

NLWJC - Kagan

Counsel - Box 034 - Folder 005

Campaign Finance Materials [2]

Withdrawal/Redaction Sheet

Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|--------------------------|--|------------|-------------|
| 001. memo | from Michael Waldman to James S. Rubin et al re RE: cfr [partial] (1 page) | 05/23/1996 | P6/b(6) |
| 002. memo | Phone No. (Partial) (1 page) | 05/16/1996 | P6/b(6) |

COLLECTION:

Clinton Presidential Records
 Counsel's Office
 Elena Kagan
 OA/Box Number: 808

FOLDER TITLE:

Campaign Finance Materials [2]

2009-1006-F

kc143

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

10 pages
to tal

**EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET**

ROUTE SLIP

| | | |
|----------------------------------|------------------------------|--------------------------|
| TO: PAUL WEINSTEIN | Take necessary action | <input type="checkbox"/> |
| ELENA KAGAN | Approval signature | <input type="checkbox"/> |
| TRACEY THORNTON | Comment | <input type="checkbox"/> |
| CHUCK KONIGSBERG | Prepare reply | <input type="checkbox"/> |
| BOB DAMUS | Discuss with me | <input type="checkbox"/> |
| JIM MURR | For your information | <input type="checkbox"/> |
| | See remarks below | <input type="checkbox"/> |
| FROM: Jim Jukes (x5-3458) | DATE: | 6-21-96 |

REMARKS

Attached are the Justice Department's constitutional objections to the McCain - Feingold campaign finance bill (S. 1219), as introduced. Justice has not completed its ~~of~~ analysis of the Lott amendment that the Senate adopted yesterday, but advises on a preliminary basis that most of the attached concerns continue to apply.

**Justice Department Comments on Senate Campaign Finance Reform
Bill, S. 1219 (McCain/Feingold Version)**

The following are comments on S. 1219, the Senate Campaign Finance Reform Act of 1995, and the statement of Administration policy on that bill. The bill would establish a voluntary system that would grant benefits to candidates who choose to participate in return for their commitment to adhere to a variety of restrictions on their fund-raising and expenditures. The bill would also enact a variety of generally applicable regulations.

I. Generally Applicable Provisions

1. Independent Expenditures by Associations: The bill would ban contributions and independent expenditures¹ by anyone other than an individual or a political committee. A political committee is defined as a political party or a committee of a political party. See S. 1219, § 201. The effect of this provision, then, is to ban independent expenditures and contributions by all political associations other than political parties. *Id.* Under current Supreme Court jurisprudence, the ban on independent expenditures is unconstitutional.²

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held unconstitutional a provision of the Federal Election Campaign Act that prohibited any independent expenditures in excess of \$1,000, unless made by a candidate, a party, or the institutional media. *Id.* at 19. The Court concluded that this provision precluded individuals and associations from availing themselves of the most effective means of communicating regarding elections. In so doing, the Act seriously infringed upon speech at the core of the First Amendment and, therefore, was subject to strict scrutiny. To satisfy this exacting level of scrutiny, a

¹ An independent expenditure is defined as an expenditure that is made without the participation or cooperation of or without consultation with a candidate and that contains express advocacy. Express advocacy, in turn, is defined as an expression of support for or opposition to a specific candidate or group of candidates or to the candidates of a specific political party. S. 12319, § 251.

² The ban on contributions by associations also raises a constitutional question, but we believe that this ban can be justified as an ancillary measure that enforces the limit on contributions by individuals that the Court upheld in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Individuals remain able to make contributions up to the statutory limit. The ban on contributions by associations merely prevents an individual from exceeding the legal limit by making unarmarked contributions to associations that the contributor regards as likely to make a contribution to the contributor's favored candidate. See *id.* at 38; see also Gard v. Wisconsin, 456 N.W.2d 809, 820 (Wis. 1990).

statute must be narrowly tailored to the advancement of a compelling governmental interest. The proffered governmental interest in Buckley was the avoidance of actual corruption or the appearance of corruption. The Buckley Court upheld the FECA's \$1,000 limit on contributions by an individual to a particular candidate on the basis of this interest. Id. at 23-38. In the context of independent expenditures, however, the Court held that the anti-corruption interest was not sufficiently compelling to justify the limitation. The Court reasoned that the potential for corruption through independent expenditures is substantially diminished as compared to direct contributions because independent expenditures by definition are not coordinated with the candidate's campaign and therefore could possibly prove counterproductive. Thus, according to the Court, independent expenditures made on behalf of a particular candidate or in opposition to that candidate's opponent are unlikely to be an effective means of carrying favor with the candidate. Under this holding of Buckley, the proposed ban on independent expenditures is unconstitutional. See id. at 19, 39-51.

Even if the Court were to accept that the anti-corruption interest is fully compelling in the context of independent expenditures,³ the specific proposal in the McCain-Feingold bill would be unconstitutional. The bill would continue to allow unlimited independent expenditures by individuals with the means to make them. It would only deny individuals of more modest means the ability to band together to engage in effective advocacy. The bill, therefore, significantly infringes the right of individuals to associate in order to express their political views. Because the right to associate for the purposes of political expression is a fundamental right, the bill's distinction is valid only if there is a compelling interest in differentiating between independent expenditures by associations, on the one hand, and by individuals, on the other. See generally Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). We are aware of no reason to believe that independent expenditures by associations present a greater potential for actual or apparent corruption than independent expenditures by individuals. See Buckley, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

This was the Court's ruling when it addressed a more limited form of the proposed prohibition. See FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"). There, the Court assessed a statute that prohibited all PACs from making

³ The Supreme Court "has consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 259-60 (1986).

independent expenditures to further the election of a presidential candidate who accepted public funding. Id. at 482. The Court ruled that "[t]o say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." Id. at 495. Therefore, the Court applied strict scrutiny, which the statute did not pass because the potential for corruption from independent expenditures is diminished as set forth in Buckley. Id. at 487-98.

not even any ref to fall back

AM
OUT

2. Contributions Made through Intermediaries: The bill would provide that, if a contribution is made through or is arranged by an intermediary or conduit, directly or indirectly, the contribution would be attributed to the intermediary or conduit if, inter alia, the intermediary or conduit is (1) a political committee or party; (2) a lobbyist or foreign agent; (3) a bank, corporation, union, or partnership; (4) or an officer, agent, or employee of (2) or (3) when acting on behalf of such person or entity. S. 1219, § 231. This provision raises serious constitutional concerns.

Constitutional concerns would be raised if "arranging" for a contribution were construed to include communications or other actions that resulted in encouraging others to make contributions, because this would impose a significant burden on the right of association. The right of association is designed to allow "individuals of modest means [to] join together in organizations which serve to amplify the voice of their adherents" and to engage in effective advocacy. NCPAC, 470 U.S. at 494 (quoting Buckley, 424 U.S. at 22). Associations that are formed to advocate the political beliefs of their members often also perform an educational function. That is, they inform their members regarding which candidates have supported the association's positions and prioritize those whose election will most benefit the association's positions. This process can be conducted and will be aided by a person who is a lobbyist or an agent or employee of a lobbyist. If this were to constitute "arranging" a contribution, it would strike at associational activity that is at the core of the First Amendment and as a result would be subject to strict scrutiny.

It might be contended that this provision could be satisfied by an association by segregating lobbyists from fundraisers and any other persons who communicate information to members of the

This provision would operate by attributing contributions made or arranged through an intermediary or conduit to the intermediary or conduit, who is subject to the general individual contribution limit of \$1,000. Thus, one of the listed conduits could not "bundle" contributions from other individuals to the extent the sum of those contributions and the intermediary or conduit's personal contributions exceeds \$1,000.

association. If that were the statutory requirement, however, it would not pass constitutional muster. In a given association, it is possible, perhaps likely, that the association's lobbyists will be uniquely situated to advise the membership as to where their contributions will do the most good from the association's point of view. Even if an association could hire a separate staff to perform this function, the Constitution requires strict scrutiny where such a burden is placed on the right to associate. Again, we are aware of no governmental interest sufficient to justify this burden. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); cf. FAIR Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (holding unconstitutional a ban on any lobbyist serving as a conduit for a contribution as part of a comprehensive ban on all contributions made by lobbyists).

To avoid these constitutional infirmities, the bill should be clarified to make it explicit that the regulation of contributions made through intermediaries or conduits applies only where the intermediary or conduit retains ultimate authority over whether or not the contribution is in fact made.

3. Contributions by advisers and employees: The bill would exclude from the definition of "independent expenditures" any expenditures made by a person who has counseled the candidate or the candidate's agents on any aspect of the candidacy, including whether to run, as well as expenditures by employees in a fundraising, fund-spending, executive or policy-making position. S. 1219, § 251(a). As a result, expenditures by advisers and employees would count as contributions and are subject to the \$1,000 limit. Although some covered advisers and employees may be sufficiently familiar with a candidate's strategy to be able to make independent expenditures that are in essence in-kind contributions to the candidate, if read literally, the bill's broad limitation on expenditures by all covered advisers and employees raises substantial concerns. To the extent the bill would sweep in expenditures by individuals who offer passing advice and who do not have distinguishably greater knowledge of a candidate's strategy than the general public, the bill would limit expenditures that are truly independent. The validity of any measure with such an effect is subject to serious doubt. See, e.g., Buckley, 424 U.S. at 39-51.

Current law addresses the issue of expenditures that are

⁵ Absent a saving construction, the bill would also have a chilling effect on political speech. Individuals who might wish to make independent expenditures would be required to forgo offering advice that they otherwise would have tendered in order to maintain their ability to speak out publicly. The Supreme Court has held that legislation that imposes such a choice is subject to strict scrutiny. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

coordinated with a candidate in a straightforward manner: any such coordinated expenditure is treated as a contribution rather than an independent expenditure. See 2 U.S.C. § 441a(7). Although one might fairly presume such coordination where the person making the expenditure is or has played a significant role in the candidate's campaign, this presumption is difficult to justify -- and would probably fail to satisfy strict scrutiny -- where the individual had only a passing relationship with the candidate or his campaign. Unless a court were to find that the broader presumption was necessary to enforce the coordinated expenditure limitation or were to adopt a narrowing construction of this provision, it would likely be held unconstitutional. To avoid the risk that a court would not so read the bill, it should be amended to require a showing of actual coordination.

