Testimony of James Bopp, Jr.
Before the Subcommittee on the Constitution of the House Judiciary Committee
Regarding "Constitutional Issues Raised by Recent Campaign Finance Legislation"
June 12, 2001[1]

Thank you for the opportunity to testify regarding constitutional issues raised by recent campaign finance legislation. My testimony today will focus on the effect on political parties if current campaign finance "reform" bills – such as McCain-Feingold (S. 27) and Shays-Meehan (H.R. 380) – were enacted into law. On June 14, I will also be testifying on constitutional problems posed by these bills before the House Administration Committee, and that testimony will focus on the effect of such legislation on the constitutional rights of citizen groups. By cross-referencing these two, I will reduce the volume of material to be reproduced, but members of this Subcommittee are respectfully referred to my June 14 testimony, which I incorporate herein by reference.

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

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

In these capacities, I have represented parties in numerous FEC investigations and enforcement actions, as well as in preenforcement suits against the FEC that resulted in the striking down of five separate FEC regulations and section 441b of the FECA for violating the First Amendment. In addition, I have represented numerous plaintiffs in successful law suits challenging state election statutes and regulations.[2]

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

[2]In addition to dozens of successful federal district court decisions, I have been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional rights to free speech in the election context, which resulted in reported appellate decisions by the United States Courts of Appeals for the 1st, 2nd, 4th, 7th, 8th, 9th, 10th and 11th circuits. *See Florida Right to Life Committee v. Lamar,* 238 F.3d 1288 (11th Cir. 2001); *Citizens for*
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Because of my developed expertise in federal election law, I have provided testimony on numerous occasions before federal and state legislative committees on proposed election legislation and before the FEC on proposed regulations. Since 1996, I have served as the Chairman of the Election Law Subcommittee, Free Speech & Election Law Practice Group, The Federalist Society for Law & Public Policy Studies. My resume is attached.

I. The Proposed Restrictions on Political Parties are Unconstitutional and Bad Public Policy.

A. Provisions Discussed

The proposed bill before the Committee (H.R. 380 or "Shays-Meehan") and the Senate-passed McCain-Feingold bill (S.27) impose virtually identical restrictions on political parties. To the extent they differ, the differences are insubstantial from a constitutional and practical perspective, so while the following discussion will focus on the Shays-Meehan provisions regarding political parties, it is applicable to the Senate-passed bill.

Continuing the modern trend towards significantly reducing the participation of political parties in the political process,[3] Shays-Meehan reflects a woeful ignorance of – or outright disdain for – the constitutionally protected role political parties play in our republican democracy. Section 101(1)(a) of Shays-Meehan bans political party national committees from soliciting, receiving or directing to another person any contribution that exceeds the FECA's limit of $20,000 for any purpose. This provision eliminates the ability of national committees to raise funds outside of the source and amount restrictions of the FECA for the many national party activities that are not related to electing federal candidates, including supporting state and local

[2](...continued)
Responsible Gov't State PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999); *North Carolina Right To Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *California Prolife Council v. Scully,* 164 F.3d 1184 (9th Cir. 1999); *Brownsburg Area Patrons Against Change v. Baldwin*, 137 F.3d 503 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *Maine Right to Life Committee v. FEC*, 914 F. Supp. 8 (D.Me. 1995, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *New Hampshire Right to Life v. Gardner,* 99 F.3d 8 (1st Cir1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Faucher v. FEC*, 928 F.2d 468, 472 (1st Cir. 1991).

[3]*See generally*, Ralph K. Winter, "THE NEW AGE OF POLITICAL REFORM": LOOKING BACK, 15 GA. L. REV. 1 (1980) (tracing the development of the regulation of political parties from the "evolved Madisonian system" through the Progressive Era and the increased regulation of campaign finances beginning in the 1970's.)

party committees and candidates and from advancing state and federal legislative agenda through grassroots lobbying.

