

Prepared Joint Testimony of Neil Reiff and Donald McGahn

Before the Senate Committee on Rules and Administration

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“Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond”

Executive Summary

Our testimony today focuses on the detrimental effects that McCain-Feingold has had on the American political system. It was hailed by the so-called “reform” groups who supported its passage as landmark legislation that would cure the ills of the American campaign finance system. Rather than correct the campaign finance system, it has created a perverse scheme of regulation that was caused by the law’s own myopia and a string of Supreme Court decisions that were decided in response to the law’s overreach.

As passed, McCain-Feingold claimed to accomplish three main goals: (1) End the soft-money system that dominated the national parties during the 1990’s; (2) reduce the number of so-called “negative ads” by prohibiting a large portion of issue advocacy spending; and (3) penalize self-funding candidates by providing their opponents with unusually large contribution limits in response to self-funders.

Instead of achieving its core goals, the Supreme Court has struck two of those three goals as unconstitutional. To the extent that McCain-Feingold was ever a carefully balanced compromise, it is certainly not that today. As for the surviving goal, it has succeeded in profoundly altering the state of American politics by severely weakening American political parties to the benefit of outside spending groups who may raise and spend unlimited funds in connection with federal elections.

Since the passage of McCain-Feingold, the American political system has seen an increase in spending, primarily on independent television advertising. However, the data relating to political parties shows that campaign spending by the state and local party committees has essentially flat-lined. This phenomenon has been caused in large part by the plethora of regulation placed upon state and local party committees by the McCain-Feingold law, while other players in the political system have benefitted from judicially mandated deregulation.

It is time for Congress to reconsider what is left of McCain-Feingold, particularly its overreaching provisions that unnecessarily weakened state and local party committees. We believe that empowering state and local party committees will improve voter education and involvement, accountability, as well as effective governance and transparency.

Prepared Joint Testimony

Thank you for the opportunity to appear before you today. We are practitioners in the area of campaign finance, and our views are shaped by decades of experience in advising and representing real people who wish to participate in politics in a legally compliant manner. Our clients include candidates for office, political party committees, political action committees, and other persons who wish to either participate in elections directly or otherwise be part of the debate regarding issues of public importance. Although we have similar clients (and are not here to represent the views of any of those clients), we differ in one significant way: one of us represents Republicans, conservatives and libertarians, while the other represents Democrats, liberals and progressives. Such a partisan difference in the modern world would ordinarily preclude any notion of common ground. But not here. Despite our party difference, we agree on much about the current state of campaign finance law: what the law is, what the law ought to be, problems with the law and – most critically – real solutions to those problems.

Recently, we co-authored an article that was published in *Campaigns & Elections* magazine that explained our views on the good, the bad, and the ugly of the current law, particularly the aspects imposed by the Bipartisan Campaign Reform Act of 2002, commonly called McCain-Feingold. In our article, which we have attached, we explain that much of what many perceive to be problems in the current system can be traced back to the underlying statute itself. To be fair, much of what Congress has passed over the years has been declared unconstitutional or otherwise rewritten by the courts. But that is precisely the point. As we predicted, McCain-Feingold has become a warped version of itself, where heavily regulated candidates and party committees have taken a back seat in our current system.

We suggest a different approach, one that flows from a different premise firmly grounded in our shared First Amendment tradition: That in order for voters to be truly informed, they need to hear directly from the candidates themselves. Thus, the candidates' voice ought to be the central voice in American democracy. In our view, the parties are the best vehicles to assist with achieving that goal – in other words, they are uniquely situated to echo their candidates' message. Unfortunately, current laws place parties at a competitive disadvantage. Laws ought to be designed to ensure the parties can once again play a critical role in our democracy and to further liberty. That liberty must be the governing principle is abundantly clear from a mountain of Supreme Court precedent that dates back decades. To us, it makes no sense to engage in academic debates over whether or not the courts got it right or not. At least since *Marbury v. Madison*, Court opinions are the law of the land. Any solution to any problem, whether real or imagined, ought to be grounded in the reality that court decisions are law that must be followed. Unfortunately, it has been the so-called “reforms” that sought to overcome such precedent, and that have had the effect of diminishing the voice of candidates and the political parties. Ultimately, recalibrating the law to strengthen candidate

and party speech will be forces for better voter education and involvement, accountability, effective governance and transparency – precisely the sorts of things that many believe to be sorely lacking in American politics today.