4. Soft money other than from political parties: Persons (broadly defined) who are not political party committees would be required to file a report for disbursements aggregating to \$2,000 and an additional report for every additional aggregation of \$2,000. This requirement covers disbursements that "might affect the outcome of a federal election" but does not cover "independent expenditures" (express advocacy regarding a specific candidate). In Buckley, the Court applied strict scrutiny to a disclosure requirement because it recognized that requiring individuals and groups to identify themselves could chill protected speech and association. Nevertheless, the Court upheld a requirement that individuals and groups file reports disclosing their independent expenditures. See 424 U.S. at 76-82. In doing so, however, the Court indicated that the governmental interest in disclosure would not be sufficient where the expenditure was not made expressly to advocate a specific result in an election. Id. at 80-82. The expenditures covered by this provision of the bill, by definition, do not include express advocacy regarding the result of a specific election.

We note, however, that the bill would not require that individuals or groups identify themselves in making the report. Rather, only the fact of the expenditure need be reported. We believe that if the bill is construed so that those making "soft money" expenditures are not required to identify themselves, the concern that the Court identified in Buckley -- chilling effect on speech and association -- would not arise.

5. Compelled advertisement identification: Existing law requires that every "general public political advertis[ement]" that includes either express advocacy of the election or defeat of a candidate or solicitation of a contribution must also identify the candidate or other person or entity who paid for the advertisement and, if the advertisement is authorized by a candidate, must disclose the authorization. 2 U.S.C. § 441d(a). The bill would further define the form of this self-identification. S. 1219, § 302. Specifically, the bill would require that printed communications make the identification in "clearly readable" type size in a box set off from the remainder of the text with a

"reasonable of color contrast between the background" and the identification. The bill would also require that any television broadcast or cablecast include the written self-identification to "appear[] at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds." Id.

As applied to solicitations, we believe that the self-identification requirement is constitutionally permissible. See FEC v. Survival Education Fund, 65 F.3d 285, 295-98 (2d Cir. 1995). As applied to express advocacy, we recognize, as did the court in Survival Education Fund, that substantial arguments might be made that the existing law does not survive McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).⁶ In that case, an individual distributed handbills expressing opposition to a local referendum to increase the school tax. The handbills did not disclose the identity of their author as required by Ohio law. The Supreme Court held that the Ohio law placed a substantial burden on speech that lies at the core of the First Amendment's protection and that the state's interest in avoiding fraud and libel was not sufficient to sustain the self-identification requirement. (The Court, however, noted that the case involved only the distribution of handbills in a local issue-based election and expressly declined to reach the question of whether, and to what extent, its holding would apply in the context of advocacy expressed through mass media regarding a federal, candidate election. See id. at 1514-15 n.3; id. at 1524 (Ginsburg, J., concurring).)

In addition to S. 1219's amendments to the form of the self-identification requirement, S. 1219 would enact additional substantive requirements. The bill would require that (1) printed communications financed by independent expenditures include the permanent street address of the person or organization that paid for the communication, (2) broadcast or cablecast communications that are paid for or authorized by a candidate include an audio self-identification that is read by the candidate, and (3) any televised broadcast or cablecast that is paid for by a candidate include, next to the written self-identification, "a clearly identifiable photographic or similar image of the candidate." S. 1219, § 302.

Assuming the validity of the existing statutory self-identification requirement and the amendments to their form proposed in S. 1219 discussed previously, the additional substantive requirements raise serious constitutional concerns. By requiring those making independent expenditures to publicize their

⁶ The validity or invalidity of the amendments proposed in S. 1219 that further define the form of the identification follows a fortiori from the validity or invalidity of the existing statute.

permanent street address and forcing candidates literally to speak⁷ or to make an appearance, each of these requirements places a burden on speech at the core of the First Amendment's protection. See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Wooley v. Maynard, 430 U.S. 705 (1977). (We are unaware of how these additional measures would advance the government's anti-corruption interest beyond the pre-existing self-identification requirement and thus believe there is a substantial risk of a court ruling that the regulations fail to advance a sufficient governmental interest.⁸ If these requirements place a substantial burden on protected speech and do not materially advance a governmental interest, these requirements do not satisfy strict scrutiny. See McIntyre, 115 S. Ct. at 1522-24; Buckley, 424 U.S. at 39-59.

II. Provisions of the Voluntary System

Out-of-state contributions: The Senate bill applies a limit on out-of-state contributions to candidates who elect to participate in the public funding system. The bill defines allowable contributions as not including "contributions from individuals residing outside the candidate's State to the extent such contributions exceed 40 percent of the aggregate allowable contributions" received during the approximately two years preceding the Senate election. S. 1219, § 501.

The bill would discriminate against out-of-state contributors. While Buckley held that there is little speech content in the size of a contribution, the Court did hold that inherent in every contribution is a statement of support that is protected by the First Amendment. In discriminating against out-of-state contributions, the bill would place burdens on the speech of citizens who do not reside in the same state as the candidate. As

⁷ We do not doubt that, if self-identification requirements are valid, a requirement that the self-identification on a televised ad be read as well as written on the screen is also permissible. Such a requirement would serve the purpose of conveying the identification to someone who does not happen to be looking at the television screen during the four seconds that the identification is required to appear. The distinct constitutional issue arises where a specific individual, here the candidate, is required personally to read the identification.

⁸ In addition, a court might, given this failure to advance a sufficient interest, be inclined to credit the argument that inevitably would be made by those who will challenge the amendment that the bill is an attempt to prevent candidates from broadcasting "negative" ads. Congress may not enact regulations that are aimed at the suppression of ideas that Congress deems dangerous. See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2519 (1995); Speiser v. Randall, 357 U.S. 513 (1958).

Approved -
wh 3
here.

such, the bill would trigger some level of scrutiny under the First Amendment, for "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." Rosenberger, 115 S. Ct. at 2516; see also, e.g., Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1986) ("A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

Speaker-based restrictions do not inevitably demand strict scrutiny; they do so only where the speaker-based discrimination is based on "the communicative impact of the regulated speech," Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994); that is, where the regulation "arises in some measure because the communication . . . is itself thought to be harmful." Buckley v. Valeo, 424 U.S. 1, 17 (1976) (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)) (quoted with approval in Turner Broadcasting, 114 S. Ct. at 2467). Thus, strict scrutiny is required where the prohibition or limitation on speech is based "on the identity of interests that spokesmen may represent in public debate over controversial issues." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). Accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990); cf. FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980) and id. at 546 (Stevens, J., concurring)).

On the other hand, strict scrutiny is not required where a regulation that discriminates among speakers does not do so because of the communicative impact of the disadvantaged speech. For example, a speaker-based restriction is implemented because certain speakers uniquely transmit communications using particular physical means, see Turner Broadcasting, 114 S. Ct. at 2460-61, 2467; or where certain speakers are favored because of things they have done in the past unrelated to their speech, see, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548-51 (1983).

We are not aware of the purpose this provision is meant to serve. We believe, however, that there are valid reasons unrelated to the communicative impact of out-of-state contributions that would sustain the provision. In particular, we believe that the government has a legitimate interest in seeking to foster strong ties between a Senator and the constituency he or she is constitutionally committed to represent. In upholding the individual contribution limit in Buckley, the Court noted its effect was merely "to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22. We believe that the out-of-state contribution limit would have essentially the same effect. It would merely require candidates to build stronger ties with the constituents whom they are elected to represent. We also note that because candidates may return to each out-of-state contributor a

pro rata share of the excess of the 40% limitation, the law does not necessarily require that a candidate ever refuse to receive, which is to say associate with, a given out-of-state contributor.



U. S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

DATE: _____

FACSIMILE TRANSMISSION SHEET

FROM: Randy Moss

OFFICE PHONE: _____

TO: Elena Kagan

OFFICE PHONE: _____

NUMBER OF PAGES: 9 PLUS COVER SHEET

FAX NUMBER: _____

REMARKS:

Please call to discuss possible saving constructions

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

**OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563
FTS NUMBER: (202) 368-0563**

Memorandum



| | |
|---|-----------------------|
| Subject S.1219, McCain-Feingold Campaign Finance Reform Bill | Date June 12, 1996 |
|---|-----------------------|

| | |
|---|--|
| To Andrew Fois Assistant Attorney General | From Randolph Moss <i>RDM</i> Deputy Assistant Attorney General |
|---|--|

The following are the comments of the Office of Legal Counsel on S. 1219, the Senate Campaign Finance Reform Act of 1995, and the statement of administration policy on that bill. The bill would establish a voluntary system that would grant benefits to candidates who choose to participate in return for their commitment to adhere to a variety of restrictions on their fund-raising and expenditures. The bill would also enact a variety of generally applicable regulations.

I. Generally Applicable Provisions

1. Independent Expenditures by Associations: The bill would ban contributions and independent expenditures¹ by anyone other than an individual or a political committee. A political committee is defined as a political party or a committee of a political party. See S. 1219, § 201. The effect of this provision, then, is to ban independent expenditures and contributions by all political associations other than political parties. Id. Under current Supreme Court jurisprudence, the ban on independent expenditures is unconstitutional.²

¹ An independent expenditure is defined as an expenditure that is made without the participation or cooperation of or without consultation with a candidate and that contains express advocacy. Express advocacy, in turn, is defined as an expression of support for or opposition to a specific candidate or group of candidates or to the candidates of a specific political party. S. 12319, § 251.

² The ban on contributions by associations also raises a constitutional question, but we believe that this ban can be justified as an ancillary measure that enforces the limit on contributions by individuals that the Court upheld in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Individuals remain able to make contributions up to the statutory limit. The ban on contributions by associations merely prevents an individual from exceeding the legal limit by making unearmarked contributions to

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held unconstitutional a provision of the Federal Election Campaign Act that prohibited any independent expenditures in excess of \$1,000, unless made by a candidate, a party, or the institutional media. Id. at 19. The Court concluded that this provision precluded individuals and associations from availing themselves of the most effective means of communicating regarding elections. In so doing, the Act seriously infringed upon speech at the core of the First Amendment and, therefore, was subject to strict scrutiny. To satisfy this exacting level of scrutiny, a statute must be narrowly tailored to the advancement of a compelling governmental interest. The proffered governmental interest in Buckley was the avoidance of actual corruption or the appearance of corruption. The Buckley Court upheld the FECA's \$1,000 limit on contributions by an individual to a particular candidate on the basis of this interest. Id. at 23-38. In the context of independent expenditures, however, the Court held that the anti-corruption interest was not sufficiently compelling to justify the limitation. The Court reasoned that the potential for corruption through independent expenditures is substantially diminished as compared to direct contributions because independent expenditures by definition are not coordinated with the candidate's campaign and therefore could possibly prove counterproductive. Thus, according to the Court, independent expenditures made on behalf of a particular candidate or in opposition to that candidate's opponent are unlikely to be an effective means of currying favor with the candidate. Under this holding of Buckley, the proposed ban on independent expenditures is unconstitutional. See id. at 19, 39-51.

