

Testimony of Alan B. Morrison
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On the Constitution and Campaign Finance Reform

Mr. Chairman, members of the Committee, I am pleased to appear before this Committee at your invitation on behalf of the 150,000 members of Public Citizen to discuss the constitutional issues surrounding campaign finance reform. I have submitted a copy of my resume to the Committee, which does not mention that I have personally argued 16 times in the Supreme Court and the Public Citizen Litigation Group as a whole has argued 40 cases and participated in hundreds of other cases, including most recently supporting the constitutionality of the contribution limit statute at issue in *Nixon v. Shrink Missouri PAC*. In addition, I have been examining the issues of campaign finance reform and the Constitution for more than 25 years, and it is on the basis of that experience that I am testifying today.

There are many issues involving the Constitution and campaign finance reform. Today I want to talk about two of them: soft money and “phony issues ads.” Although the principles applicable to both are similar, and although the two are often blended together in discussions of constitutional questions, my testimony will discuss them separately.

Before turning to specifics, let me reiterate Public Citizen’s long-standing support for the McCain-Feingold bill in both its current form and in its stronger prior versions, including the Snowe Amendment. The approaches taken in those bills are sound as a matter of policy, will cure serious problems in our campaign finance system, and are constitutional. The Hagel bill, on the other hand, is far weaker, and its only possible justification is that McCain-Feingold is unconstitutional, which it is not.

Soft Money. For purposes of this testimony, I shall refer to soft money as contributions made to a political party that do not come within the current limits and restrictions imposed by the Federal Election Campaign Act (“FECA”). Thus, under current law, there are dollar limits that individuals can give to a political party each year, but corporations and labor unions are forbidden absolutely from giving money to political parties if the money is used to advocate the election or defeat of a candidate for federal office. The limits on individual contributions and the prohibitions on corporate and labor union contributions have been upheld, and I am assuming their continued validity for

purposes of this testimony.

There can be no dispute that the primary if not exclusive purpose of a political party is to elect its candidates to office. A party goes about that through a wide variety of means and spends money on many activities to support election campaigns that are, in themselves, not acts of election advocacy. Buying meals, renting hotel rooms, and leasing cars are all activities that could be election-related or not, depending on the goal for which the persons are being fed, housed, and transported. In addition, there are a number of election-related activities that are currently not covered by the FECA, but which Congress could choose to cover as a legislative decision. Thus, the first part of the process of regulating money that is not currently covered by the Federal election laws is to expand the definition of activities that must be financed in accordance with the FECA, as McCain-Feingold does. As applied to the national committees of political parties, it could hardly be disputed that they have no constitutional right to spend money that is not subject to regulation since their primary if not exclusive goal is to elect persons to federal office. Once the definition is expanded, all activities of a national party would have to be financed as the current direct advocacy activities are now financed: with money that is subject to the dollar limitations imposed by the FECA. In the case of corporations and labor unions, the money could not be spent because those entities are currently forbidden from making direct contributions to the so-called hard money accounts of national parties.

In addition, the Supreme Court has upheld the constitutionality of bans on contributions and expenditures by corporations and unions in elections for state and federal office. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Since the national political parties directly support candidates in elections for federal office, that rationale directly supports a ban on corporations and unions giving hard money to parties. The way that they have evaded these limitations is by giving the money to a party to be used for purposes that do not constitute the narrow definition of expenditures in connection with a federal election under the existing statutes because the expenditures do not expressly (directly) advocate the election or defeat of a candidate for federal office.

If, as I showed above, Congress may constitutionally broaden the reach of federal statutes that apply to political parties whose goal is to elect persons to federal political office, to include expenditures for purposes that do not in themselves constitute express advocacy, but still support the election goals of the party, then the existing bans on corporate and union contributions to political parties could constitutionally cover all activities engaged in by a party and all expenditures that it made. Surely, no one would say that a party would have the constitutional right to spend money to fly a candidate

around the country, without reporting the expenditure and without any limits on its source, on the theory that the movement of aircraft is not a form of express advocacy and therefore the Constitution cannot govern expenditures for it. Obviously, flying candidates around the country is an essential support activity of a political party, and hence the funding for it can be regulated in the same way as activities involving express advocacy. For that same reason, soft money expenditures, most typically involving issue ads, focusing on positive issues that one party wishes to advance, or attacking the positions of the other party, constitute the same kind of support activities that may constitutionally be subjected to the same kind of regulation as currently exists for hard money contributions.