Which brings us to the 2014 campaign landscape. Certainly, direct contribution limits remain – albeit at artificially low levels that do not match the rate of inflation that has occurred since they were first instituted. For example, the \$1,000 candidate contribution limit imposed by the 1974 amendments to the law would translate to about \$4,800 today – almost double the current \$2,600 limit. The effect on the parties is even more apparent, as the \$10,000 state party limit in today’s dollars ought to be about \$48,000. And in addition to regular inflation, the cost of campaigning has skyrocketed, particularly due to the cost of television advertising. Other prophylactic measures imposed by the law have been struck – except those that limit the ability of the political party committees to effectively assist their candidates. Meanwhile, nonparty single-issue groups are free to spend in ways that, if undertaken by parties, would be illegal. And campaign disclosure has survived, albeit in a more limited form than that which was originally passed. The result? Candidates are struggling to be heard over the din of single issue and other groups, and the party committees – who historically had been a candidate’s natural ally – have been significantly diminished and essentially replaced by independent Super PACs and single issue nonprofits. To us, this seems backwards, and ironically, is the opposite of the “reform” goal of equality.

We anticipate that *McCutcheon v. FEC* will help address this problem to some degree. To see this, one needs to be clear as to what *McCutcheon* did and did not do. First, it did not strike the limitations and prohibitions on direct contributions to candidates and party committees. Corporate money is still banned, and candidates can still receive only \$2,600 per individual per election. What was struck was the so-called biennial limit – essentially an umbrella limit that prevented citizens from giving to more than a few handfuls of candidates and party committees. Chief Justice Roberts illustrated the underlying faulty logic of the biennial aggregate limit in operation: “If there is no corruption concern in giving nine candidates up to \$5,200 each, it is difficult to understand how a tenth candidate can be regarded as corruptible if given \$1,801, and all others corruptible if given a dime.” Thus, the immediate impact of *McCutcheon*: more candidates, including challengers and those that are not seen as “safe bets,” will have access to additional financial support. Similarly, such a candidate’s natural ally – the party committees - will no longer have to compete with each other for resources to the degree caused by McCain-Feingold.

But this sort of change is not enough to fix that which ill our system of privately-funded campaign finance. McCain-Feingold must be revisited. What was billed as a carefully constructed balance between breaking the link between so-called “soft money,” while at the same time limiting so-called “negative ads,” is in shambles. As we stated in our recent article, the national party soft money ban was well intended and helped stop practices at the national level, where national party

committees were leveraging 6 and 7 figure contributions in exchange for access to executive branch personnel, as well as Members of Congress. A narrow fix would have been to limit such funds. Congress could have, and should have, stopped there. But Congress did not simply limit “soft money” accounts of national party committees, or limit how much money national party committees, members of Congress and candidates for Congress could solicit. McCain-Feingold went much, much further.

Perhaps in anticipation of other hypothetical tools of evasion, McCain-Feingold gutted state and local party committees by essentially federalizing all of their important and effective activities, even activities that are designed to only benefit state and local candidates. The unchecked rationale of such “reforms” was that any attempt to elect a candidate somehow benefits a federal candidate, to a degree that if unchecked would create an appearance of corruption. By virtue of this rationale, the framework of McCain-Feingold saw no downside to requiring state and local party committees to use federally regulated and limited funds to engage in campaign efforts up and down the ticket, even when those activities were targeted solely to benefit state and local candidates. This approach ignored the fact that there are 50 other campaign finance regimes that regulate state and local elections, several of which are wholly incompatible with federal law. Also ignored was that our party committees had been a stabilizing force in our democracy for almost 200 years, and an effective way for citizens to participate in politics at the grassroots level.