Even if the Court were to accept that the anti-corruption interest is fully compelling in the context of independent expenditures,³ the specific proposal in the McCain-Feingold bill would be unconstitutional. The bill would continue to allow unlimited independent expenditures by individuals with the means to make them. It would only deny individuals of more modest means the ability to band together to engage in effective advocacy. The bill, therefore, significantly infringes the right of individuals to associate in order to express their political views. Because the right to associate for the purposes of political expression is a fundamental right, the bill's distinction is valid only if there is a compelling interest in differentiating between independent

associations that the contributor regards as likely to make a contribution to the contributor's favored candidate. See id. at 38; see also Gard v. Wisconsin, 456 N.W.2d 809, 820 (Wis. 1990).

³ The Supreme Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 259-60 (1986).

expenditures by associations, on the one hand, and by individuals, on the other. See generally Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). We are aware of no reason to believe that independent expenditures by associations present a greater potential for actual or apparent corruption than independent expenditures by individuals. See Buckley, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

This was the Court's ruling when it addressed a more limited form of the proposed prohibition. See FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"). There, the Court assessed a statute that prohibited all PACs from making independent expenditures to further the election of a presidential candidate who accepted public funding. Id. at 482. The Court ruled that "[t]o say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." Id. at 495. Therefore, the Court applied strict scrutiny, which the statute did not pass because the potential for corruption from independent expenditures is diminished as set forth in Buckley. Id. at 487-98.

2. Contributions Made through Intermediaries: The bill would provide that, if a contribution is made through or is arranged by an intermediary or conduit, directly or indirectly, the contribution would be attributed to the intermediary or conduit if, inter alia, the intermediary or conduit is (1) a political committee or party; (2) a lobbyist or foreign agent; (3) a bank, corporation, union, or partnership; (4) or an officer, agent, or employee of (2) or (3) when acting on behalf of such person or entity. S. 1219, § 231.⁴ This provision raises serious constitutional concerns.

Constitutional concerns would be raised if "arranging" for a contribution were construed to include communications or other actions that resulted in encouraging others to make contributions, because this would impose a significant burden on the right of

⁴ This provision would operate by attributing contributions made or arranged through an intermediary or conduit to the intermediary or conduit, who is subject to the general individual contribution limit of \$1,000. Thus, one of the listed conduits could not "bundle" contributions from other individuals to the extent the sum of those contributions and the intermediary or conduit's personal contributions exceeds \$1,000.

association. The right of association is designed to allow "individuals of modest means [to] join together in organizations which serve to 'amplify the voice of their adherents'" and to engage in effective advocacy. NCPAC, 470 U.S. at 494 (quoting Buckley, 424 U.S. at 22). Associations that are formed to advocate the political beliefs of their members often also perform an educational function. That is, they inform their members regarding which candidates have supported the association's positions and prioritize those whose election will most benefit the association's positions. This process can be conducted and will be aided by a person who is a lobbyist or an agent or employee of a lobbyist. If this were to constitute "arranging" a contribution, it would strike at associational activity that is at the core of the First Amendment and as a result would be subject to strict scrutiny.

It might be contended that this provision could be satisfied by an association by segregating lobbyists from fundraisers and any other persons who communicate information to members of the association. If that were the statutory requirement, however, it would not pass constitutional muster. In a given association, it is possible, perhaps likely, that the association's lobbyists will be uniquely situated to advise the membership as to where their contributions will do the most good from the association's point of view. Even if an association could hire a separate staff to perform this function, the Constitution requires strict scrutiny where such a burden is placed on the right to associate. Again, we are aware of no governmental interest sufficient to justify this burden. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); cf. FAIR Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (holding unconstitutional a ban on any lobbyist serving as a conduit for a contribution as part of a comprehensive ban on all contributions made by lobbyists).

To avoid these constitutional infirmities, the bill should be clarified to make it explicit that the regulation of contributions made through intermediaries or conduits applies only where the intermediary or conduit retains ultimate authority over whether or not the contribution is in fact made.

3. Contributions by advisers and employees: The bill would exclude from the definition of "independent expenditures" any expenditures made by a person who has counseled the candidate or the candidate's agents on any aspect of the candidacy, including whether to run, as well as expenditures by employees in a fundraising, fund-spending, executive or policy-making position. S. 1219, § 251(a). As a result, expenditures by advisers and employees would count as contributions and are subject to the \$1,000 limit. Although some covered advisers and employees may be sufficiently familiar with a candidate's strategy to be able to make independent expenditures that are in essence in-kind contributions to the candidate, if read literally, the bill's broad

limitation on expenditures by all covered advisers and employees raises substantial concerns. To the extent the bill would sweep in expenditures by individuals who offer passing advice and who do not have distinguishably greater knowledge of a candidate's strategy than the general public, the bill would limit expenditures that are truly independent. The validity of any measure with such an effect is subject to serious doubt. See, e.g., Buckley, 424 U.S. at 39-51.⁵

Current law addresses the issue of expenditures that are coordinated with a candidate in a straightforward manner: any such coordinated expenditure is treated as a contribution rather than an independent expenditure. See 2 U.S.C. § 441a(7). Although one might fairly presume such coordination where the person making the expenditure is or has played a significant role in the candidate's campaign, this presumption is difficult to justify -- and would probably fail to satisfy strict scrutiny -- where the individual had only a passing relationship with the candidate or his campaign. Unless a court were to find that the broader presumption was necessary to enforce the coordinated expenditure limitation or were to adopt a narrowing construction of this provision, it would likely be held unconstitutional. To avoid the risk that a court would not so read the bill, it should be amended to require a showing of actual coordination.

4. Soft money other than from political parties: Persons (broadly defined) who are not political party committees would be required to file a report for disbursements aggregating to \$2,000 and an additional report for every additional aggregation of \$2,000. This requirement covers disbursements that "might affect the outcome of a federal election" but does not cover "independent expenditures" (express advocacy regarding a specific candidate). In Buckley, the Court applied strict scrutiny to a disclosure requirement because it recognized that requiring individuals and groups to identify themselves could chill protected speech and association. Nevertheless, the Court upheld a requirement that individuals and groups file reports disclosing their independent expenditures. See 424 U.S. at 76-82. In doing so, however, the Court indicated that the governmental interest in disclosure would not be sufficient where the expenditure was not made expressly to advocate a specific result in an election. Id. at 80-82. The expenditures covered by this provision of the bill, by definition,

⁵ Absent a saving construction, the bill would also have a chilling effect on political speech. Individuals who might wish to make independent expenditures would be required to forgo offering advice that they otherwise would have tendered in order to maintain their ability to speak out publicly. The Supreme Court has held that legislation that imposes such a choice is subject to strict scrutiny. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

do not include express advocacy regarding the result of a specific election.

We note, however, that the bill would not require that individuals or groups identify themselves in making the report. Rather, only the fact of the expenditure need be reported. We believe that if the bill is construed so that those making "soft money" expenditures are not required to identify themselves, the concern that the Court identified in Buckley -- chilling effect on speech and association -- would not arise.

5. Compelled advertisement identification: Existing law requires that every "general public political advertis[ement]" that includes either express advocacy of the election or defeat of a candidate or solicitation of a contribution must also identify the candidate or other person or entity who paid for the advertisement and, if the advertisement is authorized by a candidate, must disclose the authorization. 2 U.S.C. § 441d(a). The bill would further define the form of this self-identification. S. 1219, § 302. Specifically, the bill would require that printed communications make the identification in "clearly readable" type size in a box set off from the remainder of the text with a "reasonable of color contrast between the background" and the identification. The bill would also require that any television broadcast or cablecast include the written self-identification to "appear[] at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds." Id.

As applied to solicitations, we believe that the self-identification requirement is constitutionally permissible. See FEC v. Survival Education Fund, 65 F.3d 285, 295-98 (2d Cir. 1995). As applied to express advocacy, we recognize, as did the court in Survival Education Fund, that substantial arguments might be made that the existing law does not survive McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).⁶ In that case, an individual distributed handbills expressing opposition to a local referendum to increase the school tax. The handbills did not disclose the identity of their author as required by Ohio law. The Supreme Court held that the Ohio law placed a substantial burden on speech that lies at the core of the First Amendment's protection and that the state's interest in avoiding fraud and libel was not sufficient to sustain the self-identification requirement. The Court, however, noted that the case involved only the distribution of handbills in a local issue-based election and expressly declined to reach the question of whether, and to what extent, its holding

⁶ The validity or invalidity of the amendments proposed in S. 1219 that further define the form of the identification follows a fortiori from the validity or invalidity of the existing statute.

would apply in the context of advocacy expressed through mass media regarding a federal, candidate election. See id. at 1514-15 n.3; id. at 1524 (Ginsburg, J., concurring).

In addition to S. 1219's amendments to the form of the self-identification requirement, S. 1219 would enact additional substantive requirements. The bill would require that (1) printed communications financed by independent expenditures include the permanent street address of the person or organization that paid for the communication, (2) broadcast or cablecast communications that are paid for or authorized by a candidate include an audio self-identification that is read by the candidate, and (3) any televised broadcast or cablecast that is paid for by a candidate include, next to the written self-identification, "a clearly identifiable photographic or similar image of the candidate." S. 1219, § 302.

Assuming the validity of the existing statutory self-identification requirement and the amendments to their form proposed in S. 1219 discussed previously, the additional substantive requirements raise serious constitutional concerns. By requiring those making independent expenditures to publicize their permanent street address and forcing candidates literally to speak⁷ or to make an appearance, each of these requirements places a burden on speech at the core of the First Amendment's protection. See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Wooley v. Maynard, 430 U.S. 705 (1977). We are unaware of how these additional measures would advance the government's anti-corruption interest beyond the pre-existing self-identification requirement and thus believe there is a substantial risk of a court ruling that the regulations fail to advance a sufficient governmental interest.⁸ If these requirements place a substantial

⁷ We do not doubt that, if self-identification requirements are valid, a requirement that the self-identification on a televised ad be read as well as written on the screen is also permissible. Such a requirement would serve the purpose of conveying the identification to someone who does not happen to be looking at the television screen during the four seconds that the identification is required to appear. The distinct constitutional issue arises where a specific individual, here the candidate, is required personally to read the identification.

