Testimony of

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Before the

United States Senate Committee on

Rules and Administration

March 22, 2000

Thank you for inviting me to testify at today's hearing. I appreciate the opportunity to set forth my views and the views of the American Civil Liberties Union on the constitutional issues involved in campaign finance laws. The ACLU is a nationwide, non-profit organization consisting of nearly 300,000 members dedicated to protecting the principles of freedom and liberty set forth in the Bill of Rights. The ACLU receives no funding from the federal government.

I have been involved with this issue for nearly three decades and personally authorized the ACLU's participation in Buckley v. Valeo and also in two important campaign finance cases that immediately preceded Buckley – National Committee on Impeachment v. United States and ACLU v. Jennings. These three cases created the constitutional framework that has constrained all campaign finance legislation during the past two decades. The more recent U.S. Supreme Court decision in Nixon, et al v. Shrink Missouri Government PAC does not significantly alter this legal landscape. Although dicta in some of the opinions gave hope to both sides, the holdings themselves in Shrink left the law basically where it was before.

But let me return to the early cases, and briefly describe the facts that led to them, because these facts put a human face on the often abstract arguments that dominate this debate. They also illustrate how the most fundamental rights of free speech have been unintentionally violated by well-meaning campaign finance reforms.

In early 1972, three elderly individuals with no connection to any candidate or political party published an advertisement in The New York Times that condemned the secret bombings of Cambodia by the U.S., called for the impeachment of President Nixon and printed an honor roll of those members of Congress who had opposed the bombings. The honor roll included Senator George McGovern.

The ad was a classic example of political speech protected by the First Amendment. However, it violated a federal campaign finance law, which effectively barred expenditures for such ads on the grounds that they might influence the upcoming presidential election by criticizing President Nixon and applauding one of his possible opponents, Senator McGovern.

On the basis of this law, the U.S. government sued the three in federal court. It sought to enjoin them from publishing such ads, and it wrote a letter to The Times threatening The Times with criminal prosecution if it published such an ad again.

The ACLU represented the three defendants. We asked the Court to strike down the campaign finance law because it violated the First Amendment rights of citizens to speak their minds on public policy issues and to criticize or praise elected officials.

Soon after, the ACLU itself sought to purchase space in The Times in order to publish an open letter to President Nixon, criticizing him for his position on school desegregation. The letter made no mention of the election and indeed the ACLU has never supported or opposed any candidate for elective office and is strictly nonpartisan. Fearful of government reprisal based on the government's threatening letter from the previous case, the Times refused to publish the ad. The ACLU sued to challenge the law and The Times filed an amicus brief supporting us. In both these cases the government argued that barring such ads was necessary to achieve fair elections even though the rights of individuals to criticize their government would be curbed.

The ACLU won both cases – National Committee on Impeachment v. U.S. and ACLU v. Jennings – on First Amendment grounds. These cases were early examples of the way in which well-intentioned campaign finance reforms led to government restrictions on precisely the sort of speech the First Amendment was designed to protect. They also sensitized us to the unintended effects of campaign finance reforms.

In 1974, in the aftermath of the Watergate scandal, Congress enacted a new and even more elaborate statutory scheme. It amended the Federal Election Campaign Act (FECA), to reform the rules governing the financing of federal election campaigns. Once again, little attention was paid to the unintended ways in which such reforms would provide the government with unprecedented powers to curb citizen speech. At the core of this reform was the imposition of limits on campaign contributions and expenditures. FECA did not just limit the expenditures of candidates and political parties, it applied to individual citizens as well, even if their advocacy was independent and unconnected to particular candidates or political parties.

Once again, the new law swept far too broadly and necessarily limited speech clearly protected by the First Amendment. As written, for example, the law barred the ACLU from publicly criticizing an elected official during an election year, because such criticism could be construed as affecting the election; therefore the ACLU's expenditures to pay for an ad or to publish a brochure critical of the government could be limited.