The effects of this approach have been devastating to state and local party committees and grassroots activists, and have driven an unnecessary wedge between them and the candidates they wish to support. Under McCain-Feingold, state parties and their supporters have been subject to a labyrinth of regulation that seeks to intercept all of their activities and force them into the federal system, regardless of whether those activities have any relation to federal elections or candidates. In addition, some of the regulatory choices that McCain-Feingold have forced party committees to make in order to operate in compliance with the law can only be seen as bizarre.

McCain-Feingold federalized all elections through its introduction of a new term, “federal election activity,” which subjected traditionally local activities such as voter registration and get-out-the-vote to Federal regulation and limitation. The implementation of this new concept has proven rocky. When passed, it was claimed to be a narrowly targeted anti-circumvention measure. Defense of the law followed suit, and minimized the reach of the new law. After the law was upheld *McConnell v. FEC*, however, supporters changed their tune, and argued that the Federal Election Commission (FEC), the agency charged with enforcing this law, was not reading the new mandates broadly enough. Litigation ensued, and courts instructed the FEC to rewrite and broaden its rules governing state and local parties.

Today, McCain-Feingold's "federal election activity" covers virtually any state and local party activity that matters. For example, under the FEC's recently redefined definition of "get-out-the-vote," essentially all public communications undertaken by a state party committee – even those made totally independent of any Federal candidate involvement -- are subject to federal law, merely by exhorting the voter to go vote for a state or local candidate. Therefore, if a party committee wishes to air a television or radio ad that exhorts listeners or viewers to go "Vote for Smith for Governor," federal law may mandate that this advertisement be paid for entirely or in part with federally regulated funds. Prior to McCain-Feingold, state law governed such state or local candidate support. But today, parties are governed by federal law, whereas a non-party group could run the same exact advertisement free of such federal limitation. Worse, state party organizations are disproportionately subjected for audit by the FEC, and pay a disproportionate amount of the fines levied on non-candidate committees. This is not necessarily a reflection of targeting by the FEC, but a predictable result caused by the complexity and scope of the laws that regulate state and local party committees.

In another example, if a state party undertakes certain mailings that exhort readers to vote exclusively for a state or local candidate, it can only pay for the mailing if the exhortation to vote is "incidental" to the entire mailing (a term that has not been defined by the FEC) and as long as the mailing does not provide the voter with any information on how to actually vote. In other words, if a party committee informs the voter on when the polls are open or how to obtain an absentee ballot, federal law regulates and limits the funding of the mail piece. Yet a non-party nonprofit could send the same exact mail piece, free of any federal election law limitations. That the parties are disadvantaged limits the ability to assist ordinary citizens in obtaining information on where and when to vote.

Simply put, the party committees have been muzzled when it comes to their ability to inform voters of the most basic voting information if they want to avoid being subject to federal regulation. We cannot conceive of any logical policy justification that would support this – particularly when other groups who engage in the exact same sort of activities do so without such regulation. Much of the current regulation of state and local parties is at odds with recent Supreme Court precedent. This is best illustrated by example. In light of *Citizens United v. FEC*, a corporation could fund a multi-million dollar independent expenditure advocating the election of a candidate. But if a party committee wished to do the same advertisement, even if done independently of the candidate, it could only use money subject to federal limitations. Given that the Supreme Court has repeatedly made clear that the application of regulation cannot turn on the identity of the speaker, it is hard to see how the restrictions that apply only to parties can withstand constitutional scrutiny.

