Testimony of
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Mr. Chairman and Members of the Committee:

Thank you for the privilege of testifying before you today on the Constitution and campaign finance reform. I am currently Dean and Richard E. Lang Professor and Stanley Morrison Professor at Stanford Law School. I speak as a professor of constitutional law who has studied and written about the implications of such reform for liberties of speech and association protected by the First Amendment. My principal writings on this topic include *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663 (1997); *Political Money and Freedom of Speech: a Reply to Frank Askin*, 31 U.C. Davis L. Rev. 1083 (1998); and *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311 (1998).

Campaign finance reformers claim that our political system is awash in money, corruption and influence peddling, and that free speech principles should not stand in the way of ever greater regulation to stop these alleged evils. I respectfully disagree with them on three grounds. First, rumors of the death of our democracy have been greatly exaggerated. Second, regulation of political money does implicate free speech principles at the heart of the First Amendment, contrary to the reformers' assumptions. And third, our experience with existing campaign finance regulation suggests that the cure has been worse than the disease – the most troubling features of political fund-raising today are the unintended consequences of earlier efforts at campaign finance reform. Many currently proposed reforms are likely to be similarly ineffective.

To begin with the first point, American politics today is far from "corrupt" in the traditional sense of that word. Of course none of us wishes to live in a plutocracy, where wealth alone determines political clout. But contributions to candidates and parties today do not line anybody's pockets as they did in the heyday of political machines like Tammany Hall. Vigilant press scrutiny and law enforcement now nip improper personal inurement in the bud, as those members embroiled in the House post office or Senate savings and loan scandals found out to their detriment.

Political money today instead goes directly into political advertising, a quintessential form of political speech. Political candidates need a lot of money to compete in American elections. Our large electoral districts and relatively weak political parties force candidates to communicate directly with large groups of voters. This depends on the use of mass media,

which in our system are privately owned. Thus getting the candidate's message out is expensive. And these costs have escalated with the increased use of television advertising and sophisticated polling techniques.

When reformers talk about "corruption," what they really mean is that they believe that representatives will be more responsive to some constituents than to others based on their relative degrees of financial support. But this argument overestimates how effective political money can be at directly securing political results. Representatives' ability to cater to contributors is checked by their need to respond to all the voters who can keep them in office, and by the power of the media and the opposition to attack them publicly if they appear to be in any contributor's pocket. Thus, it is not surprising that various studies of congressional behavior suggest that contributions do not affect congressional voting patterns as strongly as do considerations of party and ideology.

In any event, our equal right to vote in our democracy does not entail that we will always have a right to equal influence. A.J. Liebling once famously quipped the "freedom of the press belongs to those who own one." Yet no one would think that the disproportionate power of major newspaper publishers to influence electoral outcomes is a sign of weakness in our democracy. We also accept that legislators will respond disproportionately to the interests of some constituents over others depending, for example, on the degree of their organization, the intensity of their interest in particular issues, and their capacity to mobilize votes to punish the legislator who does not act in their interests. Efforts at leveling all these playing fields would be inconsistent with the liberty essential to a constitutional democracy.

Contrary to reformers' assumptions, it might be argued that the amount of political information available to voters today is at an all-time high while the level of "corruption" is at an all-time low.

Turning to the second point, campaign finance regulation plainly amounts to a restriction upon political speech. It follows that it should not be undertaken unless it has a very strong justification – that is, unless we are practically certain that it will really work.

Unfortunately, the Supreme Court only half recognized this point in *Buckley v. Valeo* – the 1976 decision setting forth the First Amendment guidelines that still govern campaign finance laws today. As you well know, *Buckley* struck down as unconstitutional Congress's post-Watergate limits on political expenditures, while upholding limits on political contributions. Political expenditures, the Court reasoned, may not be limited in order to level the playing field, but political contributions may be limited to prevent the reality or appearance that big contributors will have disproportionate influence upon the candidates they help elect. The Court reaffirmed this basic structure for analysis in its 1996 decision in *Colorado Republican Campaign Committee v. FEC*, and its decision earlier this year in *Nixon v. Shrink Missouri Government*.