Section 101(1)(b) requires state and local party committees to use funds raised under the FECA's limits[4] if spent for a newly created classification of "Federal election activities." Shays-Meehan defines "Federal election activity" as (1) voter registration within 120 days of a federal election, (2) "voter identification, get-out-the-vote activity and generic campaign activity in connection with an election" in which a candidate for federal office is on the ballot even if there are state candidates also on the ballot, (3) if spent on a public communication that refers to federal candidates and that "promotes, attacks, or opposes a candidate for that office" even if the communication does not expressly advocate for or against a candidate, and (4) a State party employee's salary if the employee devotes more than a quarter of her monthly work schedule to "Federal election activities."[5] These provisions effectively federalize state party committees and dramatically limit the ability of state party committees to perform traditional functions that are vital to healthy state elections.[6]

In section 205, Shays-Meehan[7] requires political parties, once they select a nominee, to elect either to make only constitutionally protected independent expenditures with respect to the candidate or to waive the right to do so in order to be free to make coordinated expenditures, which are limited as contributions. This "either/or" approach reflects an unwillingness to accept that the Supreme Court has already decided that political parties enjoy the same First Amendment liberty to both make independent expenditures and to contribute to candidates as individuals and PACs.[8] Section 205 further mandates that all state, local, national and congressional campaign committees of a party shall be considered to be a single committee for purposes of the waiver.

Section 206 mandates that party coordinated expenditures be a contribution to the

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[4]H.R.380 and S.27 each raise the limit on contributions to state political party committees to $10,000 per calendar year.

[5]Section 101(b)(2)(A).

[6]Only Virginia and New Jersey conduct elections for state offices in odd numbered years. This section, then, effectively federalizes state party activity in 48 states.

[7]See section 213 in S.27.

[8]*See FEC v. Colorado Republican Federal Campaign Comm.*, 518 U.S. 614, 618 (1996) (plurality) ("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.")

candidate and be subject to contribution limits. The definition of "coordinated activity" in section 206(a)(1)(C) applies to all "persons," not just political parties. This definition is unconstitutionally overbroad for reasons that will be presented more fully in my testimony before the House Administration Committee on June 14, 2001. My testimony before this committee will be confined to political party coordinated activities, which may not constitutionally be limited in any event, even by a provision that would otherwise be constitutional as applied to other persons. Section 206(a)(1)(E) also treats all party committees as a single legal entity for purposes of coordinated expenditures.

None of these provisions are desirable or constitutional. The Supreme Court has said "[w]e are not aware of any special dangers of corruption associated with political parties . . . ."[9] That assertion is backed both by the case law and by the overwhelming political science evidence of how political parties operate.

B. Political Parties Play a Vital, Constitutionally Significant Role in Republican Democracy

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech."[10] To abridge is "to contract, to diminish; to deprive of."[11] The text of this explicit, absolute, constitutional command is often overlooked in discussions of campaign finance laws, even, or perhaps especially, by those sworn to uphold it, but it has no more pressing application. While Shays-Meehan and McCain-Feingold fly under the benign-sounding propaganda banner of "Campaign Finance Reform," they are in reality nothing more than the latest efforts to subject political speech and association to the most rigorous of regulation to the benefit of incumbent politicians.[12] Federal restrictions on political speech and association "limit political expression 'at the core of our electoral process and of the First Amendment freedoms.'"[13] Political parties, while not perfect, have traditionally been the most important

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[9]*Colorado Republican*, 518 U.S. at 616.

[10]U.S. CONST. amend I.

[11]T. Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796).

[12]As Wisconsin Supreme Court Justice Prosser has warned, "The First Amendment is not what it used to be. It is fashionable today to protect deviant speech and expressive conduct. But pure speech which discusses public issues and public officials is vulnerable to the impulse for government regulation." *Elections Bd. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 685 (1999) (PROSSER, J., concurring in part, dissenting in part).

[13]*Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes,* 393 U.S. 23, 32

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constitutionally protected citizens' groups to the maintenance and survival of republican democracy.[14] Accordingly, Congress increases the regulatory burden on these vital institutions at the nation's peril.[15]

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. 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."[16] 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 govern-

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[13](...continued)
(1968)).

[14]*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.

[15]*See* Winter, *supra* note 3 at 18 ("History has harsh rewards for those who cannot acknowledge progress and who would carelessly abandon the hard-won gains of the past for the ephemeral promises of the unknown. I fear we have hardly begun to pay the price.").

[16]*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) (emphasis added).