McCain-Feingold has had other detrimental effects. Its federalization of state parties has created disincentives for state parties to run joint campaigns that feature the entire party ticket. Prior to McCain-Feingold, it was commonplace for state parties to pay for communications that featured candidates from the top of the

ticket to the bottom of the ticket. Due to the barriers of federal law, such communications are now few and far between and have been replaced mostly by single candidate communications in the most competitive of races, where state parties can allocate their scarce resources. In addition, state and local candidates have bypassed party committees when engaging in advocacy and get-out-the-vote activities, due to the incompatibility of federal and state law. The current structure of the law has caused a significant demise in state and local party relevancy as funding sources seek out less regulated organizations, such as federal, state and local Super PACs, who may independently spend money without any restriction on how those communications are funded and how much voting information that they can provide. All this has had a detrimental impact on the ability of ordinary citizens to be involved in politics at the grassroots level.

This demise of the parties has had serious implications for the American political system. Party committees have played a vital role in grassroots campaigning. Historically, parties have been instrumental in delivering positive party messaging and increasing turnout in American elections through grassroots voter contact methods. Now, what some may characterize as single-issue, outside groups have come in to fill the void. Although such activities are perfectly legal, it seems to be exactly the opposite system of that envisioned by proponents of “reform.”

That the Republican Party has generally been opposed to the typical “reforms” should come as no surprise. After all, the Republican National Committee was one of the plaintiffs in McCain-Feingold. Now, however, as the real effects of the law have become apparent in actual application, opposition has become significantly more bi-partisan. Recently, the Association of State Democratic Chairs passed a unanimous resolution at its meeting in November of last year that calls on Congress and the FEC to reevaluate how state and local party committees are regulated. Attached is a copy of this resolution and legislative recommendations made by the ASDC for your review. None of the proposals made by the ASDC advocate for the repeal of any contribution limit. Rather, the ASDC seeks common sense regulation that balances the need to have vital party organizations along with the need to provide safeguards against political corruption.

Critically, our views and suggestions are not designed to simply transfer relevancy back to the parties for relevancy’s sake. Recall that the plaintiff in *Buckley v. Valeo* – Senator James Buckley of New York – was not nominated by one of the two major parties. And it was precisely that sort of candidate that felt the burdens of that wave of “reform” the most. Certainly, history teaches that anything taken to the extreme can cause problems, and parties have had their share of issues. But in our view, freeing the parties from the shackles of McCain-Feingold is the best way to counteract recent trends and encourage more effective grassroots activism. Whether one looks to the rise of the Tea Party or the Occupy Wall Street movement, grassroots activists will organize and speak. The law ought to encourage such

grassroots involvement, and not single-out and deter the party committees from participating in such activism in ways that they had in the past.

Although we each have a number of ideas and suggestions regarding specific changes to the law, we both believe that any common sense steps to help revitalize state and local party committees would be helpful, such as:

- Refine and simplify the existing volunteer exemptions for grassroots activities to make them easier to use by state party committees and consider expanding them to other modes of grassroots campaign activities.
- Repeal those McCain-Feingold provisions that have needlessly federalized joint and non-federal campaign activities undertaken by state and local party committees. In the alternative, modify the FEC's current interpretation of the existing rules to scale back their expansive scope that essentially federalizes all party campaigning on behalf of state and local candidates.
- Index contribution limits to party committees, as these limits were inexplicably excluded by the contribution limit indexing provided for by McCain-Feingold. Similarly, to the extent that limitations on coordinated party expenditures still are required, update the limits to more closely reflect modern economic reality.

In the short time that we have today, we can only briefly touch upon the byzantine nature of federal regulation that state parties are subject to. Thank you for the opportunity to present our views.

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Biographies

Neil P. Reiff is a founding member of the firm of Sandler, Reiff, Young & Lamb, P.C., in Washington, D.C., with over fifteen years of experience concentrating advising national and state party committees, candidates and other political organizations in campaign finance and election law matters.