⁸ In addition, a court might, given this failure to advance a sufficient interest, be inclined to credit the argument that inevitably would be made by those who will challenge the amendment that the bill is an attempt to prevent candidates from broadcasting "negative" ads. Congress may not enact regulations that are aimed at the suppression of ideas that Congress deems dangerous. See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2519 (1995); Speiser v. Randall, 357

burden on protected speech and do not materially advance a governmental interest, the provision would fail to pass constitutional scrutiny. See McIntyre, 115 S. Ct. at 1522-24; Buckley, 424 U.S. at 39-59.

II. Provisions of the Voluntary System

Out-of-state contributions: The Senate bill applies a limit on out-of-state contributions to candidates who elect to participate in the public funding system. The bill defines allowable contributions as not including "contributions from individuals residing outside the candidate's State to the extent such contributions exceed 40 percent of the aggregate allowable contributions" received during the approximately two years preceding the Senate election. S. 1219, § 501.

The bill would discriminate against out-of-state contributors. While Buckley held that there is little speech content in the size of a contribution, the Court did hold that inherent in every contribution is a statement of support that is protected by the First Amendment. In discriminating against out-of-state contributions, the bill would place burdens on the speech of citizens who do not reside in the same state as the candidate. As such, the bill would trigger some level of scrutiny under the First Amendment, for "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." Rosenberger, 115 S. Ct. at 2516; see also, e.g., Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1986) ("A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

Speaker-based restrictions do not inevitably demand strict scrutiny; they do so only where the speaker-based discrimination is based on "the communicative impact of the regulated speech," Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994); that is, where the regulation "arises in some measure because the communication . . . is itself thought to be harmful." Buckley v. Valeo, 424 U.S. 1, 17 (1976) (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)) (quoted with approval in Turner Broadcasting, 114 S. Ct. at 2467). Thus, strict scrutiny is required where the prohibition or limitation on speech is based "on the identity of interests that spokesmen may represent in public debate over controversial issues." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). Accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990); cf. FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980) and id. at 546 (Stevens, J., concurring)).

U.S. 513 (1958).

On the other hand, strict scrutiny is not required where a regulation that discriminates among speakers does not do so because of the communicative impact of the disadvantaged speech. For example, a speaker-based restriction might be imposed based on a speaker's unique ability to transmit communications using particular physical means; see Turner Broadcasting, 114 S. Ct. at 2460-61, 2467, or based on things the speaker has done in the past unrelated to their speech; see, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548-51 (1983).

We are not aware of the purpose this provision is meant to serve. We believe, however, that there are valid reasons unrelated to the communicative impact of out-of-state contributions that would sustain the provision. In particular, we believe that the government has a legitimate interest in seeking to foster strong ties between a Senator and the constituency he or she is constitutionally committed to represent. In upholding the individual contribution limit in Buckley, the Court noted its effect was merely "to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22. We believe that the out-of-state contribution limit would have essentially the same effect. It would merely require candidates to build stronger ties with the constituents whom they are elected to represent. We also note that because candidates may return to each out-of-state contributor a pro rata share of the excess of the 40% limitation, the law does not necessarily require that a candidate ever refuse to receive, which is to say associate with, a given out-of-state contributor.



U. S. Department of Justice

Office of Legal Counsel

Washington, D. C. 20530

DATE: _____

FACSIMILE TRANSMISSION SHEET

FROM: Randy Moss

OFFICE PHONE: _____

TO: Elena Kagan

OFFICE PHONE: _____

NUMBER OF PAGES: 9 PLUS COVER SHEET

FAX NUMBER: _____

REMARKS:

Please call to discuss possible saving constructions

IF YOU HAVE ANY QUESTIONS REGARDING THIS FAX, PLEASE CONTACT KATHLEEN MURPHY OF KEVIN SMITH ON 514-2057

**OFFICE OF LEGAL COUNSEL FAX NUMBER: (202) 514-0563
FTS NUMBER: (202) 368-0563**

Memorandum



| | |
|--|---|
| Subject S.1219, McCain-Feingold Campaign Finance Reform Bill | Date June 12, 1996 |
| To Andrew Foiss Assistant Attorney General | From Randolph Moss <i>RM</i> Deputy Assistant Attorney General |

The following are the comments of the Office of Legal Counsel on S. 1219, the Senate Campaign Finance Reform Act of 1995, and the statement of administration policy on that bill. The bill would establish a voluntary system that would grant benefits to candidates who choose to participate in return for their commitment to adhere to a variety of restrictions on their fund-raising and expenditures. The bill would also enact a variety of generally applicable regulations.

I. Generally Applicable Provisions

1. Independent Expenditures by Associations: The bill would ban contributions and independent expenditures¹ by anyone other than an individual or a political committee. A political committee is defined as a political party or a committee of a political party. See S. 1219, § 201. The effect of this provision, then, is to ban independent expenditures and contributions by all political associations other than political parties. Id. Under current Supreme Court jurisprudence, the ban on independent expenditures is unconstitutional.²

¹ An independent expenditure is defined as an expenditure that is made without the participation or cooperation of or without consultation with a candidate and that contains express advocacy. Express advocacy, in turn, is defined as an expression of support for or opposition to a specific candidate or group of candidates or to the candidates of a specific political party. S. 12319, § 251.

² The ban on contributions by associations also raises a constitutional question, but we believe that this ban can be justified as an ancillary measure that enforces the limit on contributions by individuals that the Court upheld in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Individuals remain able to make contributions up to the statutory limit. The ban on contributions by associations merely prevents an individual from exceeding the legal limit by making unearmarked contributions to

In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held unconstitutional a provision of the Federal Election Campaign Act that prohibited any independent expenditures in excess of \$1,000, unless made by a candidate, a party, or the institutional media. Id. at 19. The Court concluded that this provision precluded individuals and associations from availing themselves of the most effective means of communicating regarding elections. In so doing, the Act seriously infringed upon speech at the core of the First Amendment and, therefore, was subject to strict scrutiny. To satisfy this exacting level of scrutiny, a statute must be narrowly tailored to the advancement of a compelling governmental interest. The proffered governmental interest in Buckley was the avoidance of actual corruption or the appearance of corruption. The Buckley Court upheld the FECA's \$1,000 limit on contributions by an individual to a particular candidate on the basis of this interest. Id. at 23-38. In the context of independent expenditures, however, the Court held that the anti-corruption interest was not sufficiently compelling to justify the limitation. The Court reasoned that the potential for corruption through independent expenditures is substantially diminished as compared to direct contributions because independent expenditures by definition are not coordinated with the candidate's campaign and therefore could possibly prove counterproductive. Thus, according to the Court, independent expenditures made on behalf of a particular candidate or in opposition to that candidate's opponent are unlikely to be an effective means of currying favor with the candidate. Under this holding of Buckley, the proposed ban on independent expenditures is unconstitutional. See id. at 19, 39-51.

Even if the Court were to accept that the anti-corruption interest is fully compelling in the context of independent expenditures,³ the specific proposal in the McCain-Feingold bill would be unconstitutional. The bill would continue to allow unlimited independent expenditures by individuals with the means to make them. It would only deny individuals of more modest means the ability to band together to engage in effective advocacy. The bill, therefore, significantly infringes the right of individuals to associate in order to express their political views. Because the right to associate for the purposes of political expression is a fundamental right, the bill's distinction is valid only if there is a compelling interest in differentiating between independent

associations that the contributor regards as likely to make a contribution to the contributor's favored candidate. See id. at 38; see also Gard v. Wisconsin, 456 N.W.2d 809, 820 (Wis. 1990).

³ The Supreme Court "ha[s] consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 259-60 (1986).

expenditures by associations, on the one hand, and by individuals, on the other. See generally Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). We are aware of no reason to believe that independent expenditures by associations present a greater potential for actual or apparent corruption than independent expenditures by individuals. See Buckley, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

This was the Court's ruling when it addressed a more limited form of the proposed prohibition. See FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"). There, the Court assessed a statute that prohibited all PACs from making independent expenditures to further the election of a presidential candidate who accepted public funding. Id. at 482. The Court ruled that "[t]o say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." Id. at 495. Therefore, the Court applied strict scrutiny, which the statute did not pass because the potential for corruption from independent expenditures is diminished as set forth in Buckley. Id. at 487-98.

2. Contributions Made through Intermediaries: The bill would provide that, if a contribution is made through or is arranged by an intermediary or conduit, directly or indirectly, the contribution would be attributed to the intermediary or conduit if, inter alia, the intermediary or conduit is (1) a political committee or party; (2) a lobbyist or foreign agent; (3) a bank, corporation, union, or partnership; (4) or an officer, agent, or employee of (2) or (3) when acting on behalf of such person or entity. S. 1219, § 231.⁴ This provision raises serious constitutional concerns.

Constitutional concerns would be raised if "arranging" for a contribution were construed to include communications or other actions that resulted in encouraging others to make contributions, because this would impose a significant burden on the right of

⁴ This provision would operate by attributing contributions made or arranged through an intermediary or conduit to the intermediary or conduit, who is subject to the general individual contribution limit of \$1,000. Thus, one of the listed conduits could not "bundle" contributions from other individuals to the extent the sum of those contributions and the intermediary or conduit's personal contributions exceeds \$1,000.

association. The right of association is designed to allow "individuals of modest means [to] join together in organizations which serve to 'amplify the voice of their adherents'" and to engage in effective advocacy. NCPAC, 470 U.S. at 494 (quoting Buckley, 424 U.S. at 22). Associations that are formed to advocate the political beliefs of their members often also perform an educational function. That is, they inform their members regarding which candidates have supported the association's positions and prioritize those whose election will most benefit the association's positions. This process can be conducted and will be aided by a person who is a lobbyist or an agent or employee of a lobbyist. If this were to constitute "arranging" a contribution, it would strike at associational activity that is at the core of the First Amendment and as a result would be subject to strict scrutiny.

It might be contended that this provision could be satisfied by an association by segregating lobbyists from fundraisers and any other persons who communicate information to members of the association. If that were the statutory requirement, however, it would not pass constitutional muster. In a given association, it is possible, perhaps likely, that the association's lobbyists will be uniquely situated to advise the membership as to where their contributions will do the most good from the association's point of view. Even if an association could hire a separate staff to perform this function, the Constitution requires strict scrutiny where such a burden is placed on the right to associate. Again, we are aware of no governmental interest sufficient to justify this burden. See FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986); cf. FAIR Political Practices Comm'n v. Superior Court, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979) (holding unconstitutional a ban on any lobbyist serving as a conduit for a contribution as part of a comprehensive ban on all contributions made by lobbyists).