It is also undisputed that the national parties work closely with state parties in electing federal officials. Under the current system, there are already rules for activities in which there are joint efforts by state and national parties that govern how the money is allocated and hence whether money is subject to the federal requirements, including whether they must be financed in accordance with the federal law. It is widely recognized that those rules are extremely loose and therefore favorable to efforts to spend money that is financed through state parties, which are not subject to federal requirements and limitations. Hence, by forbidding the use of state party funds to support federal election activities, it will be much more difficult for unlimited funds to be given to state parties that will end directly supporting candidates in federal elections. Although there may be some limits on what Congress can do in this regard, the courts will almost certainly give considerable deference to Congress in its judgment that activities that are carried on by state parties, during the time frame when federal elections are occurring, can reasonably be attributed to federal elections. Thus, a decision by Congress that the rules governing federal elections should be applied to govern monies that are formally contributed to a state party, but are in fact used to help finance federal election races, would be upheld.

As noted above there is no question that Congress can constitutionally limit the amount of hard dollars that are given by individuals and political action committees to national parties. For purposes of these discussions, it is not the amounts of such limitations that are relevant, but the fact that Congress has constitutionally imposed those limitations under existing law, and therefore can almost certainly do under rules that cover a wider range of activities, including activities conducted by state parties, but whose goal is to aid in federal elections.

Although I am confident that eliminating the distinction between hard and soft money given to a political party is constitutional, others do not agree. Therefore, for those doubters, there is another way that Congress could assure that the national parties

do not accept soft money, and under that approach there is no doubt whatsoever of its constitutionality. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court struck down the portion of FECA that limited spending by candidates, but then upheld the part of the law that conditioned the right of candidates for offices to receive federal funding on an agreement not to spend beyond limits established in the law. *Id.* at 57, n. 65. Since the national parties accept millions of federal dollars each presidential year for their conventions and for the campaigns of their candidates for President, Congress could simply add another condition to the bargain that already limits the additional hard money that a party can raise and spend: no soft money. Of course, a party could refuse to accept the \$70 million or so, which it might do if it knew that George W. Bush were going to be its candidate and could raise the amounts of money he did in the primaries for the general election as well. But that would be a very large gamble, not only financially, but politically. In addition, Congress could make that choice much harder by making candidates ineligible for federal matching funds in the primaries if their party did not accept the soft money ban, which it would have to do before the primary season even opened.

There is also another hook that Congress could use is the law that requires television and radio stations to charge candidates for federal office the lowest unit rate. Once again, Congress could condition the right to that reduced rate on the willingness of the candidate and/or the party to accept the soft money rules. The benefits of the lowest unit rate law extend to candidates for the House and the Senate, as well as the President, and imposing this kind of condition on the national party would have a significant impact on all candidates for federal office. Therefore, because it is such strong medicine, and because the direct ban is constitutional and has no side effects for other candidates for federal office, we do not think it necessary to impose this condition on the lowest unit rate law at this time for that purpose, even though it too would provide a further constitutional basis for eliminating soft money.

It is sometimes said that restricting contributions to political parties will simply end up diverting the money into independent expenditures by the same individuals or having them channel their funds into PACs or other groups that will make the same expenditures. There are at least four answers to that claim. First, that claim is principally a policy not a constitutional argument against limits on soft money donations to a party. It may or may not be a wise decision to have more money spent by parties and less by individuals acting on their own, but there is no constitutional aspect to that policy difference. Second, individuals can give only \$5000 per year to a PAC, a much different situation than the current one under which there are no limits on soft money contributions to a party. Third, to the extent that this is an argument over phony issue ads, we deal with that directly in the next section of this testimony.

Fourth, and most telling from a constitutional perspective, the Supreme Court in *Buckley* struck down limits on the amount an individual could spend on truly independent expenditures, while upholding contribution limits because the prevention of corruption, or the appearance of corruption, was found to be a non-existent problem if an individual spends money on her or his own for political ads, but a matter of legitimate concern if the person is giving the money to a candidate or his party and letting them spend it. Even for a supporter of a candidate, there is a major difference in control when the individual, rather than the candidate or the party, makes the decision about what is said (and what is not said), how it is said, and when it is said. Indeed, it is often true that individuals who are supporting a candidate do not always agree with the candidate on every issue, or on the message that should be conveyed and how it should be conveyed. But even more important is the fact that the Supreme Court considers the potential for the quid pro quo from large gifts to a party, whether in the form of hard money or soft money, to be less likely when the individual makes the expenditure on his or her own.

Furthermore, to the extent that the record of the 1996 campaign shows that many of the individuals who contributed to the Clinton Gore re-election effort did so in order to ingratiate themselves with the current administration, some of the contributors may be unwilling to take out an ad on their own, and report that to the FEC, whereas they would make a soft money gift to a party. Finally, to the extent that persons make soft money contributions against their will, because of real or imagined threats of retaliation, those contributions will not be made at all if the only choice is to spend the money in the form of truly independent expenditures.

