophony of strident voices, but to attract diverse groups to a common purpose. It is built not on television, but on a national vision. And when that party is out of power, its charge is to provide an alternative."

Senator Ernest F. Hollings **

** The Washington Post (National Weekly Edition), July 23, 1984, p. 23.

Political parties are an American invention. Jefferson and Madison devised them as means of changing the policy directions of government; Jackson and Van Buren revised them as means of expanding popular participation in government. Since the 1830s, they have, albeit imperfectly, continued to serve these ends. Parties are the only broad-based, multi-interested organizations we have that can nominate candidates for office, mobilize popular support behind them, and organize those elected into a government. Unlike special-interest groups, parties must appeal to pluralities in the electorate if they are to win; and unlike single-candidate organizations, they must win many races if they are to govern. Parties, moreover, give coherence to American politics. We have a constitutional system and a political culture dominated by disunifying forces: separated powers, federalism, pluralism, individualism. Parties have been a unifying force in this system, cutting across the branches and levels of government as well as across voting blocs to aggregate interests, build coalitions, and make mass democracy possible.

Political parties have always had a difficult time in our constitutional system and will always have to compete for influence here. Historically, their influence has waxed and waned. But strong parties and a strong party system remain the best hope for representative and responsible democracy in an extended and diverse republic like ours. They are the only institutions in our electoral system that can be held accountable for what government does. Those elected to public in their name must make policy, not just advocate it, and are answerable for their actions to the electorate as a whole, not to a narrow constituency of limited and special interest.

Strengthening our political parties ultimately means making them more representative and accountable institutions that link elections to government, so that voters can influence the direction of public policy. A strong party system, therefore, should be both competitive and participatory, and should structure electoral choice as to the direction of government. A strong party should have the organization and resources to formulate a coherent set of public policy

principles, to nominate and elect candidates for public office consistent with these principles, to withhold party support from candidates who do not support its principles, and to advance these principles in government. A strong party should be open to all party members, should have active committees at all levels, should support candidates for all public offices, should be professionally staffed, and should have clear lines of internal authority. We believe the following principles of strong party organization are a guide to these ends.

(1) Political parties should govern themselves. As private associations with public responsibilities, parties should be as free as possible from state and federal regulation to determine their own structure and functions. The public interest requires that parties operate in an open, honest, fair, and accountable way, but these goals may be achieved through reporting and disclosure requirements and not by detailed regulation of party organization and activities. Parties should define their organization and powers formally and publicly through party constitutions or charters and by-laws, so that all who affiliate with them may know the rules of party governance. In our political system, parties differ organizationally and functionally from political action committees and other special interest groups, and they should not be treated the same in law. Indeed, state and federal courts have regularly recognized this distinction. The public interest is best served by law that complements party self-regulation, not by statutes that substitute for it.

(2) Political parties should use caucuses and conventions to draft platforms and endorse candidates. Caucuses and conventions are avenues of general participation in party affairs that encourage dialogue and peer review of party programs and candidates. The quantity of participation in them may not be as large as in primaries, but the quality of participation is much higher. Local caucuses open to all registered party members are useful checks on both the programmatic direction of a party and the ambition of individuals seeking party endorsement for public office. Party conventions, representative of local caucuses and committees, should devise platforms and endorse candidates for public office. Party primaries closed to all but party registrants can be an effective rank-and-file check on party endorsements and should therefore follow party conventions.

(3) Political party organization should be open and broadly based at the local level. Local politics is a basic testing ground for candidates and the principal arena of direct citizen participation in politics. Strong local party committees should be the foundation upon which state and national party structures are built. They should be the principal party instrument for defining membership, registering voters, recruiting candidates, and conducting campaigns. They should also be central to the development of a party platform and to public education with respect to party programs for government.

(4) Political parties should advance a public agenda. Parties are the most broadly-based organizations in our democratic system and thus best able to define priorities for government and to develop programs that serve general interests. They serve the public interest best by developing and defining a broad philosophy of governance that differentiates one party from another and by giving voters a reasonable choice in the direction of government. Parties should develop platforms at all levels of government through open and representative procedures that begin with caucuses at the local level in which all registered party members may participate. They should publicize their platforms in order both to inform their members and to educate the public, and

should develop procedures through which to hold party nominees and office holders accountable to party platforms.