Campaign finance reformers often deny the first premise, claiming that restrictions on political money are not really abridgements of speech at all. Their assumption is incorrect; there

can be little serious doubt that restrictions on political money amount to restrictions on political speech. A law barring newspapers from accepting paid political advertisements, or limiting the sale price of political books, would likewise limit only the exchange of money. Yet no one would question that such laws inhibit political speech -- as do restrictions on campaign funding.

The Supreme Court has never doubted this outside the campaign finance context. It has repeatedly held that financial disincentives to speech, just as much as prohibitions of speech, trigger strict First Amendment review. It has struck down a ban on the receipt of honoraria by federal employees who, like latter-day Nathaniel Hawthornes and Herman Melvilles, were moonlighting by writing dance columns and giving Quaker history lectures on the side. It has held that the First Amendment protects the right to use paid solicitors to gather signatures for ballot access petitions, reasoning that such spending facilitates valuable political speech. It has repeatedly barred the limitation of administrative and overhead expenses by a nonprofit organization to any fixed percentage, reasoning that such a limitation might discourage valuable speech by reducing compensation for it. It has held that the exaction of mandatory fees for ideological causes that are disagreeable to agency shop employees and bar association members constitutes a presumptively invalid compulsion of speech, even though it is only the money, not any oath or pledge, that is being compelled. And it has held that a state may not force a publisher to escrow the proceeds of confessional crime books for possible payout in restitution to victims, reasoning that such a financial disincentive to publication is no less suspect than a ban. Any blanket reversal of *Buckley*'s premise that restrictions on political money implicate the First Amendment thus would bring down a great deal of law in its wake.

Reform advocates sometimes reply that the *amount* of money spent in campaigns is not crucial to political expression -- that is, once you've signified your support for a candidate by a small contribution there's no First Amendment gain from piling dollars on. But this misses the point that the level of support may signify the intensity of support for the candidate. Just as the Court struck down a ban on honoraria for government employees' outside speech, it no doubt would have struck down a cap on the amount of such honoraria, which would have injured only the most articulate or persuasive moonlighters.

Campaign finance reformers sometimes argue that, even if restrictions on political spending are restrictions on speech, elections are different, and speech restrictions are more justifiable for elections than other contexts of informal political discourse. While it is true that we allow some restrictions on electoral speech we do not allow elsewhere – for example, the secret ballot, or limits on political signs and posters at the polling place – it turns the First Amendment on its head to say that speech is more regulable the closer it comes to the heart of the political process.

But an even greater problem with this argument is practical rather than conceptual: drawing any boundary between formal electoral discourse and informal political discourse is very difficult to administer, and necessitates the use of intrusive bureaucracies that have all the institutional disadvantages of traditionally disfavored licensors. If a line is to be drawn between party expenditures that are or are not coordinated with a candidate, for example, then

considerable government investigation into party activities is required. If a line is to be drawn between express advocacy on behalf of a candidate and general issue ads, then intensive regulatory scrutiny of the content of the ads will be required to see whether they actually incited voters to vote for a particular candidate.

But it is unseemly in a democracy for government bureaucrats to police the degrees of separation between politicians and their supporters. And it is contrary to free speech principles for unelected censors to decide when an ad might actually have incited voters to vote. What else, after all, is political speech supposed to do?

Finally, campaign finance reformers sometimes argue that even if limits on political money amount to limits on speech, they are constitutionally permissible because aimed at the distribution of speech rather than its content. To be sure, the Court has sometimes upheld redistribution of speech, for example in upholding the requirement that cable operators must carry some broadcast stations they'd rather not.