To avoid these constitutional infirmities, the bill should be clarified to make it explicit that the regulation of contributions made through intermediaries or conduits applies only where the intermediary or conduit retains ultimate authority over whether or not the contribution is in fact made.

3. Contributions by advisers and employees: The bill would exclude from the definition of "independent expenditures" any expenditures made by a person who has counseled the candidate or the candidate's agents on any aspect of the candidacy, including whether to run, as well as expenditures by employees in a fundraising, fund-spending, executive or policy-making position. S. 1219, § 251(a). As a result, expenditures by advisers and employees would count as contributions and are subject to the \$1,000 limit. Although some covered advisers and employees may be sufficiently familiar with a candidate's strategy to be able to make independent expenditures that are in essence in-kind contributions to the candidate, if read literally, the bill's broad

limitation on expenditures by all covered advisers and employees raises substantial concerns. To the extent the bill would sweep in expenditures by individuals who offer passing advice and who do not have distinguishably greater knowledge of a candidate's strategy than the general public, the bill would limit expenditures that are truly independent. The validity of any measure with such an effect is subject to serious doubt. See, e.g., Buckley, 424 U.S. at 39-51.⁵

Current law addresses the issue of expenditures that are coordinated with a candidate in a straightforward manner: any such coordinated expenditure is treated as a contribution rather than an independent expenditure. See 2 U.S.C. § 441a(7). Although one might fairly presume such coordination where the person making the expenditure is or has played a significant role in the candidate's campaign, this presumption is difficult to justify -- and would probably fail to satisfy strict scrutiny -- where the individual had only a passing relationship with the candidate or his campaign. Unless a court were to find that the broader presumption was necessary to enforce the coordinated expenditure limitation or were to adopt a narrowing construction of this provision, it would likely be held unconstitutional. To avoid the risk that a court would not so read the bill, it should be amended to require a showing of actual coordination.

4. Soft money other than from political parties: Persons (broadly defined) who are not political party committees would be required to file a report for disbursements aggregating to \$2,000 and an additional report for every additional aggregation of \$2,000. This requirement covers disbursements that "might affect the outcome of a federal election" but does not cover "independent expenditures" (express advocacy regarding a specific candidate). In Buckley, the Court applied strict scrutiny to a disclosure requirement because it recognized that requiring individuals and groups to identify themselves could chill protected speech and association. Nevertheless, the Court upheld a requirement that individuals and groups file reports disclosing their independent expenditures. See 424 U.S. at 76-82. In doing so, however, the Court indicated that the governmental interest in disclosure would not be sufficient where the expenditure was not made expressly to advocate a specific result in an election. Id. at 80-82. The expenditures covered by this provision of the bill, by definition,

⁵ Absent a saving construction, the bill would also have a chilling effect on political speech. Individuals who might wish to make independent expenditures would be required to forgo offering advice that they otherwise would have tendered in order to maintain their ability to speak out publicly. The Supreme Court has held that legislation that imposes such a choice is subject to strict scrutiny. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

do not include express advocacy regarding the result of a specific election.

We note, however, that the bill would not require that individuals or groups identify themselves in making the report. Rather, only the fact of the expenditure need be reported. We believe that if the bill is construed so that those making "soft money" expenditures are not required to identify themselves, the concern that the Court identified in Buckley -- chilling effect on speech and association -- would not arise.

5. Compelled advertisement identification: Existing law requires that every "general public political advertis[ement]" that includes either express advocacy of the election or defeat of a candidate or solicitation of a contribution must also identify the candidate or other person or entity who paid for the advertisement and, if the advertisement is authorized by a candidate, must disclose the authorization. 2 U.S.C. § 441d(a). The bill would further define the form of this self-identification. S. 1219, § 302. Specifically, the bill would require that printed communications make the identification in "clearly readable" type size in a box set off from the remainder of the text with a "reasonable of color contrast between the background" and the identification. The bill would also require that any television broadcast or cablecast include the written self-identification to "appear[] at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds." Id.

As applied to solicitations, we believe that the self-identification requirement is constitutionally permissible. See FEC v. Survival Education Fund, 65 F.3d 285, 295-98 (2d Cir. 1995). As applied to express advocacy, we recognize, as did the court in Survival Education Fund, that substantial arguments might be made that the existing law does not survive McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995).⁶ In that case, an individual distributed handbills expressing opposition to a local referendum to increase the school tax. The handbills did not disclose the identity of their author as required by Ohio law. The Supreme Court held that the Ohio law placed a substantial burden on speech that lies at the core of the First Amendment's protection and that the state's interest in avoiding fraud and libel was not sufficient to sustain the self-identification requirement. The Court, however, noted that the case involved only the distribution of handbills in a local issue-based election and expressly declined to reach the question of whether, and to what extent, its holding

⁶ The validity or invalidity of the amendments proposed in S. 1219 that further define the form of the identification follows a fortiori from the validity or invalidity of the existing statute.

would apply in the context of advocacy expressed through mass media regarding a federal, candidate election. See id. at 1514-15 n.3; id. at 1524 (Ginsburg, J., concurring).

In addition to S. 1219's amendments to the form of the self-identification requirement, S. 1219 would enact additional substantive requirements. The bill would require that (1) printed communications financed by independent expenditures include the permanent street address of the person or organization that paid for the communication, (2) broadcast or cablecast communications that are paid for or authorized by a candidate include an audio self-identification that is read by the candidate, and (3) any televised broadcast or cablecast that is paid for by a candidate include, next to the written self-identification, "a clearly identifiable photographic or similar image of the candidate." S. 1219, § 302.

Assuming the validity of the existing statutory self-identification requirement and the amendments to their form proposed in S. 1219 discussed previously, the additional substantive requirements raise serious constitutional concerns. By requiring those making independent expenditures to publicize their permanent street address and forcing candidates literally to speak⁷ or to make an appearance, each of these requirements places a burden on speech at the core of the First Amendment's protection. See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988); Wooley v. Maynard, 430 U.S. 705 (1977). We are unaware of how these additional measures would advance the government's anti-corruption interest beyond the pre-existing self-identification requirement and thus believe there is a substantial risk of a court ruling that the regulations fail to advance a sufficient governmental interest.⁸ If these requirements place a substantial

⁷ We do not doubt that, if self-identification requirements are valid, a requirement that the self-identification on a televised ad be read as well as written on the screen is also permissible. Such a requirement would serve the purpose of conveying the identification to someone who does not happen to be looking at the television screen during the four seconds that the identification is required to appear. The distinct constitutional issue arises where a specific individual, here the candidate, is required personally to read the identification.

⁸ In addition, a court might, given this failure to advance a sufficient interest, be inclined to credit the argument that inevitably would be made by those who will challenge the amendment that the bill is an attempt to prevent candidates from broadcasting "negative" ads. Congress may not enact regulations that are aimed at the suppression of ideas that Congress deems dangerous. See, e.g., Rosenberger v. Rector & Visitors of the University of Virginia, 115 S. Ct. 2510, 2519 (1995); Speiser v. Randall, 357

burden on protected speech and do not materially advance a governmental interest, the provision would fail to pass constitutional scrutiny. See McIntyre, 115 S. Ct. at 1522-24; Buckley, 424 U.S. at 39-59.

II. Provisions of the Voluntary System

Out-of-state contributions: The Senate bill applies a limit on out-of-state contributions to candidates who elect to participate in the public funding system. The bill defines allowable contributions as not including "contributions from individuals residing outside the candidate's State to the extent such contributions exceed 40 percent of the aggregate allowable contributions" received during the approximately two years preceding the Senate election. S. 1219, § 501.

The bill would discriminate against out-of-state contributors. While Buckley held that there is little speech content in the size of a contribution, the Court did hold that inherent in every contribution is a statement of support that is protected by the First Amendment. In discriminating against out-of-state contributions, the bill would place burdens on the speech of citizens who do not reside in the same state as the candidate. As such, the bill would trigger some level of scrutiny under the First Amendment, for "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." Rosenberger, 115 S. Ct. at 2516; see also, e.g., Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1986) ("A law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.").

Speaker-based restrictions do not inevitably demand strict scrutiny; they do so only where the speaker-based discrimination is based on "the communicative impact of the regulated speech," Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994); that is, where the regulation "arises in some measure because the communication . . . is itself thought to be harmful." Buckley v. Valeo, 424 U.S. 1, 17 (1976) (quoting United States v. O'Brien, 391 U.S. 367, 382 (1968)) (quoted with approval in Turner Broadcasting, 114 S. Ct. at 2467). Thus, strict scrutiny is required where the prohibition or limitation on speech is based "on the identity of interests that spokesmen may represent in public debate over controversial issues." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978). Accord Pacific Gas & Elec. Co. v. Public Utilities Comm'n, 475 U.S. 1, 15 (1986) (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990); cf. FCC v. League of Women Voters, 468 U.S. 364, 383-84 (1984) (citing Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 537-40 (1980) and id. at 546 (Stevens, J., concurring)).

U.S. 513 (1958).

On the other hand, strict scrutiny is not required where a regulation that discriminates among speakers does not do so because of the communicative impact of the disadvantaged speech. For example, a speaker-based restriction might be imposed based on a speaker's unique ability to transmit communications using particular physical means; see Turner Broadcasting, 114 S. Ct. at 2460-61, 2467, or based on things the speaker has done in the past unrelated to their speech; see, e.g., Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548-51 (1983).

We are not aware of the purpose this provision is meant to serve. We believe, however, that there are valid reasons unrelated to the communicative impact of out-of-state contributions that would sustain the provision. In particular, we believe that the government has a legitimate interest in seeking to foster strong ties between a Senator and the constituency he or she is constitutionally committed to represent. In upholding the individual contribution limit in Buckley, the Court noted its effect was merely "to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." 424 U.S. at 22. We believe that the out-of-state contribution limit would have essentially the same effect. It would merely require candidates to build stronger ties with the constituents whom they are elected to represent. We also note that because candidates may return to each out-of-state contributor a pro rata share of the excess of the 40% limitation, the law does not necessarily require that a candidate ever refuse to receive, which is to say associate with, a given out-of-state contributor.

NTIA/OCC FAX



**UNITED STATES DEPARTMENT OF
COMMERCE**
National Telecommunications and
Information Administration
Room 4713, HCH Building

| | |
|--|-----------------------------|
| TO: Kathleen Wallman | |
| FROM: Bruce Hensch Office of Chief Counsel | FAX: (482)501-8013 |
| | PHONE: (202)482-1816 |
| DATE: June 3, 1996 | |

Attached is the letter sent to the FCC regarding the Fox Broadcasting petition. Please call me at 482-0012 if you have any questions.