> ment. 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.[17]

Of course, "measured change" is not often the goal of incumbent politicians before most elections. This unfortunate reality could go a long way toward explaining the zeal with which some incumbent politicians 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.[18] Indeed, *increasing* the role of political parties in voter registration and get-out-the-vote efforts is the practical formula for improving many of the ills the soft-money ban purports to address.[19]

While there are varying opinions about the role of money in campaigns, there is widespread agreement among political scientists that political parties ought to be strengthened rather than weakened. A. James Reichley, Visiting Senior Fellow of the Graduate Public Policy Program at Georgetown University testified in 1995 before the House Oversight Committee on the Role of Political Parties, that "there is a broad consensus within the profession [of political scientists] on the desirability of strengthening parties, that parties have been weakened in the overall system."[20] Parties ought to be strengthened because:

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[17]*Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring). *See also, Eu v. San 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).

[18]Malbin & 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.").

[19]Gierzynski 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.

[20]*Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before*
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> [t]hey promote agreement between different interests and groups. They promote discussion of major issues and educate the electorate. They promote effective government across all divisions of the American system. They provide responsibility and accountability. They promote participation, and perhaps, most relevant, *they promote clean politics*.[21]

Contrary to the widely-held consensus regarding the desirability of strengthening parties, many new restrictions, including the FECA, have had the opposite effect.[22] Indeed, the 1979 amendments to the FECA, which allowed state and local parties to use money raised outside of the restrictions of the FECA to pay for party slate cards, office space and accounting expenses, were specifically adopted in response to a marked decline in grassroots political activity during the 1976 campaign.[23]

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

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[20](...continued) *the House Oversight Comm.*, 104th Cong. 66 (1995).

[21]Gerald M. Pomper, Professor of Political Science, Engleton Institute of Politics, Rutgers University, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 42 (1995) (emphasis added).

[22]Congressman William Thomas, Chairman of the House Committee on Oversight, Testimony, *Campaign Finance Reform Legislation: The Role of Political Parties: Hearing Before the House Oversight Comm.*, 104th Cong. 27-28 (1995).

> [P]olitical parties are unique institutions. Unfortunately, I don't believe there was adequate knowledge in the 1970s about the role of the political parties in not only recruiting candidates but getting them elected and then programming public policy and the issues, or education that the parties do. Perhaps, the limits that were placed on the ability of political parties to get funds I think significantly hampered parties in a negative way and relatively enhanced the special interests. Now, while people are looking at ways to change the system, I think perhaps unleashing political parties or freeing them from the current legislation would go a long way toward solving our problems

[23]Bradley A. Smith, *Soft Money. Hard Realities: The Constitutional Prohibition On A Soft Money Ban*, 24 J. Legis. 169, 182 (1998).

manifesto entitled "Principles of Strong Party Organization,"[24] 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.

The new restrictions before the Committee violate each of these principles, weakening political parties to the detriment of the Republic. The current proposal to further restrict the ability of local, state and national elements of political parties to form broad-based coalitions and to advance their electoral agenda is a step in the wrong direction.

1. The soft money ban federalizes many activities of national, state and local political parties.

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."[25] 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 and to engage in the public policy debate on an equal footing with other associations. The soft money ban ignores this reality and converts *national* party committees into *federal* party committees as a matter of law.

Additionally, under Shays-Meehan, if there is a federal candidate on the ballot, any state political party "federal election activity" must be paid for with money raised under the limits of federal law, not with money raised lawfully under state law. These activities are traditional

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[24]**Attached as Appendix B**.

[25]*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).

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.

Those who would attempt to justify the new restrictions on political parties in Shays-Meehan on the ground that the Supreme Court upheld limits on individual and political committee contributions to candidates in *Shrink Missouri Government PAC v. Nixon*,[26] 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.

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 accept unlimited contributions 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.[27] So-called "soft money" bans are unconstitutional.[28]

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."[29] The Supreme Court has heard oral argument in that case and a decision is expected by July 2001. Under this ruling, the party coordination provision in section 206(a)(1)(E) will likely be stillborn.

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

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[26]120 S. Ct. 897 (2000).