But campaign contribution limits, unlike the cable act, do not operate as structural redistributive measures that should receive lesser First Amendment scrutiny. They do not redistribute speaking power from rich to poor. They do not merely inhibit rich candidates from spending large sums of personal wealth, but also inhibit individuals and groups who are good at fund raising, regardless of personal wealth, from spending the money they are able to raise. Nor can spending and contribution limits meaningfully diminish the voice of the rich and powerful, for those limits cannot begin to cover their alternative outlets -- at least not without trenching upon well-accepted First Amendment rights to engage in substitutes for campaign spending such as buying media outlets or devoting resources to lobbying.

Nor do campaign finance regulations redistribute speaking power from incumbents to challengers. Incumbents enjoy considerable non-financial advantages in electoral competition: name recognition, free publicity through news coverage, the ability to deliver benefits to constituents and to time them in relation to elections. They also enjoy a major in-kind subsidy in the form of the franking privilege. Challengers need large sums of money to offset these advantages. Contribution limits are arguably harmful to challengers, who need critical minimum thresholds of funding to be competitive but who have less name recognition, and thus a harder time in the startup phase of a candidacy in raising money from many different small contributors.

By my argument so far, limits on political contributions as well as expenditures should be constitutionally permissible only if there is strong justification for them – that is, if they will truly work to serve important or compelling government interests. But they haven't. My third point is that earlier attempts at campaign finance reform have had unintended and antidemocratic consequences, and that further efforts at similar reforms are likely to be similarly ineffective. When the cure has been worse than the disease, the solution is not more doses of the same medicine.

What interests do limits serve? Obviously, contribution limits are not helpful in protecting candidates' time; the more contributions one needs to raise the same amount of

money, the more time one has to spend on the hustings. Nor can they be constitutionally defended as improving the quality of debate. Reformers sometimes decry today's political advertising as repetitious and reductive. But it is not clear what golden age of high-minded democratic debate they hark back to; the antecedent of the spot ad is, after all, the bumper sticker, and such slogans as "Tippecanoe and Tyler too." In any event, reform based on the premise of elevating debate is elitist and inconsistent with free speech principles barring regulation of speech for its content.

Thus the argument for campaign finance regulation stands or falls on whether it can achieve some increase in political equality. Our experience shows that it has not, and likely cannot without us paying too high a price in related liberties.

The problem flows in large part from the *Buckley* decision's noble but flawed attempt at compromise, which has left us in the worst of all possible worlds: government may limit the supply of political money but not the demand. In other settings, this produces black or grey markets and politics is no different. Instead of money flowing directly to candidates, it now flows to parties as so-called "soft money," or to independent advocacy organizations for issue ads that often, as one would expect in a democracy, imply support for or opposition to specific candidates.

Campaign finance reform plus the *Buckley* decision thus have shifted political spending and speech away from the candidates, who are accountable to the voters, to organizations that are much harder for the voters to monitor and discipline – a result that turns democracy on its head. Soft money to the parties and independent issue ads are the unintended consequence of campaign finance reform itself.

Reform proposals such as McCain-Feingold and its progeny proceed on the assumption that the answer is to keep on shutting down "loopholes" in the system. But in a system of private ownership and free expression, the loopholes can never all be shut down. If the wealthy cannot bankroll campaigns, they can buy newspapers, or fund lobbying organizations that will draft legislation rather than campaign ads.

Does this mean we should eliminate all campaign finance regulation? Certainly not. Even if we give up on contribution limits, we should retain and enhance mandatory disclosure and public subsidies -- two kinds of government intervention that are consistent with both democracy and the Constitution.

Mandatory disclosure of the amounts and sources of political contributions enables the voters themselves, aided by the press, to follow the money and hold their representatives accountable if they smell the foul aroma of undue influence. Such disclosure is an extraordinarily powerful and accessible tool in the age of cheap and instantaneous digital communication over the Internet.

And public subsidies can help political challengers reach the critical threshold amounts

they need to get their messages out In ongoing debates about campaign finance reform, it is worth remembering that the free speech principles that bar the imposition of ceilings on political money do not bar the raising of floors.