*Copies to: Elena ✓
Greg Simon
Paul Weinstein
Jamie Robin
Michael Waldman*

June 3, 1996

The Honorable Reed Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

RE: Fox Broadcasting Request for Declaratory Ruling

Dear Chairman Hundt:

This letter addresses the request of Fox Broadcasting Company (Fox), filed with the Commission on April 25, 1996, for a declaratory ruling under Sections 315(a)(2) and (a)(4) of the Communications Act. The National Telecommunications and Information Administration (NTIA) is the President's principal adviser on telecommunications matters. On behalf of the Administration, NTIA strongly supports the Fox request for a declaratory ruling that its proposal to provide free television time for prerecorded interviews with the major Presidential candidates, as well as on-the spot election eve coverage, does not implicate the equal time requirements of Section 315, because these events constitute bona fide news within the exemptions from the equal time requirements under subsections (a)(2) and (a)(4), respectively.

President Clinton has stated that providing candidates with free television time to talk directly with citizens about real issues and ideas furthers the health of our democracy.¹ In addition to President Clinton's statements, there is widespread support among public interest groups encouraging the television industry to offer free access to major presidential candidates in order to provide issue oriented information directly to the public in formats designed to reach the maximum number of viewers. In the past month, other broadcasters, such as ABC, CBS, CNN, NBC, PBS, and the U.S. Satellite Broadcasting, have all announced plans to offer free television time to candidates.

In this context, Fox's proposal to provide free scheduled broadcast air time will provide a great public benefit. Fox proposes to schedule back-to-back prerecorded interviews by the major Presidential candidates at ten different times for 60 seconds each during the 30 day period immediately prior to the election. In

¹ Radio Address by the President to the Nation, Feb. 17, 1996.

the interviews, each candidate will respond to specific questions that allow citizens to compare how the candidates would handle the same issues. The questions the candidates answer will be formulated by an independent consulting or polling organization with no ties to any candidate. Fox also plans to provide one hour of free air time on election eve for longer statements by each candidate, in response to a single question. By announcing the interviews at scheduled times and capping them with election eve coverage, Fox Broadcasting will provide the public with the opportunity to compare directly the candidates' views on important issues.

Both of the formats proposed by Fox fall within the scope of the exemptions from the equal time requirements for bona fide news interviews under Section 315(a)(2) and on-the-spot coverage of bona fide news events under Section 315(a)(4). Section 315(a) exempts from the equal time requirements appearances by candidates on several types of programming:

- (1) bona fide newscasts;
- (2) bona fide news interviews;
- (3) bona fide documentaries (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); and
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

Fox's programming satisfies the second and fourth of these exemptions. In order for a program to be considered a "bona fide news interview" under Section 315(a)(2), it must be regularly scheduled, the producer must exercise sufficient control to prevent a candidate from taking control, and the broadcaster's decisions on the format, content, and participants must be based on good faith journalistic judgment and newsworthiness, rather than on an intention to further any individual's candidacy. In re The Pacifica Foundation, 9 FCC Rcd 2817 (1994). Fox's proposed programming meets these tests. First, it is deemed to be "regularly scheduled" under FCC precedent. The Commission has granted exemption for programming that, like that proposed by Fox, is scheduled for limited yet recurrent runs during the current and future election seasons. In re U.S. News and World Report, L.P., 2 FCC Rcd 7101, 7102 (1987). Second, Fox will retain control over the topics and questions posed as part of the programming. Third, the format of the programming presents the candidates on the basis of their "newsworthiness" and does not favor the candidacy of any of the participants. Id.

Even if not deemed to be "bona fide news interviews," Fox's proposal would nonetheless qualify for the exception for "on-the-spot coverage of bona fide news events" under Section 315(a)(4). See In re King Broadcasting Co., 6 FCC Rcd 4998, 4999 (1991). Under the Commission's decision in King, programming in

which presidential candidates answer questions, and in which candidates present their essential campaign messages, are deemed to be news "events" subject to the exemption under 315(a)(4). Additionally, Fox's programming will be "newsworthy" in that it will be objective, balanced, and unbiased;² in such a case, the Commission has "no basis to question a broadcaster's bona fides in covering such events."³ King, 6 FCC Rcd at 5000.

Accordingly, the Commission should grant the declaratory ruling requested by Fox Broadcasting. The public interest will be furthered by allowing Fox to broadcast the Presidential candidates' positions on key issues with the certainty that such broadcasts will not trigger the equal time provisions of Section 315. Any lingering concern about the equal time requirements could chill the availability of such important news events.

The grant of the requested declaratory ruling is consistent with Congress' purpose in amending the Communications Act in 1959 to add the exemptions from the equal time requirements discussed above. Congress added these exemptions due to recognition that "the right of the public to be informed through broadcasts of political events" was paramount and because of its conviction that broadcaster discretion with respect to news coverage should be increased.⁴ While Congress acknowledged there could be some risk to the equal time provisions in adding the statutory exemptions, it decided the balance must fall in favor of increased news coverage of political events on behalf of the public and also that the Commission should have great leeway in interpreting Section 315.

With this in mind, it is important to note that since the 1959 exemptions for bona fide news were added to Section 315, the trend has been for the Commission to broaden its interpretation of the scope of the exemptions. Such action is

² For example, the initial order of the Candidates' statements will be determined by coin toss or drawing straws. This order will then be reversed or followed in sequence for subsequent broadcasts of the various position statements. Additionally, the questions will be formulated by neutral independent groups. All statements will also be broadcast in prime-time programs of comparable audience size and will be promoted and regularly scheduled in the period preceding the general election.

³ It is also important to note that the fact that the programs will be pre-recorded does not affect their status as "on-the-spot" coverage. See King, 6 FCC Rcd at 4998 (programming to be shown would be taped).

⁴ Chisholm v. FCC, 538 F.2d 349, 352 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976).

consistent with Congress' intent that the Commission have maximum flexibility in determining whether news coverage is exempt from the equal time requirements.

Accordingly, NTIA urges the Commission to grant Fox's request for declaratory ruling so it may proceed to provide free broadcast time for the major Presidential candidates -- to the benefit of the entire American public.

Sincerely,

Larry Irving
Assistant Secretary for
Communications and Information

cc: The Honorable James H. Quello
The Honorable Rachelle B. Chong
The Honorable Susan Ness

DRAFT

*Comments
TO me
By 10:00 AM
Friday
65577*

June 3, 1996

*Positive
embassy
meeting?*

*Elena:
Comments
TO P. Womski
By 10:00
Friday
65577*

The Honorable Reed Hundt
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

RE: Fox Broadcasting Request for Declaratory Ruling

Dear Chairman Hundt:

This letter addresses the request of Fox Broadcasting Company (Fox), filed with the Commission on April 25, 1996, for a declaratory ruling under Sections 315(a)(2) and (a)(4) of the Communications Act. The National Telecommunications and Information Administration (NTIA) is the President's principal advisor on telecommunications matters. On behalf of the Administration, NTIA strongly supports the Fox request for a declaratory ruling that its proposal to provide free television time for prerecorded interviews with the Republican and Democratic Presidential candidates, as well as on-the spot election eve coverage, does not violate the equal time provisions of Section 315, because these events constitute bona fide news within the exemptions from the equal time requirements under subsections (a)(2) and (a)(4), respectively.

President Clinton has stated that providing candidates with free television time to talk directly with citizens about real issues and ideas furthers the health of our democracy.¹ In this vein, Fox's proposal to provide free scheduled broadcast airtime will provide a great public benefit and is supported by the Administration.

More specifically, Fox proposes to schedule back-to-back prerecorded interviews by the two major Presidential candidates at ten different times for 60 seconds each during the 30 day period immediately prior to the election. In the interviews, each candidate will respond to specific questions and therefore allow citizens to compare how the two candidates would handle the same issues. The questions the candidates answer will be formulated by an independent consulting or polling organization with no ties to any candidate. Fox also plans to provide one hour of free airtime on election eve for longer statements by each candidate. By announcing the interviews at scheduled times and capping them with elective eve coverage, Fox Broadcasting will provide the public with the opportunity to

¹ Radio Address by the President to the Nation, Feb. 17, 1996.

DRAFT

compare directly the candidates views on important issues. Viewers can either plan to watch the broadcasts when aired or tape them for later viewing, thereby allowing them to make more informed voting decisions.

Fox's proposal is clearly within the scope of the exemptions from the equal time requirements for bona fide news interviews under Section 315(a)(2) and on-the-spot coverage of bona fide news events under Section 315(a)(4). The proposed interview format qualifies as bona fide news because the questions will not be formulated by the candidates and will not be slanted to favor either one. Further, the interviews will be broadcast at regularly scheduled times with the purpose of providing genuine news and allowing citizens to become better informed voters. Similarly, Fox's proposed election eve coverage also qualifies for exemption. Broadcasting the position statements of the major presidential candidates on specific issues that are important to the voting public clearly constitutes on-the-spot news coverage, particularly at a time as critical as the eve of the election. Additionally, the structural safeguards proposed by Fox will ensure that there is no favoritism toward any candidate.²

Accordingly, the Commission should grant the declaratory ruling requested by Fox Broadcasting. The public interest will be furthered by allowing Fox to broadcast the Presidential candidates' positions on key issues with the certainty that such broadcasts will not trigger the equal time provisions of Section 315. Any lingering concern about the equal time requirements could chill the availability of such important news events.

The grant of the requested declaratory ruling is consistent with Congress' purpose in amending the Communications Act in 1959 to add the exemptions from the equal time requirements discussed above. Congress added these exemptions due to recognition that "the right of the public to be informed through broadcasts of political events" was paramount and a conviction that broadcaster discretion with respect to news coverage should be increased.³ While Congress acknowledged there could be some risk to the equal time provisions in adding the statutory exemptions, it decided the balance must fall in favor of increased news coverage of political events on behalf of the public and also that the Commission

² For example, Fox will determine the initial order of the Candidates' statements by coin toss or drawing straws. This order will then be reversed or followed in sequence for subsequent broadcasts of the various position statements. All statements will also be broadcast in prime-time programs of comparable audience size and will be promoted and regularly scheduled in the period preceding the general election.

³ Chisholm v. FCC, 538 F.2d 349, 351 (1976).

DRAFT

should have great leeway in interpreting Section 315.