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

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

[29] *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).

rights at stake in the context of party contribution limits are "different from, and weightier than, those that were involved in *Buckley*."[30]

> 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.[31]

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.[32]

The post-*Shrink* decisions of these four federal courts demonstrate that Shays-Meehan 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.[33]

In addition to being unconstitutional, the soft money ban in Shays-Meehan 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

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

[31]*Id.*

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

[33]*See* 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).

> 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.[34]

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."[35] 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.[36]

What's more, imposing federal limits on virtually all state party committee activity simply because federal and state elections are held on the same day runs counter to the will of the people of many states.[37] For example, the people of California in 2000 approved Proposition 34 by a 60 to 40 percent margin.[38] In the findings section of Proposition 34, they declared that "Political parties play an important role in the American political process and help insulate candidates from the potential corrupting influence of large contributions."[39] The Act was specifically adopted to "strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full,

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[34]Anthony Gierzynski, Money Rules: Financing Elections in America 125 (2000).

[35]Gierzynski, Money Rules at 125.

[36]Larry J. Sabato and Glenn R. Simpson, Dirty Little Secrets 334 (1996) (emphasis in original)(referring specifically to "soft" money contributions.)

[37]The following states impose no limits on individual contributions to political party committees: Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Utah, and Virginia.

[38]California Secretary of State Website; <<http.//vote2000.ss.ca.gov/Returns/prop/00.htm>>, visited on June 7, 2001.

[39]2000 Cal. Stats. 102(1)(a)(3).

complete, and timely disclosure to the public."[40] The new $25,000 per year limit on contributions to state political party committees applies only to those funds the party uses to in turn make contributions to state candidates, which party committees may make in unlimited quantities.[41] In view of the case law, the political science and the will of the American people as reflected by the laws of many States, Shays-Meehan represents unconstitutional, counter-productive, and unwanted federal paternalism at its worst.

2. Restrictions on Local, State, and National Party Committee Issue Advocacy are Unconstitutional

"Issue advocacy" refers to advertisements that discuss issues of public concern but do not in express or explicit words advocate the nomination election or defeat of a candidate for public office.[42] The provisions in Shays-Meehan defining which communications are subject to regulation are overbroad because they include far more speech than the Supreme Court and a legion of lower federal courts have held the First Amendment permits.[43] However, even a narrowly tailored definition of express advocacy would not cure the constitutional infirmity in the soft money ban. Forcing political parties, which after all are only broadly based citizens groups, to fund their issue advocacy and grassroots lobbying subject to source and amount contribution limits while other advocacy groups are free to raise money in unlimited amounts from foundations, individuals and business corporations to fund their issue advocacy communications violates the political parties' rights to equal protection under the Fifth Amendment.[44]

It is well established that corporations, labor unions, associations of all kinds and individuals which engage in issue discussion may fund their issue advocacy without being subject to contribution limits. Because Shays-Meehan prohibits the raising of "soft money" by national political parties, they have no such money available for issue advocacy, legislative, and

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[40]2000 Cal. Stats. 1102(1)(b)(7).

[41]2000 Cal. Stats. 102(29)(b-c).

[42] *See Buckley*, 424 U.S. at 45.

[43] *See* Appendix A, listing federal and state court decisions that have followed *Buckley's* bright line rule. *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). For a thorough analysis of why Shays-Meehan's provisions violate the *Buckley* bright line rule, the Committee is respectfully referred to my June 14, 2001 testimony before the House Administration Committee.

[44]*See Plyler v. Doe*, 457 U.S. 202, 215 (1982) (The touchstone of equal protection is that "all persons similarly situated be treated alike.")

organizational activities. It treats national political parties as if they were just federal-candidate election machines. As a result, Shays-Meehan has severely restricted the ability of political parties to pursue 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 compete on a level playing field in such issue advocacy?[45]

However, proponents of abolishing "soft money" argue that this is simply a "contribution limit."[46] 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*

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[45]For 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.

[46]Brief 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).

quo corruption,[47] which cannot justify a limit on issue advocacy.[48]

The proposed ban on soft money contributions, which would fund party issue advocacy, cannot be justified on the theory that political parties corrupt federal candidates. To justify burdens on political speech, there must be some "real problem" or some "real harm."[49] The Supreme Court has "never accepted mere conjecture as adequate to carry a First Amendment burden,"[50] and the government "must present more than anecdote and supposition."[51] Restrictions on issue advocacy must pass strict scrutiny.