For all these reasons, it is my firm view that the Constitution does not prevent Congress from treating soft money contributions made to national and state political parties as subject to the rules now governing hard money contributions that benefit candidates for federal office, as McCain-Feingold does. In this way, corporations and unions will no longer be able to make contributions to national political parties, and individuals and PACs will no longer be able to evade the current limitations through soft money. Similarly, to prevent evasion of those rules, the same principles can be extended to expenditures by state parties when working jointly with national parties, or otherwise attempting to influence the outcome of federal elections, by treating more of the closely related activities as federal activities, and hence subject to federal rules on funding sources.

In the past, in an effort to gain support for McCain-Feingold, its backers have eliminated provisions designed to assure that independent expenditures are made by persons or entities that are truly independent of the candidate or party. One reason why

the Supreme Court has been willing to limit the amount of hard money contributions that individuals and PACs can make to candidates and to parties is that such contributors remain free to make independent expenditures, in the form of advertisements or other activities that directly advocate the election or defeat of a candidate for office, and can do so without any legislatively-imposed dollar limitations. However, for such expenditures to be lawful, they must be truly independent. It is widely recognized that the independence of many committees being established and using soft money is open to serious question. To take one example, no one who has followed the Senate race in New York could suggest that the committees to receive soft money established by Mayor Giuliani and First Lady Hillary Clinton are independent in any meaningful sense of the word. Similarly, a number of presidential aspirants set up state-based committees in recent years to avoid the limitations of federal law, but again, no one argued that they were independent and could not be regulated if Congress broadened the applicability of the laws. In other cases, such as that of the Christian Coalition's case in which it was challenged by the FEC for coordinating political activities with others, the issue was far less clear cut. Thus, to prevent evasion of the new rules on contributions, whether of hard or soft money, Congress should, and constitutionally may, amend the law to assure that independent committees are independent in fact, not just in name.

The current rules for dealing with the issue of independence – which require the Federal Election Commission to show actual cooperation (coordination) between the candidate and the supposedly independent committee – are too difficult to satisfy. Various provisions have been included in prior bills to correct this problem, which would presume a lack of independence from such objective and easily verifiable factors as an overlap in officers of the committees, use of the same polling firms, and use of the same advertising agency. We support that approach, as well as other means of assuring that independent expenditures are not being controlled by a candidate or a party. By eliminating the claim to independence of such entities, the amounts that could be given to them would be included as the amounts that are treated as being given to the candidate. Thus, independent expenditures would be reserved for truly independent persons and not those acting at the requests of the candidate or his or her committee, which would help control the evasions now taking place. Again, there cannot be any constitutional issue to these kinds of changes which are designed only to assure that the Supreme Court's distinction between independent expenditures and contributions to a candidate or party is carried out in practice.

Phony Issue Ads. The second major area in the current campaign finance reform debate involves phony issue ads. As the Committee is aware, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), interpreted FECA to apply only to expenditures that expressly advocate the election or defeat of a particular candidate for federal office.

While the courts have not always insisted upon use of magic words such as “vote for” or “vote against” or “defeat Jones,” they have generally insisted that something very close to those magic words be included in the advertisement or else it would not be construed as being subject to the federal law. Although the decision was based on the Court’s interpretation of the statute, it was done against a background of avoiding serious constitutional problems that might arise if the statute were applied, for example, to an expenditure of money by a citizen’s group that criticized the environmental record of an elected official and that criticism might impliedly be seen as urging the defeat of that particular person in a race for federal office.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Supreme Court recognized the distinction between elections involving candidates for office and elections involving ballot initiatives and held that a Massachusetts statute that forbade corporations from making expenditures to support or defeat a ballot initiative was unconstitutional, although limits or bans on expenditures where there was a candidate for office, and hence the potential for corruption, are not unconstitutional. Thus, there are clearly significant areas where corporate or union financing of pure issue ads cannot be prohibited.

However, the First Amendment of the Constitution does not require Congress to close its eyes to the reality of what has been occurring in recent elections with so-called issue ads that are not at all disguised efforts to support or defeat a particular candidate for office although they carefully omit the magic words that the Supreme Court has said are required under existing law. Nothing in any of the Supreme Court decisions on campaign finance suggests that the Court would not uphold a narrowly drawn statute that recognized the reality that certain kinds of ads, at certain times in the election cycle, are the functional equivalent of vote for or vote against a candidate, and hence they can be regulated in the same manner as are independent expenditures that contain express advocacy. In my view, a statute with the following kinds of characteristics, that have been included in earlier versions of McCain-Feingold, would be sustained by the Supreme Court and, equally importantly, would cover only the most significant expenditures and would leave more than ample breathing room for legitimate issue-related activities.

