Testimony
Of
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On the

Implications of Campaign Finance Reform Legislation For Constitutionally Protected Citizen Participation

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Chairman McConnell, Members of the Committee my name is Laura W. Murphy. I appreciate the opportunity to testify today on behalf of the American Civil Liberties Union (ACLU). For almost 80 years the ACLU has been a nation-wide, non-partisan membership organization of nearly 300,000 members devoted to protecting the rights and principles of freedom and individual liberty set forth in the Bill of Rights and the Constitution.

The ACLU and the ACLU Foundation are not-for-profit 501(c)(4) and 501(c)(3) organizations respectively. We are wholly supported through membership dues, private individual donations and foundation grants. Neither entity receives any federal funds, whatsoever.

I have had the privilege of serving as Director of the ACLU's Washington Office for the last seven years. In addition to directing the overall legislative and Executive Branch operations for the national organization, I have also served as the ACLU's primary lobbyist on campaign finance reform issues.

The ACLU has been studying, litigating and lobbying on the constitutional and practical implications of federal campaign finance laws for over the last twenty five years. The ACLU filed two important lawsuits that preceded Buckley v. Valeo, 424 U.S. 1 (1976) -- National Committee on Impeachment v. United States 469 F. 2d 1135 (2d Cir. 1972) and ACLU v. Jennings 366 F. Supp. 1041 (D.D.C. 1973). ACLU attorneys also argued for the plaintiffs before the Supreme Court in the case of Buckley v. Valeo. These three ACLU cases created much of the constitutional framework that has constrained all federal campaign finance legislation during the past two decades

Perennial congressional debates on campaign finance reform are driven by several elements:

- A desire to prove to the public that Congress is willing to limit the perception or reality that corporate, personal or interest group funds disproportionately or illegally influence the outcome of elections and the fate of legislation.
- A need to respond to perceived campaign abuses of the moment.
- Personal frustration about the time and effort that it takes to raise money to run for Congress.

- Frustration by candidates and some interest groups that, during elections, information about candidates or their positions on issues is not solely controlled by parties and candidates because of the explosion of unregulated soft money and issue advocacy.
- The desire to address the unintended consequences created by the original Federal Election Campaign Act (FECA) and subsequent court rulings (placing influence on campaigns outside the sphere of "control" of candidates).
- Rigid notions carried over from Congress to Congress, of what constitutes legitimate "reform" legislation.
- Related decisions by House and Senate party leaders about which proposals will make it through the legislative processes (through discharge or normal processes), and subsequent pressure on members to "fall in line."

Unfortunately, efforts to engage in true problem solving have been frustrating. Congress and the so-called reform interest groups seem hardened in their approach to reform. Recent congressional debates seem more focused on incidents such as the 1996 soft money scandal than on fixing systemic problems in a constitutional manner. Most of my recent conversations with members of Congress and interest groups have been focused more on what is expedient and politically correct and not enough on preserving First Amendment freedoms. When constitutional issues are raised, some cynically characterized these issues only as a means by "reform opponents" to undermine popular "reform" proposals.

What is worse, some members of Congress feel such enormous pressure to "do something" that they quietly say they hope the courts will overturn the very laws they are voting to enact. Sometimes voting against bills like McCain-Feingold or Shays-Meehan, even if it is done to protect the First Amendment, is not worth the criticism by their colleagues, the "reformers" or the media back at home in the district. Other Members only recognize the First Amendment in the context of campaign finance reform and become deaf to it when it concerns flag desecration or Internet free speech or hate speech. At the end of the day -- because of the certainty of filibusters and challenges to the constitutionality of the legislation – too many Members are convinced that the status quo that got them here will prevail. For these survivors, the known "evil" of our broken system is

preferable to the imaginary "level playing field" promised to us all by McCain-Feingold.

In case I am sounding like the ACLU is here only to point fingers, let me say that we intend to be part of the solution. The system of electing candidates to federal office needs repair. The ACLU is too often perceived as a pawn of the "just say no to reform" crowd rather than the engine of creative constitutional proposals to address our systemic electoral problems. The ACLU will not merely state its objections the constitutional infirmities of the popular so-called reform measures such as the McCain-Feingold bill, S. 26. We will continue to advocate reform of the current system, but with fidelity to the First Amendment principles, and with the goal of expanding, not limiting political speech.