(5) Political parties should endorse candidates for public office. If parties are to present voters with a choice of policy alternatives and if they are to be accountable for governance, they must have a measure of control over who runs for office in their name. At the very least, parties should be able to establish threshold tests for candidate access to primary ballots of 15-20% of the vote at endorsing conventions, thereby assuring that all candidates for nomination represent significant factions within the party. Checks may be legislated on party endorsement processes to ensure full and fair participation of party members, but the ultimate check will and should be whether a party's program for and performance in government merit the support of the general electorate.

(6) Political parties should be effective campaign organizations. Parties will be strong insofar as candidates depend upon them for election and insofar as they are key to the success of those who seek election in their name. To this end, parties should recruit candidates who share their philosophy and should provide them with training and expert advice and direction in the organization and conduct of their campaigns, with research on the district and the opponent, and with polling, media, and other state-of-the-art campaign services. Parties should also endeavor to coordinate campaigns of all party candidates in a given election to minimize conflicts and to maximize resources.

(7) Political parties should be a major financier of candidate campaigns. No service to candidates is more important than the provision of money, and there should be few restraints on the ability of parties to raise and spend money in campaigns. Limits on individual contributions to parties should be removed, and limits on annual individual contributions to parties that qualify for a full tax deduction or credit should be raised significantly. Statutory limits on group contributions to candidates and parties should be retained. Parties themselves should be able to make unlimited contributions to the campaigns of their candidates for offices at all levels of government. If a system of public financing of elections is adopted, it should use the parties as channels through which to distribute these funds as they see fit.

(8) Political parties should be the principal instruments of governance. Parties should be instruments of collegial governance which broaden and unite leadership in the different branches and levels of government and by means of which specific programs may be developed to implement party platforms. State central and national party committees should work closely with party leaders in the legislative and executive branches of government to advance the party platform. Party leaders in Congress and state legislatures should make maximum use of caucuses in setting a party agenda and developing strategy. Presidents and governors should make maximum use of party platforms and committees to develop their programs and to educate voters. Equally important, the opposition party(s) should be institutionalized, through question periods or in other ways, so as to provide a more effective check on specific policy decisions of the government. Between elections, the opposition is the key to accountability, and the quality of democratic government turns as much on its performance as it does on that of the party in power.

(9) Political parties should maintain regular internal communications. Parties at all levels should keep members informed of activities, decisions, and plans through newsletters or other house organs. This is another avenue of accountability and also one of participation, for it facilitates an exchange of ideas, positions, and analyses about the party and politics of the moment. Organizationally, a good house organ can build support for party positions and programs and also lance sores before they become cancers. It also makes for "news" about the party.

(10) Election law should encourage strong political parties. More than other forms of political organization, parties have served egalitarian and majoritarian values and encouraged widespread citizen participation in American politics. They are our most democratic institutions and should be sustained and encouraged by public policy. This can be done in many ways, including requiring voter registration by party, adopting the party column ballot, and restoring partisan local elections. Public policy should also recognize the difference between parties and other political groups in the regulation of campaign finance, the making of endorsements, and access to both the ballot and the news media. By law, parties should have a privileged position in our political system. They should be given advantages over special interest groups and over individual candidates.

In recent years, there have been widespread reports that our political parties are dying. These obituaries are premature. Indeed, party organization at the state and national levels may never have been healthier than it is today, as the number and professionalism of staff has grown along with the financial resources and activities of parties at these levels. Rather than on their deathbed, our parties have been in a long transitional period from an old politics of patronage and machine organization to a new politics of issues and high technology. Since the 1960s, both national parties have sought to renew themselves by adapting organizationally to the changed realities of American politics. The two parties, however, have not taken the same approach to renewal: the Democrats have concentrated on internal reform, while the Republicans have focused on candidate services. But a truly strong party should travel both these paths: it should be both internally democratic and electorally effective. We believe that the principles outlined above will produce the kind of party organization that can realize these goals and strengthen American democracy as a result.