Although limits on the amount of financial support provided by political parties to their candidates impose greater burdens on political speech than limits on individual contributions, the Tenth Circuit in *Colorado Republican II*, recently applied the more deferential *Shrink* standard to the federal limits on coordinated expenditures in 2 U.S.C. § 441a(d) and held that those limits violate the First Amendment. The government had "not demonstrated . . . that coordinated spending by political parties corrupts, or creates the appearance of corrupting, the electoral process."[52] Moreover, given provisions that already address the risk that individuals may attempt to circumvent limits on their contributions by using political parties as conduits, the Tenth Circuit also held that limits on the amount of financial support provided by political parties are not "closely drawn" to enforcing limits on an individual's own contributions.[53] If limits on coordinated expenditures between a party and its own candidate do not pass constitutional muster because they do not corrupt candidates, *ipso facto* political party issue advocacy poses an even more remote danger of corruption and restrictions cannot be justified.

In *Missouri Republican Party v. Lamb,*[54] the Eighth Circuit also applied the more deferential *Shrink* standard and held that state law limits on direct political party contributions

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

[48]*Buckley*, 424 U.S. at 45.

[49]*United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1888-93 (2000).

[50]*Shrink*, 120 S. Ct. at 907,

[51]*Playboy,* 120 S. Ct. at 1891.

[52]*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).

[53]*Id.* at 1232-33.

[54]227 F.3d 1070 (8th Cir. 2000).

violate the First Amendment because "the record is wholly devoid of any evidence that limiting parties' campaign contributions will either reduce corruption or measurably decrease the number of occasions on which limitations on individuals' campaign contributions are circumvented."[55] Again, if limits on direct monetary contributions by a political party are not closely drawn, neither are issue advocacy restrictions.

In *Colorado Republican I*, the FEC took the position that independent, uncoordinated expenditures by political parties ought to be treated as contributions to the benefitted candidate.[56] 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."[57] The Court continued in this vein with respect to the FEC's proposed ban on political party independent expenditures, which has direct application to Shays-Meehan'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.[58]

The concurring justices also found little, if any, opportunity for party corruption of candidates

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[55] *Id.* at 1073.

[56] 518 U.S. at 619.

[57] *Id.* at 616.

[58] *Id.* at 618.

because of their very nature and structure.[59]

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.[60]

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 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."[61] 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."[62] "[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."[63] "Finally, a contributor dissatisfied with how funds

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[59]*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).

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

[61]*MCFL*, 479 U.S. at 260.

[62]*Id.* at 260-61.

[63]*Id.* at 261.

are used can simply stop contributing."[64] 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.[65]

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.

3. Aggregating the Activities of All Party Committees Based on the Activity of One Committee is Unconstitutional

Shays-Meehan mandates that all state, local and national committees be presumed in law to be a single legal entity for the purpose of the independent expenditure waiver in section 205 and for the purpose of aggregating coordinated expenditures in section 206, even if they in fact are independent of each other. This presumption is predicated on a factually faulty view of the structure of political parties and is unconstitutional.

Political parties are not monolithic, top-down organizations subject to the direction and control of the central committee. Rather, they are built from the ground up and are comprised of a confederation of independent committees who share similar values and electoral and public policy goals. In this sense they are similar to the Federal union of sovereign States.

In *FEC v. Sailor's Union*,[66] the Ninth Circuit examined the relationship between associated unions and concluded that before political contributions involving more than one committee may be aggregated, one of the entities must have actual authority over the other. Mere association is not enough.[67] Furthermore, this determination cannot be made without "examining the organization's division of power . . . to determine the *degree of control*" one organization exercises over another.[68] Thus, imputing the independent decisions of one party committee to each of the thousands of other committees of the same political party overreaches Congress's

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

[65]*See Appendix C.*

[66] 828 F.2d 502, 506 (9th Cir. 1987).

[67] *See also Michigan State AFL-CIO v. Miller*, 891 F. Supp. 1210 (E.D. Mich 1995), *rev'd in part on other grounds,* 103 F.3d 1240 (6th Cir. 1996).