Mr. Reiff's primary field of expertise is federal and state campaign finance law. He has successfully represented numerous clients before the Federal Election Commission and various state election agencies. Mr. Reiff has spoken on numerous panels on campaign finance law and has provided public testimony before the Federal Election Commission on numerous occasions. Mr. Reiff has also co-authored two amicus briefs pertaining to campaign and election law before the United States Supreme Court. In addition, Mr. Reiff was a member of the legal team representing plaintiffs in the landmark Supreme Court case *McConnell v. FEC*. Mr. Reiff has authored and co-authored several published articles on campaign finance law.

Prior to becoming Deputy General Counsel at the DNC, Mr. Reiff served the DNC as Deputy Compliance Director (1990-1991) and Compliance Director (1991-1993). In that capacity, Mr. Reiff was responsible for ensuring DNC compliance with federal and state election laws, as well as the filing of all disclosure reports by the DNC with federal and state election authorities. From June 1993 until May 1998, Mr. Reiff served as Deputy General Counsel of the Democratic National Committee, until joining Joe Sandler in founding Sandler, Reiff, Young & Lamb.

Mr. Reiff graduated from the National Law Center at George Washington University in 1992. He graduated Phi Beta Kappa from the State University of New York at Binghamton in 1989.

Donald McGahn is a Partner at the law firm of Patton Boggs LLP in Washington, D.C., where he advises and represents elected officials, candidates, national and state parties, political consultants and others on election law and related issues. Prior to joining Patton Boggs, Mr. McGahn served as a commissioner of the Federal Election Commission (FEC). Nominated by President George W. Bush in May 2008, his nomination received unanimous consent of the U.S. Senate the following month, and in July 2008 Mr. McGahn was elected chairman of the FEC. During his time at the FEC, Mr. McGahn led what has been called a "revolution" in campaign finance.

Before his appointment to the FEC, Mr. McGahn served as the head of McGahn & Associates PLLC, a Washington-based law practice which specialized in political law. In his capacity as head of the practice, Mr. McGahn counseled numerous federal and state candidates, members of Congress, national and state political party committees, leadership political action committees (PACs),

corporations and corporate PACs, nonprofits, trade associations and political consultants. Representations have included issues related to campaigns, including the regulation of broadcast television and radio, direct mail, telephones, defamation, polling, ballot access, voter identification, get-out-the-vote, election contests and recounts, election day operations and party conventions. Mr. McGahn has represented those involved in politics before the FEC, the House and Senate Ethics Committees, several state agencies, and in federal and state court as well as in connection with grand jury proceedings.

Mr. McGahn served as general counsel for the National Republican Congressional Committee (NRCC) for nearly 10 years. As general counsel, he updated the NRCC's legal operations and compliance and introduced several innovations, including what has become the standard structure for making independent expenditures. In this role he also managed and oversaw legal issues for the party, including compliance with federal and state campaign finance laws (and the transition mandated by the passage of McCain-Feingold), defending FEC or state regulatory matters, defending and managing all civil litigation, and other related legal issues. Mr. McGahn assisted countless House campaigns with a variety of legal.

Mr. McGahn has been featured in both the *Wall Street Journal* and the *New York Times*, which referred to him as one of the "architects of the campaign finance revolution." His writings have appeared in national publications, including *Campaigns & Elections*, *The New York Times*, *The Washington Post*, *Politico*, *Roll Call*, *The Hill* and the *Washington Examiner*. Mr. McGahn has spoken or lectured at several law schools, including Harvard, the University of Pennsylvania, New York University, the University of Virginia, George Washington University, William & Mary, and American University, and appeared as a keynote speaker for the Practicing Law Institute and NABPAC. Mr. McGahn has addressed members of Congress and their senior staff at several House and bi-cameral retreats regarding congressional ethics and appeared numerous times on television, including on *Fox News*, *PBS* and *C-SPAN*. He graduated from the University of Notre Dame and the Widener University School of Law.