The problems in our current system

Most of us on this panel probably agree that we have a political financing system that is in need of reform. It is a system of unintended consequences, created by well-intentioned legislation proposed to fight corruption during the Watergate era in 1971 and 1974. Federal court rulings, most notably the Supreme Court's decision in Buckley v. Valeo and many related decisions during the last two decades, struck down much of the 1974 law.

Some oversimplify Buckley and reduce it to a ruling that says "money equals speech." But the ruling was more nuanced than that. The Court recognized that money is spent in our democratic system for speech to be heard. Flyers are printed, ads are run, consultants are hired and paid, trips are taken -- all to get political and issue messages out. The Court believed that to the extent Congress placed dollar limits on the amounts of funds raised and spent, it gave the government the capacity to ration and control political speech protected by the First Amendment.

But the Court also ruled that the only reason that limits should be in place at all is to guard against the reality or appearance of corruption. Because some of the laws Congress enacted were kept in place and others were not, we have a legal mishmash of Congressional statutes and Court rulings giving us our current system that:

- Retains outdated campaign contribution limits of $1,000 per race, $2,000 per cycle and $25,000 in total;
- Allows unchecked spending by candidates with personal wealth;
- Forces candidates to spend much more time raising money because of contribution limits that have never been adjusted for inflation;
- Gives rise to and fosters reliance upon political action committees (PACs);
- Increases the importance of independent expenditures (that are used to support or oppose candidates but are not run or coordinated by the candidates);
- Helps explode the raising and spending of money by political parties, known as "soft money;"
- Skews the marketplace of ideas by stifling some voices and, by default, magnifying others, such as those of the owners of major media outlets whose editorials cannot (and should not) be controlled by campaign finance legislation; and
- Greatly enhances the influence of celebrity endorsements because of the restrictions on hard money funds available for campaigns.

Now that we have identified these interconnected problems in our campaign finance system, we need to focus on meaningful solutions. But let's first focus on what we should <u>not</u> do.

<u>How does McCain –Feingold limit or chill issue advocacy?</u>

The American Civil Liberties Union believes that too many current proposals attempt to restrict issue advocacy, soft money and rights of new Americans and lawful permanent residents in a manner inconsistent with federal court holdings and constitutional rights. For the sake of today's testimony I will focus my remarks primarily on key elements of S. 26, because this is the bill that has the most co-sponsors and enjoys the support of President Clinton. We believe that this bill violates First Amendment rights because the legislation contains provisions that would create burdensome laws that will abridge the very speech that the First Amendment was designed to protect – political speech.

McCain-Feingold has a chilling affect on issue group speech that is essential in a democracy. This bill contains restrictions on issue advocacy achieved through unconstitutionally redefining issue advocacy as "electioneering communications." The Supreme Court has held that only express advocacy, narrowly defined, can be subject to campaign finance controls. The key to the existing definition of express advocacy is the inclusion of an explicit directive to vote for or vote against a candidate. Minus the explicit directive or so-called "bright-line" test, what will constitute express advocacy or "electioneering communications" will be in the eye of the beholder, in this case the Federal Election Commission (FEC). Few non-profit issue groups will want to risk their tax status or incur legal expenses to engage in speech that could be interpreted by the FEC to have an influence on the outcome of an election.

- S. 26 could result in an issue advocacy "black-out" on television and radio issue advertising 30 days before the primaries and 60 days before general elections. The bill's statutory limitations on issue advocacy could force groups that now engage in issue advocacy -- 501(c)(3)s and 501(c)(4)s -- to create new institutional entities – PACs -- in order to "legally" speak before an election. Groups could also be forced to disclose or identify all of their contributors if they chose to speak through television and radio advertisements during this period. For organizations like the ACLU, this will mean individuals will stop contributing rather than risk publicity about their gift. The opportunities that donors now have to contribute anonymously to our efforts to highlight issues during elections would be eliminated. (This is a special concern for groups that advocate unpopular or divisive causes. See *NAACP v. Alabama* 357 U.S. 449(1958).) For many non-profits, being forced to disclose contributor names or to establish PACs is significant. In particular, the establishment of a PAC can change the very character of an organization, especially for vociferously non-partisan groups such as the ACLU. Separate accounting procedures, new legal compliance costs and separate administrative processes would be imposed on these groups -- a high price to exercise their First Amendment rights to comment on candidate records. It is very likely that some groups will remain silent rather than risk violating this new requirement or absorbing the attendant cost of compliance. Thus, the only entities that will be able to characterize a candidate's record (unfettered by the