The Supreme Court ultimately and properly struck down that aspect of the law in Buckley v. Valeo. Nonetheless, the Federal Election Commission, which was created in 1974 by FECA, tried to cite the ACLU for violating the law during the 1980s because we criticized President Reagan in direct mail fundraising solicitations to our own members! Many other organizations, including the National Organization for Women, anti-tax groups, anti-abortion groups and others have been similarly cited – some for doing nothing more than publishing the voting records of members of Congress on the issues that concerned them. Many of these groups targeted by the Federal Election Commission were hardly the sort of powerful, wealthy contributors that the public has in mind when it

thinks of campaign finance reform. To the contrary, many were small groups of people expressing their views – like a tax reform group in New York or the Maine Right to Life organization. Their right to express themselves on political issues has over the years been relentlessly interfered with by the FEC, which has, as a result of campaign reform, gained unprecedented power to regulate, inhibit and harass free speech and protected political activities.

It is important to review these early encounters between free speech and campaign finance "reform." because they bear a strong resemblance to the provisions regulating issue advocacy that have appeared in some recent versions of legislative proposals. If those provisions were to become law today, they, like the statute that led to ACLU v. Jennings, would restrict the rights of citizens to criticize elected officials within 60 days of an election. Such a result would, in our view, be both unconstitutional and absurd.

Beyond the constitutional problems posed by FECA's expenditure limitations, the terms of the limitations made little sense even from the perspective of those who were concerned about the corruption that might flow from large contributions. For example, the major stated purpose of campaign finance reform was to avoid corruption by limiting big contributions to candidates. But when Ramsey Clark ran for the U.S. Senate, he voluntarily decided to limit individual contributions to his campaign to $100, and in fact, the average contribution he received was not much more than $20. Thus, the money he raised was directly proportional to the number of people who supported him. And his ability to speak to the electorate —to publish leaflets, to mail to constituents, to buy radio and TV time, to buy ads in newspapers etc. – was directly proportional to his capacity to spend the money his supporters contributed.

Even though there were no large contributions to his campaign and therefore no plausible possibility of bribery or corrupt influence, the new law said that after a point, he could speak no more. Once the law's expenditure limit was reached, he could not spend another dime on leaflets or letters or radio ads, even if thousands of his supporters contributed $5 each to allow him to do so. The ACLU thought this sort of expenditure limitation was a clear violation of the First Amendment, and had no relationship to the legitimate purpose of reducing corruption. Some supporters of expenditure limits believed that the purpose of campaign finance reform was not only to reduce corruption, but to enhance fair elections by giving all candidates equal access to the voters. The Supreme Court has rejected that rationale as a constitutional matter. But, as a matter of fact, FECA failed that test as well. Its provisions did not level the playing field. For example, most newspapers and broadcast stations were supporting Ramsey Clark's opponents and their speech was unlimited by the new law while his ability to respond by buying ads was curbed. Newspaper publishers could support Clark's opponent without limit, but Clark was prohibited from spending money to buy an ad in order to respond.

For these kinds of reasons, the ACLU challenged FECA in Buckley v. Valeo and in 1976 the U.S. Supreme Court ruled partially in our favor. It struck down limits on independent expenditures, ruling that any individual or group unconnected to a candidate could advocate the election or defeat of that candidate without limit. It also struck down limits

on expenditures by candidates, ruling that any limit on spending money to publish ads or brochures would necessarily bar speech. But the Court upheld the law's limits on the size of direct contributions to candidates. It reasoned that although a contribution was a form of political expression, the size of a contribution was less so and that the government's interest in reducing corruption was a justifiable reason for limiting the size of direct contributions of money to candidates.

The Court's split decision created several anomalies. Because it ruled that a candidate could not corrupt himself, it permitted a wealthy candidate, like Ross Perot, for example, to spend an unlimited amount on his own candidacy. But if an equally wealthy individual wanted to support Perot's opponent, the law made it unlawful to do so. This worsened the inequality of campaign financing. Thus, under current law, Perot is able to spend whatever he wants to run for office but if an equally wealthy donor wants to enable Colin Powell to run against Perot, he commits a crime. This should not be a result anyone would support.

This kind of inequality is an unavoidable consequence of the current approach to campaign financing. For example, even under Buckley, limits on contributions are permitted. But such limits only apply to cash contributions. Thus, the owner of a newspaper could openly campaign for one candidate in the pages of his publication, but a wealthy individual could not provide equivalent support to the other candidate to allow him to respond.