[68]*Sailor's*, 828 F.2d at 506-07 (emphasis added).

legitimate authority.

4. Forbidding Political Parties from Making Independent Expenditures if They Make Even One Coordinated Expenditure With a Candidate is Unconstitutional.

In section 205, Shays-Meehan forbids political party committees from making both independent expenditures and coordinated expenditures with respect to the party's nominee. In other words, after the party has nominated a candidate it must completely forego making all independent expenditures if it elects to coordinate even one advertisement with its candidate. This provision reflects what can only be described as an intentional misreading of the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*.

Colorado Republican I began as an enforcement action by the FEC in which it was alleged that a certain advertisement that was critical of the Democratic candidate for Senator exceeded party coordinated spending limits. As a matter of fact, the critical advertisement was published before the Republican Party had nominated its own candidate. Based in part on this fact, the Court concluded that the advertisement was not, in fact, coordinated with the Republican Party's candidate. The issue before the Court then was whether all expenditures by a party committee could be conclusively presumed to be coordinated with the party's candidate. The Court concluded, "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."[69] Nothing in the opinion even remotely suggests that once a party nominates its own candidate, Congress may put the party to a choice either to make only independent expenditures or to make only coordinated expenditures.

Indeed, the Court's entire discussion turned on an examination of whether the *particular* communication had been coordinated. In other words, if a particular communication is made independently from a candidate it is an independent expenditure and may not be subject to limits. On the other hand, if a particular communication is coordinated it may be treated as an in-kind contribution. The two are in no way dependent on each other. By predicating the right to make unlimited independent expenditures on the condition that a party not make any coordinated expenditures, Shays-Meehan imposes an unconstitutional condition.[70]

Section 205 appears to reflect the view that a single coordinated expenditure leavens the whole loaf, justifying treating all expenditures, even if made independently, as if they were

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[69] *FEC v. Colorado Republican Federal Campaign Comm.*, 518 U.S. 614, 618 (1996) (plurality).

[70] "[T]he government . . . may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – *especially*, his interest in freedom of speech." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (emphasis added).

coordinated. In *Christian Coalition v. FEC*, the court rejected the FEC "insider trading" theory of coordination and concluded that the First Amendment demands a definition of "coordination" that involves an extremely high level of collaboration over a *particular* communication between the candidate and the speaker.[71] In the real world, it is perfectly reasonable for a political party to coordinate a direct mail piece with its candidates while simultaneously independently publishing a television ad that is critical of the opposing party's candidate. Section 205 is unconstitutional. Of course, if the Supreme Court rules in *Colorado Republican II* that limits on party coordinated expenditures are unconstitutional, this provision will have no practical consequences.

CONCLUSION

The restrictions on political parties being considered in the Congress today are there because of the incessant drum beat of a few self-styled "reformers" whose appetite for ever more regulation of political speech and association is insatiable. Restrictions adopted in the past have not satisfied these regulators, and indeed, they have made citizen participation in the political process ever more cumbersome and the risk of criminal or civil prosecution ever more likely. True reform would recognize that strong political parties would promote both a healthy electoral

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[71] *Christian Coalition v. FEC*, 52 F. Supp.2d 45, 91-92 (D.D.C. 1999).

> I take from *Buckley* and its progeny the directive to tread carefully, acknowledging that considerable coordination will convert an expressive expenditure into a contribution but that the spender should not be deemed to forfeit First Amendment protections for her own speech merely by having engaged in some consultations or coordination with a federal candidate.
>
> First Amendment clarity demands a definition of "coordination" that provides the clearest possible guidance to candidates and constituents, while balancing the Government's compelling interest in preventing corruption of the electoral process with fundamental First Amendment rights to engage in political speech and political association. . . . A narrowly tailored definition of expressive coordinated expenditures must focus *on those expenditures* that are of the type that would be made to circumvent the contribution limitations. . . .
>
> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over *a communication's*: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4) "volume" (e.g., number of copies of printed materials or frequency of media spots). 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.

system and the liberties guaranteed by the First Amendment. There is no justification, in either policy or law, for the severe limits on national, state, and local political parties imposed by Shays-Meehan and McCain Feingold.