First, the principal problem is not with individuals taking out issue ads since they are free to expend as much money as they can afford on express advocacy, which is at least as effective as phony issue ads, if not more so. Nor is the problem with PACs because they raise only hard money (capped at \$5,000 per year from any one individual), and hence they do not need to use issue ads to achieve their election-related goals. Rather, the problem arises because corporations and unions -- which are forbidden from

making independent expenditures, as well as contributions to candidates, PACs, or parties -- either take out issue ads themselves or donate money to other entities that do so. Thus, the law would be triggered only if either the entity making the expenditure were a corporation or a union -- including non-profit corporations -- or the ultimate source of the funding for the ad itself were a corporation or a union.

Second, the candidate or political party would have to be clearly identified in the expenditure, and the expenditure would have to convey a message of support or opposition for the candidate or party, in order for it to be covered. The notion that corporations or unions can take out advertisements saying "Democrats are better at protecting Social Security" or "Republicans are the party for national defense", and yet not have those ads be subject to federal election regulation, because they don't use the magic words, does not make any sense. Third, the expenditure would be covered only if it were made within a narrow time frame before a primary or general election, such as within sixty days. The clear time demarcation also serves the First Amendment interest in avoiding possible confusion or chilling protected speech.

Fourth, there ought to be a threshold of expenditures that must be exceeded before the law would apply, such as ten thousand dollars. Having a threshold would provide for the assurance that there are not accidental expenditures that somehow trigger a federal requirement. Moreover, it is only the significant federal expenditures that have raised questions about their influence and raise potential concerns about the appearance of impropriety and undue influence based on the source of the money. Last, the law would cover radio and television and paid newspaper advertisements, which are the areas where large amounts of money have been spent on issue ads as substitutes for express advocacy.

Having created this narrow category of clearly election-related expenditures, Congress should extend the principles under existing law and forbid corporations (both for-profit and non-profit) and unions from making these kinds of expenditures and from contributing to organizations that make such expenditures, unless the funds are earmarked for purposes other than these advertisements or the special provision for non-profits described below is satisfied. The theory of this approach, which is followed in the Snowe amendment, is that these expenditures are the functional equivalent of independent expenditures, which unions and corporations are now forbidden from making, and hence these issue ads ought to be treated in the identical manner. Such a ban on corporate and union sponsorship of phony issue ads would be sustained by the courts because such ads seek to achieve the same ends as express advocacy ads which corporations and unions are currently forbidden from doing. As in the Snowe amendment, which Public Citizen has supported and continues to support, there would be an exemption under which non-profit corporations could make these kinds of election-related expenditures, but they would have to be funded by individuals and they would be

encouraged to utilize separate, segregated funds (as they do for other political activities) and disclose the identities of large donors to such funds. Moreover, there would have to be full and immediate disclosure of the sponsor of these ads and the major financial supporters of them.

Despite the public interest in knowing the source of funding for these candidate related expenditures, some would argue, relying on *NAACP v. Alabama*, 357 U.S. 449 (1958), that there is a countervailing interest in the First Amendment right of individuals to associate together for common purposes that would preclude the government from learning the identities of those persons. However, since the statute would be narrowly drawn to require disclosures only of the largest contributors who support major advertising activities at election time, and since the ads are no different from other election-related expenditures for which the source of funding is now required, the constitutionality of the disclosure requirement would, in my view, be sustained.

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Mr. Chairman, in the relatively short time that I was given to prepare this testimony, I have neither attempted to write a statute that would be sustained under the First Amendment, nor have I attempted to write a detailed legal memorandum supporting such a statute. Rather, what I have attempted to do is set forth a series of guidelines that, if followed, as do current and prior versions of McCain-Feingold, would enable Congress to enact meaningful laws that would end most of the soft money abuses, would end phony issues ads sponsored by corporations and unions, and require the disclosure of the sources of funding for the most significant phony issue ads taken out by non-profit corporations that are close in time to federal elections. If the goal of such a law is to eliminate all possible abuses and close all possible loopholes, such a bill might run afoul of the First Amendment. But a statute designed to deal with the worst abuses, as I have outlined above, would, in my judgment, almost certainly be sustained by the Supreme Court.

I appreciate the opportunity to appear here today, and I stand ready to assist the Committee and others in Congress in drafting amendments to the basic McCain-Feingold bill that will significantly reduce the major problems of soft money and phony issue ads.