Consider this hypothetical. Rupert Murdoch owns the New York Post and decides to use his newspaper to campaign for the election of Mayor Rudolph Giuliani to the U.S. Senate. He has the First Amendment right to do so, which no one can dispute, and which federal election laws recognize. Suppose Mayor Giuliani's opponent Hillary Clinton wants to respond to the New York Post's electioneering. If she owned a newspaper, she could do so. If a friend and supporter owned a newspaper, he or she could do so. Suppose, however, that she has a very wealthy individual supporter who doesn't own a newspaper, but who is willing to give her the money to run a full-page ad on behalf of her candidacy. If he does so, he violates the law, because current campaign finance laws place strict limits on the size of contributions, and the cost of even a single full-page ad exceeds those limits. The result? One candidate gets an entire newspaper's support every day, while the other is denied even one page once during the campaign. How can it be that if you buy a newspaper, you get to provide unlimited support for the candidate of your choice but if you buy a billboard to do the same thing, you commit a crime? This is bad First Amendment law, it has little to do with curbing corruption, it doesn't level the playing field and it is the opposite of true campaign finance reform.

Or consider this. An incumbent senator mails to his constituency for free, using the franking privilege. This is not counted as a campaign expenditure or as a contribution by the taxpayers. But if a challenger secures a large contribution to pay for similar mailings to the same constituents, a violation of the law occurs.

Similarly, incumbents can make news. They can create events, announce legislative initiatives and call news conferences. They have the ability to get themselves covered on television and in newspapers. But if a prospective challenger wants to buy space to respond, he cannot secure a contribution to pay for it.

Such inequalities were built into the 1974 amendments to the Federal Election Campaign Act, and they are inherent in any legislative scheme that utilizes limits on contributions. No set of limits can possibly limit everything. Inequalities are thus created in the name of equality, unfair advantages are institutionalized in the name of fairness and some forms of political speech are protected while other forms are criminalized.

Reformers have been willing to tolerate these inequalities and the gross violations of free speech resulting from campaign finance laws because they thought it was important to lower the cost of election campaigns, reduce the influence of special interests and make the electoral system more accessible to challengers. Even if campaign finance laws had achieved these goals, they could not possibly justify the First Amendment violations I have described. But in fact, campaign finance laws have not achieved their goals. Between 1977 and 1998, congressional campaign spending increased by about 380 percent. Contributions by PACs increased from $20.5 million in 1976 to $189 million in 1994. The number of federal PACs has increased from 608 in 1974 to over 4500 today. And while incumbents in the House of Representatives outspent challengers by 1.5 to 1 in 1976, they outspent challengers by 4 to 1 in 1992. Campaign finance laws were supposed to decrease all these numbers; in fact, they have all increased. The truth is that campaign finance laws have no demonstrable effect on the amount of campaign spending.

The Source of the Problem – and Its Remedy

The major cost of election campaigns is the cost of communicating with voters – a core First Amendment activity. The primary reason why this cost has escalated so dramatically in recent years is the dominant use of television and the high cost of television advertising. It is this demand that is driving the need for the supply of money. Public financing is a possible solution, but it must be sufficient and fair to all candidates: it must be structured to avoid providing advantages to incumbents and it must avoid discriminating against third party candidates.

Toward a Fair System of Public Financing

Limits have proven to be a bogus reform. They have not – and cannot – prevent corruption and they necessarily enhance inequality and therefore make elections more unfair. Moreover, they inevitably lead to curbs on speech that everyone agrees should be protected by the First Amendment. For these reasons, the ACLU opposes limits on contributions and expenditures. However, we support public financing that would establish a floor of support for candidates to communicate with voters.

Examinations of many campaigns suggest that if the floor of support is adequate, there is no need to impose a ceiling. Thus, providing a floor of support through public financing for all qualified candidates is a better and more likely constitutional route to reform than the failed attempt to establish ceilings by imposing legal limits on contributions and expenditures.