With this in mind, it is important to note that since the 1959 exemptions for bona fide news were added to Section 315, the trend has been for the Commission to broaden its interpretation of the scope of the exemptions. Such action is consistent with Congress' intent that the Commission have maximum flexibility in determining whether news coverage is exempt from the equal time requirements. Thus, the Commission should give the most expansive reading possible to the exemptions whenever it weighs the imposition of the equal time requirements against proposals, such as that of Fox, seeking to provide the public with genuine news regarding political events, including elections.

Accordingly, NTIA urges the Commission to grant Fox's request for declaratory ruling so it may proceed to provide free broadcast time for the major Presidential candidates -- ultimately to the benefit of the entire American public.

Sincerely,

Larry Irving
Assistant Secretary for
Communications and Information

cc: The Honorable James H. Quello
The Honorable Rachelle B. Chong
The Honorable Susan Ness



PUBLIC NOTICE

Federal Communications Commission
1919 M St., N.W.
Washington, D.C. 20554

News media information 202 / 418-0600
Fax-On-Demand 202 / 418-2830
Internet: <http://www.fcc.gov>
<ftp://cc.gov>

May 13, 1996

FCC SEEKS COMMENT ON ISSUES RELATING TO BROADCASTER PROPOSALS TO PROVIDE TIME TO PRESIDENTIAL CANDIDATES; WILL HOLD *EN BANC* HEARING

On April 25, 1996, the Fox Broadcasting Company filed with the Commission a Request for Declaratory Ruling regarding a proposal to present statements by Presidential candidates over the Fox network prior to the November 5, 1996 general election. Fox has proposed to offer news event coverage of back-to-back statements by the major presidential candidates, as determined by the Commission on Presidential Debates, in a one-hour block of time on Election Eve, and of ten 60-second position statements by each candidate in a seven-week period before the election. ABC, CBS, NBC, PBS and CNN also have announced plans to provide broadcast time to candidates.

Fox seeks a Commission ruling that its proposed programming would be exempt from the "equal opportunities" provision of Section 315 of the Communications Act as *bona fide* news programming. Section 315 requires that when a legally qualified candidate appears on a broadcast station outside the context of *bona fide* news programming, the station must afford equal opportunities to all legally qualified opponents. The statute exempts the following news programming from this requirement: 1) *bona fide* newscasts; 2) *bona fide* news interview programs; 3) *bona fide* news documentaries; and 4) on-the-spot coverage of *bona fide* news events. Also before the Commission is a letter dated April 16, 1996 from the Free TV for Straight Talk Coalition requesting that the Commission hold a public hearing to "better enable the Commission to discharge its important function of affording guidance as to the application of the equal opportunities requirement and the exemptions thereto."

The Fox Request raises important issues regarding broadcasters' ability under the Communications Act and the Commission's rules to provide time to political candidates and, specifically, regarding the Commission's interpretation of the news exemptions to Section 315 obligations. The Commission seeks comment from interested parties on whether an exemption for the Fox proposal would be consistent with the statutory language, legislative history, and judicial and Commission case law regarding the news exemptions. Also, commenters should address whether the Commission's current interpretation of Section 315 may limit the ways in which broadcasters may voluntarily provide time for candidates to speak directly to voters, and whether programming that broadcasters in good faith deem to be *bona fide* news should be exempt from the equal opportunities rules regardless of format. Interested parties may express their views in written comments on or before June 3, 1996.

The Commission also will hold an *en banc* hearing in June to afford further public exploration of these important issues. Persons interested in participating in this hearing should express that interest, in writing, by June 3, 1996, in a letter to Jonathan Cohen, Assistant Chief, Mass Media Bureau, Room 314, 1919 M Street, N.W., Washington, D.C. 20554. A date and an agenda for this hearing will be announced in a subsequent Public Notice.

Copies of the Fox request and the Coalition letter may be obtained from the Commission's Public Reference Room, Room 239, 1919 M Street, N.W., Washington, DC 20554, from the Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, DC 20037, telephone (202) 857-3800, or from the FCC's World Wide Web site, www.fcc.gov, in the Mass Media Bureau "informal" directory under "fox_request.txt" and "coalition_ltr.txt". Comments should be filed with the Acting Secretary, Federal Communications Commission, Room 222, 1919 M Street, N.W., Washington, DC 20554, not later than June 3, 1996.

For further information, contact Bobby Baker (202-418-1440) or Jonathan Cohen (202-418-2600) of the Commission's Mass Media Bureau.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In re Request for Declaratory Ruling of)
FOX BROADCASTING COMPANY)
Regarding Sections 315(a)(2) and (4))
of the Communications Act)

To: The Commission

REQUEST FOR DECLARATORY RULING

Fox Broadcasting Company ("Fox"), pursuant to Section 1.2 of the Commission's Rules, hereby requests a declaratory ruling that the news event coverage described herein and proposed to be broadcast over the Fox Network during the 1996 presidential general election campaign is exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act, as amended. ^{1/} As will be shown below, Fox's proposals fall within the ambit of the *bona fide* news interview and "on-the-spot" news coverage exemptions codified at Sections 315(a)(2) and (4). Furthermore, Fox's proposals will contribute to the public interest in an open and vigorous exchange of ideas prior to the November 5.

^{1/} This proposal was first made by Rupert Murdoch in a speech given on February 26, 1996. This request seeks to implement the proposal, following numerous discussions with interested parties subsequent to Mr. Murdoch's remarks.

1996 general election, while fully comporting with "Congress's objectives both to treat all candidates equally and to ensure maximum coverage" of political news.

King Broadcasting Co. v. FCC, 860 F.2d 465, 466 (D.C. Cir. 1988). 2/

I. FOX PROPOSES TO PROVIDE NEWS EVENT COVERAGE OF SHORT- AND LONG-FORM CANDIDATE PRESENTATIONS REGARDING ISSUES OF CONCERN TO VOTERS.

Fox seeks a ruling with respect to the following two proposals to provide news event coverage of appearances by the major presidential candidates, as determined by the Commission on Presidential Debates (collectively, the "Candidates"): 3/

A. Short-Form News Event Coverage.

Between September 15 and November 2, 1996, Fox proposes to provide news event coverage of ten 60-second position statements by each Candidate, for a total of ten minutes per Candidate. Each statement will be a response to a question

2/ Fox makes this proposal unilaterally and without any expectation that the other networks will participate. The proposal advanced herein is in addition to the existing extensive opportunities for candidate appearances on Fox news programs on its owned and operated stations across the country, e.g., "The Fox Morning News" and "The 10 O'Clock News" on WTTG in Washington. In fact, prime-time newscasts on numerous Fox affiliates represent an opportunity, unique in the industry, for prime-time appearances by both national and local candidates for public office.

3/ Fox does not seek to involve the Commission on Presidential Debates in making determinations apart from those it makes for its own debates. Rather, because of the timing of Fox's proposed news event coverage, the determinations made by the Commission on Presidential Debates will be sufficient to assure participation by all major candidates.

about a different issue of demonstrable concern to voters in the general election. The ten questions will be formulated by an independent consultant or polling organization and will be submitted to the Candidates in writing by September 1, 1996. Fox will not exercise any control over the content of the Candidates' statements.

The following additional structural safeguards will be implemented in order to assure fairness and comparable exposure to the Candidates:

1. The position statements of each candidate responsive to each issue will be broadcast in prime-time programs of comparable audience size.
2. The order of the Candidates' statements will be determined initially by coin toss or by drawing straws, and will reversed (or followed in sequence if there are more than two participating candidates) in each broadcast for the duration of the series.
3. The ten events will be regularly scheduled during the designated 30-day period preceding the general election, and will receive advance promotion.

Fox submits that these safeguards, in addition to the mechanism for selecting the candidates, selecting the topics to be addressed and formulating the questions to the Candidates, will satisfy "Congress' intent that the programs be of genuine news value and not be used to advance the candidacy of a particular individual." Henry Geller, 95 F.C.C.2d 1236, 1243, aff'd sub nom. League of Women Voters Educ. Fund v. FCC, 731 F.2d 995 (D.C. Cir. 1983).

Fox believes that, in view of both the proposed format of the series and the complicated and unpredictable schedules of the Candidates in the month preceding the general election, it will be impracticable to present live coverage of

each of the Candidates' ten position statements. Accordingly, Fox will make production facilities available, free of charge and at mutually convenient times and locations, for the Candidates to record their statements live on videotape. 4/

B. News Event Coverage of Election-Eve Candidate Presentations.

In addition to the short-form news event coverage discussed above, Fox proposes to make available one hour of its prime-time network schedule on Monday evening, November 4, 1996, to provide news event coverage of longer, back-to-back statements by each Candidate. These statements will consist of the final campaign message in response to the question, "Why should the American voter vote for you?" The hour will be divided equally among the Candidates. Fox will not exercise any control over the content of the Candidates' statements, and the order of the presentations will again be determined by coin toss (or by drawing straws). For the reasons discussed above, Fox also will provide production facilities free of charge at mutually agreeable times and locations for the recording of the Candidates' statements.

4/ This process will require that the Candidate appear live and provide his responses, without any opportunity to edit or otherwise modify or enhance the responses in the post-production process.

II. FOX'S PROPOSALS QUALIFY FOR EXEMPTION FROM THE EQUAL OPPORTUNITIES REQUIREMENT OF SECTION 315(a).

Like the other exemptions from the equal opportunities requirement of Section 315(a), the "bona fide news interview" and "on-the-spot" news coverage exemptions are intended to strike a balance between, on the one hand, the guaranteed equal treatment of political candidates, and, on the other,

the right of the public to be informed through broadcasts of political events . . . [and] the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

Hearings on Political Broadcasts--Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate Foreign Commerce, 86th Cong., 1st Sess. 2 (1959) (comments of Chairman Harris). As explained below, Fox respectfully submits that its proposals satisfy the Commission's criteria for exemption from the equal opportunities requirement of Section 315(a) with respect to either of these provisions.

Both Fox's short-form and election-eve presentations "reasonably may be viewed as news 'events' subject to broadcast coverage" in the exercise of Fox's good faith news judgment. King Broadcasting Company, supra, at 4999 (back-to-back candidate presentations alternating with candidate interviews collectively exempt under Section 315(a)(4)). The Commission has concluded that there is "no significant distinction between coverage of this sort of political 'event' [i.e., alternating candidate presentations] and the candidate debates we previously have deemed to be news 'events.'" Id. Accordingly, the spoken presentations by the Candidates on issues of concern to voters proposed to be broadcast by Fox, "by any

reasonable standard, are news 'events' within the contemplation" of the "on-the-spot" exemption. Id. at 5000. See also Henry Geller, supra, at 1246-47 (delayed broadcasts qualify for Section 314(a)(4) exemption).

