STATEMENT OF PROFESSOR LILLIAN R. BEVIER

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Senator Mitch McConnell, Chairman

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I am Professor Lillian R. BeVier from the University of Virginia School of Law. I have written extensively on First Amendment issues, particularly with respect to the constitutionality of campaign finance regulation. It is an honor to speak to the committee today. In the interest of keeping my remarks within the short time allotted, I will discuss just two aspects of the regulatory proposals currently before you. Before I do so, however, I hope the Committee will forgive me for once again making an often-neglected point: for all the heated rhetoric that swirls around us, the debate over campaign finance regulation raises issues that genuinely transcend the short run. These issues are of fundamental and permanent significance, for though the campaign finance proposals come to you in the benign guise of "reform," many of them would require reneging on a central premise of our representative democracy---the individual political freedom that our Constitution guarantees.

The first issue I will address is that of "voluntary" spending limits. Mandatory limits, of course, confront the impenetrable constitutional wall that *Buckley v. Valeo* emphasized. The objective of the new regulatory proposals, therefore is to attempt to fit limits into the safe harbor that the Court in *Buckley* provided when it qualified its rejection of expenditure limitations:

> Congress may engage in *public funding* of election campaigns and may condition acceptance of *public funds* on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private funding and accept *public funding*.[1]

[1] Buckley v. Valeo, 414 U.S. 1, 57 n. 65 (1976).

When the Court in *Buckley* sustained the exchange of a presidential candidate's right to make unlimited expenditures in his own behalf for the right to receive public funding, it did so because it concluded that the purpose of public funding "was not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process."[2] The purpose of the current proposals to impose "voluntary" spending limits along with their accompanying burdens and benefits is quite different.

In the first place, the limits are not imposed in exchange for receipt of *public funding*, and thus could not be defended as necessary to protect the integrity of a government-funded program. Second, the effect of the proposed limitations, whether they are deemed "voluntary" or not, will be to reduce substantially the quantity of campaign speech. Indeed, that must be their purpose, since the restrictions are explicitly motivated by the objective of reducing "excessive" spending. In addition, the spending limitations do not serve the posited goal of creating a level playing field between incumbents and challengers because they fail to dissipate the already significant advantages of incumbency. Incumbents begin every electoral race with important advantages; equalizing the amount of money that incumbents and challengers can spend would simply make permanent the incumbent advantages that already exist.

The second issue I will address is the proposed limits on soft money. Advocates of increased regulation of campaign finance often assert that soft money is the most dangerous and destructive money in the political system today. Yet a ban on soft-money contributions would amount to an unprecedented restriction on political activity, one whose justification is to compelling and whose scope far exceeds what the First Amendment allows. Advocates of a soft-money ban defend it as a contribution-limitation-loophole-closing device: corporations and unions that would not otherwise be permitted to contribute to candidates' campaigns make large soft-money donations to political parties; and individuals often contribute soft money in excess of the amount they would be entitled to contribute to particular candidates. Such arguments assume, of course, that contribution limitations represent an appropriate and inviolable ceiling on the amount of money that individuals, corporations, and unions should be allowed to contribute to the political process *whether or not the contribution funds speech that creates a risk of quid pro quo corruption of particular candidates.* Thus supporters of the ban make no pretense of establishing a link between soft-money contributions and the appearance or reality of candidate corruption that alone provides a constitutional predicate for regulation.

Calling the soft-money contribution ban a contribution-limit-loophole closure does not change the basic fact, however: soft money does not fund speech that "in express terms advocate[s] the election or defeat of a clearly identified candidate for federal office," which is the *only kind* of speech for which the Court has held that contributions may be constitutionally restricted. To regulate contributions for speech that is other than express advocacy of the election of particular candidates, the Court said, would create intractable vagueness problems and cause unacceptable chilling of protected, issue-oriented political speech. It would, in other words, thwart speech debating the merits of government policies and addressing the public issues that are at stake in elections---the very kind of speech that the First Amendment primarily

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[2] *Id.* at 92-93.

protects. Thus, because a ban on soft money aims directly and indiscriminately at core political activity, and because its proponents have not made their case that soft money contributions pose a danger of quid pro quo corruption, the ban could not pass muster as a finely tuned means of achieving a compelling state interest. Moreover, although the Supreme Court has not yet faced the issue of whether the corruption-prevention rationale for limiting *candidate contributions* would support limits on spending by political parties, it is more than conceivable that it could decide that party spending on political activity cannot constitutionally be limited. If it were to so decide, then contributions to parties to make those expenditures would likewise seem to be protected from regulation. In sum, from a constitutional perspective, restrictions on soft money are among the least defensible proposals for campaign finance reform.