Public financing should be equally available in equal amounts to all legally qualified candidates. The amount of financing should be adequate to insure public debate of campaign issues. Any funds candidates raise from other sources should not be limited. If the floor is adequate, such additional funds will have only a marginal effect, and any attempt to bar them will create First Amendment problems.

Campaign finance reform based on limits is what we've had for nearly 30 years, and it has not worked very well. Moreover, there has been an increase, rather than a decrease, in inequality. Indeed, inequalities that unfairly benefit incumbents over challengers are built into laws that impose contribution limits. An incumbent has enormous visibility by virtue of the very office he or she holds. More often than not, a challenger's disadvantage can be overcome only by outspending the incumbent. But contribution limits make that difficult, if not impossible. Incumbents also have the franking privilege – they enjoy a large number of free mailings to their constituents. Direct mail expenses by challengers, on the other hand, are charged against their campaign limits.

Limits designed to forestall corruption also give wealthy candidates an unfair advantage. Since the Court ruled in Buckley v. Valeo that candidates cannot corrupt themselves, a wealthy candidate can spend millions on his own campaign. But a candidate of more modest means is prohibited from accepting more than $1000 from a wealthy supporter. This does not advance the goal of equality.

Contrary to what they were intended to do, contribution limits actually invite corruption and abuse and avoid electoral accountability. The incredibly high cost of television ads, which can consume more than half of a candidate's budget, creates an insatiable demand for money. This demand will be met, if not openly, through more devious means, including taking advantage of inconsistencies in the election laws. The rich, who can hire teams of lawyers and accountants, will always find a way around such laws, and they have. Moreover, when the law forces supporters to be devious and to spend their money directly instead of giving it to the candidate, electoral accountability is severed. That is exactly what happened recently when Sam Wyly, a wealthy supporter of George W. Bush, independently spent his own money to advocate Bush's election. Limits have been in place for nearly 30 years, but the problems limits were designed to solve remain, and new problems have been created. It is time for a new approach.

A public financing system could in principle minimize corruption, equalize access to voters, and promote free speech by establishing a real floor. This could be done in a variety of ways. All qualified candidates, including minor party candidates, could be given an adequate franking privilege during the campaign. Various systems to provide adequate time on television could be established. Travel vouchers could be provided. Or

direct subsidies could be provided. These steps would reform the system by reducing or paying for its major costs, thereby drying up the need to raise large amounts of money. This approach would also eliminate the need for a government agency like the FEC to regulate citizen speech.

In addition to establishing an unbiased system of public financing, there is another area in which Congress can improve the existing system of campaign regulation: public disclosure of large gifts.

The ACLU has always believed that public disclosure of large campaign contributions, with the exceptions noted in Buckley, is the best check on corruption or the appearance of corruption in this area. It allows the voters to make up their own minds about what is inappropriate, and it gives them the tools to make that judgment. But public disclosure must be timely in order to be useful. The Internet has given us the ability to collect and disseminate large collections of data almost instantaneously. We should insist that required campaign finance reports be filed in a uniform format on tape or disk so that they can be posted on the Internet and available to all interested individuals at once.

ACLU Policy

The ACLU believes that limitations on contributions or expenditures made by individuals or organizations for the purpose of advocating causes or candidates necessarily impinges directly on freedom of speech and association. The appropriate response to the disparities in the ability of different groups and individuals to communicate their political views to voters during an election campaign is to expand, not limit, the resources available for political advocacy. The ACLU therefore supports public financing to provide a floor for campaign expenditures in an amount sufficient to insure a fair public debate, rather than caps on contributions and expenditures, which only enhance inequality and curb speech. Such financing should be available in equal amounts to all legally qualified candidates for office. An objection to this sort of public financing is that it will be too expensive. But in 1998, all congressional general-election candidates combined spent approximately $740 million – roughly $3.69 per eligible voter. That does not seem to be an amount that is prohibitive for a democracy to spend in order to assure fair access to the voters.

Constructing such a system of public financing will be a complicated task. But it is the right road for Congress to travel. The road we have been traveling – the road of limits on contributions and expenditures – is full of constitutional landmines and is inherently unfair. We need to get off that road now.

Thank you for the opportunity to present these views.