FEC) on radio and television during these pre-election periods will be the candidates, PACs and the media. Yet, the period when non-PAC issue groups are locked out is the very time when everyone it paying attention! Further, members of Congress need only wait until the last 60 days before an election (as it often does now) to vote for legislation or engage in controversial behavior, so that their actions are beyond the reach of public comment and, therefore, effectively immune from citizen criticism.

- S. 26 redefines "expenditure," "contribution" and "coordination with a candidate" so that heretofore legal and constitutionally protected activities of issue advocacy groups could become illegal. Let's say, for example, that the ACLU decided to place an ad lauding, by name, Representatives or Senators for the effective advocacy of constitutional campaign finance reform. That ad could be counted as express advocacy on behalf of the named Congresspersons under S. 26 and would be effectively prohibited. If the ACLU checked with key congressional offices to determine when this reform measure was coming to the floor so the placement of the ad would be timely – that would be an "expenditure" counted as a "contribution" to the named officials and it would be deemed "coordinated with the candidate." An expanded definition of coordination chills legal and appropriate issue group-candidate discussion.

If these very same restrictions outlined above were imposed on the media, we would have a national First Amendment crisis of huge proportions. Yet, newspapers such as the *Washington Post,* the *New York Times,* the *Los Angeles Times* and other media outlets relentlessly editorialize in favor of McCain-Feingold -- a proposal that blatantly chills free speech rights of others, but not their own. Let's suppose Congress constrained editorial boards in a similar fashion. Any time news outlets ran an editorial -- 60 days before an election or otherwise -- that mentioned the name of a candidate, the law now required them to disclose the author of the editorial, the amount of money spent to distribute the editorial and the names of the owners of the newspaper to the FEC, or risk prosecution. The media powerhouses would engage in a frenzy of protest, and you could count on the ACLU challenging such restraints on free speech. Yet, the press has as much if not more influence on the outcome of elections as all issue advocacy

groups combined. I've seen more people go to the polls with their newspapers wrapped under their arm than any other issue group literature.

The McCain-Feingold bill contains misguided and unconstitutional restrictions on issue group speech and only works to further empower the media to influence the outcome of elections. None of the proposals seek to regulate the ability of the media -- print, electronic, broadcast or cable -- to exercise its enormous power to direct news coverage and editorialize in favor or against candidates. This would be clearly unconstitutional. It is equally unconstitutional to effectively chill and eliminate citizen group advocacy. It is scandalous that Congress would muzzle issue groups in such a fashion.

Finally, the ACLU has to be especially watchful of the Federal Elections Commission because it is a federal agency whose primary purpose is to monitor political speech. If Congress gives the FEC the authority to decide what constitutes "true" issue advocacy versus "sham" issue advocacy or "electioneering communications", the FEC is then empowered to become "Big Brother" of the worst kind. Already, it has been, far too often, an agency in the business of investigating and prosecuting political speech. The FEC would have to develop a huge apparatus that would be in the full-time business of determining which communications are considered unlawful "electioneering" by citizens and non-profit groups.

What are our proposed solutions?

The ACLU believes that there is a less drastic and constitutionally offensive way to achieve reform: public financing.

If you believe that the public policy process is distorted by candidates' growing dependence on large contributions then you should help qualified candidates mount competitive campaigns – especially if they lack personal wealth or cannot privately raise large sums of money. Difficult questions have to be resolved about how to deal with soft money and independent expenditures. Some of these outcomes are constrained by constitutionally based court decisions.

But not withstanding the nay-sayers who say public financing is dead on arrival, we should remember that we once had a system where private citizens and political parties printed their own ballots. It later became clear

that to protect the integrity of the electoral process ballots had to be printed and paid for by the government. For the same reason the public treasury pays for voting machines, polling booths and registrars and the salaries of elected officials. In conclusion, we take it as a fundamental premise that elections are a public not a private process – a process at the very heart of democracy. If we are fed up with a system that allows too much private influence and personal and corporate wealth to prevail, then we should complete the task by making public elections publicly financed.