Guided by prior Commission decisions, Fox has designed structural safeguards that will ensure that there is no candidate favoritism. See Aspen Institute Program, 55 F.C.C.2d 697 (1975), aff'd sub nom. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976) (exempt presentations must be broadcast in non-discriminatory manner). Each candidate will receive an identical amount of time to respond to each of a series of ten identical questions; thereafter, on November 4, each candidate will be given an identical amount of time for an extended statement in response to a final question. Cf. King Broadcasting Company, supra, at 4999 ("the mere fact that the presentations allow the candidates to present their views in the most favorable light, without spontaneous interaction with the press or opposing candidates, does not preclude application of the news event exemption"). In addition, Fox has removed itself completely from the process of selecting participating candidates. The Fox news event coverage will treat equally all those candidates deemed eligible by the Commission on Presidential Debates.

Fox submits that its proposals also satisfy, in form and substance, the three principal factors the Commission has considered in finding limited duration election-specific interview series qualified for exemption under the "bona fide news interview" provision of Section 315(a)(2). See, e.g., U.S. News and World Report,

L.P., 2 FCC Rcd 7101 (1987); The Pacifica Foundation, DA 94-639 (MMB 1994).

First, decisions regarding the format, content, scheduling and production will be made by Fox "in the exercise of its *bona fide* news judgment and not for the political advantage of the candidate for public office." U.S. News and World Report, supra, at 7102, quoting H. Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959).

Second, the presentations will be regularly scheduled during the 30-day period preceding the general election, "with the intention to continue the series to coincide with the advent of future Presidential elections." Id. (limited duration, "election-specific" series satisfy "regularly scheduled" criterion). See also Media and Society Seminars, 56 R.R.2d 1150, 1153 (MMB 1984) ("[o]nly where the scheduling of a program is used as a vehicle to advance the political aspirations of a participant would the Commission question its proximity to an election"). Third, the programs will originate with and be under the control of the Fox network. See U.S. News and World Report, L.P., supra, at 7102.

Indeed, although in "a typical interview format, there can be no guarantee that competing candidates will be given precisely equal treatment" (King Broadcasting Company, supra, at 5000), Fox's proposed format will do exactly that. Furthermore, the duration of the short-form candidate responses does not affect their entitlement to the exemption. See Silver King Broadcasting Co., 64 R.R.2d 1440 (MMB 1988) (segments of three to four and one-half minutes' duration qualify as exempt news interview programs); National Broadcasting Co., Inc., 60 R.R.2d 1068 (MMB 1986).

III. CONCLUSION

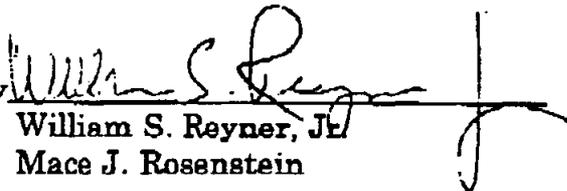
Fox submits that its proposals will unquestionably serve the public interest by providing enhanced coverage of the 1996 presidential election in a manner fully consistent with Congress' objectives both to treat all candidates equally and to ensure maximum coverage of political news and information.

- Fox's proposals will permit the wide dissemination by a free, over-the-air television network of political news and information.
- The format and content of the programs will be determined by Fox in exercise of its good faith journalistic judgment, and the selection methodology, formulation of questions and other structural safeguards designed by Fox will guarantee against even the possibility of "favoritism or bias." King Broadcasting Co. v. FCC, 860 F.2d at 467.
- Fox's proposals "will further Congress' intent to permit broadcasters to make a full and more effective contribution to an informed electorate" (King Broadcasting Company, supra, at 5000) without risking the chilling effect on public discourse protected by the First Amendment that could result from a rigid application of Section 315(a).
- Fox's proposals will mitigate the potential unfairness resulting from the high cost of broadcast advertising time in general, and of prime-time television time in particular.

Accordingly, for all the reasons stated herein, Fox respectfully requests that the Commission rule that its planned political coverage, as described above, is exempt from the equal opportunities provision of Section 315(a) of the Act.

Respectfully submitted,

FOX BROADCASTING COMPANY

By 
William S. Reyner, Jr.
Mace J. Rosenstein

HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, N.W.
Washington, D.C. 20004
202/637-5600

Its Attorneys

April 25, 1996

REE for straight talk coalition

April 16, 1996

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20544

Dear Chairman Hundt,

We the undersigned request the Commission to convene an en banc hearing to promote a maximum contribution by the electronic media, especially broadcast television, to the coming general election campaign for president, with special focus on recent proposals to provide free network television air-time to the major presidential candidates.

Because it is relied upon so heavily by the public for news and information, the role played by television in its coverage of political affairs is crucial to a free society. Part of that role is to contribute as much as possible to a fully informed public and thus to interest that public in participating in this vital civic undertaking. While television does make a significant contribution in this respect, it is not, we submit, the maximum contribution that is so greatly needed in these times, particularly in light of indicia like low voter turnout and voter cynicism.

Therefore, prominent citizens, members of the press, politicians, academics, party leaders, and various network officials have all expressed a deep and growing concern over this state of affairs. Serious proposals to improve the situation raise the hope that the political media generally, and television in particular, can respond much more fully and positively to the electorate's need for substantive information regarding candidates and issues. Congressional interest in such proposals is growing as well.

The 1996 presidential campaign has become a focal point for these efforts. The Fox Network has offered to schedule free time for the major presidential candidates this fall. Our newly created group ---The Free TV for Straight Talk Coalition--- has urged all the networks voluntarily to offer the major presidential candidates a few minutes a night during prime-time for the culminating weeks of the 1996 presidential campaign.

We believe an en banc hearing before the FCC offers a timely and appropriate forum to explore the range of free television time proposals being considered, and to discuss the relevant legal and practical questions necessary to make free television a reality.

We are not suggesting the need for a formal proceeding of written comments and replies. Rather, an oral en banc proceeding will provide a full opportunity for network representatives, elected officials, academics, and concerned citizens to present their views on free television for the major presidential candidates. In addition, they may want to address the broader question of how the telecommunications media can better serve the public interest in public discourse and democratic decision-making. In doing so, the Commission will serve the public interest by facilitating this important, voluntary, and much needed development in political broadcast coverage. The Commission has previously acted to "encourage the larger and more effective use of [broadcasting] in the public interest" (47 U.S.C. Sec. 303(g)) in this political field (see First Report, 48 FCC2d 34 (1972)), and should do so now.

There is a second reason for the Commission to convene such a proceeding. The Commission has the statutory responsibility for enforcing the equal opportunities requirement of 47 U.S.C. Section 315 (a). The Fox Network has expressed its intention to seek a declaratory ruling from the FCC exempting its free time proposal from the relevant equal opportunities regulations. (47 C.F.R. Sections 73.1941 and 76.205). Accordingly, an en banc hearing will better enable the Commission to discharge its important function of affording guidance as to the application of the equal opportunities requirement and the exemptions thereto. In that connection, we believe that our proposal, under established precedent, does fall within the exemption in Section 315 (a)(4) and thus could go forward as a legal and practical matter.

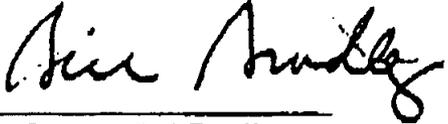
Other than the foregoing agency responsibility, we are not calling for any Commission action or government intervention into political broadcasting. Any such offer by the networks should and would be entirely voluntary and would be undertaken by them in discharge of their own responsible recognition, recently stressed by them, of their public trustee obligation. The broadcast industry is unique, in fact and in law (see Turner Broadcasting Sys., Inc. v. FCC, 114 S.Ct. 2445, 2456-57 (1994)), and therefore has a unique opportunity to make a maximum contribution sought in this vital civic area.

Much has been and will be given the broadcast industry, and thus much can be expected of them. It is therefore our hope that if the FCC brings together the interested parties and presides over a good faith discussion of free television proposals, the outcome may well be that the networks will find new ways to improve the political coverage of the presidential campaign. The presidential candidates may be given a new opportunity in such free network air-time to communicate their positions on a variety of topics with the electorate. But even more importantly, the American people will discover a new political forum in which their interest in the presidential campaign and knowledge of the issues will be greatly heightened.

We believe our free television proposal is best, but are eager to hear all views at the FCC hearings. Because time is of the essence, we look forward to your decision to convene an en banc hearing at the earliest possible date.

Thank you for giving this matter and our request your consideration.

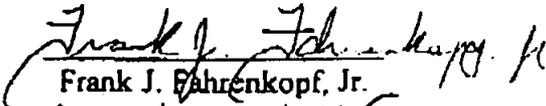
Sincerely,



Senator Bill Bradley



Senator John McCain



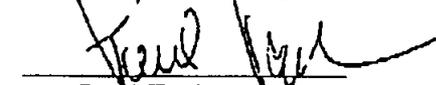
Frank J. Fahrenkopf, Jr.



Charles T. Manatt



Kathleen Hall Jamieson



Paul Taylor

cc: Commissioner Rachelle B. Chong
Commissioner Susan Ness
Commissioner James H. Quello

EXECUTIVE OFFICE OF THE PRESIDENT

23-May-1996 05:16pm

TO: (See Below)
FROM: James S. Rubin
Office of Legislative Affairs
SUBJECT: cfr

Another victory for the people:

The Senate approved by voice vote the Thompson amendment to the Budget Resolution expressing the intent of the Senate to keep the checkoff financing system fully funded.

Distribution:

TO: Peter Jacoby
TO: Michael Waldman
TO: William Curry
TO: Kathleen M. Wallman
TO: Elena Kagan
TO: Paul J. Weinstein, Jr
TO: Lisa Jordan Tamagni

Withdrawal/Redaction Marker

Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|--------------------------|--|------------|-------------|
| 001. memo | from Michael Waldman to James S. Rubin et al re RE: cfr [partial] (1 page) | 05/23/1996 | P6/b(6) |

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 808

FOLDER TITLE:

Campaign Finance Materials [2]

2009-1006-F

kc143

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EXECUTIVE OFFICE OF THE PRESIDENT

23-May-1996 07:35pm

TO: (See Below)
FROM: Michael Waldman
Office of Communications
SUBJECT: RE: cfr

PLEASE make sure P6/(b)(6) knows what (if anything) we did. They totally screwed us last year - put out press release that trashed us, even though we and Fowler had actually saved the day for them. (They urged us to threaten a "veto" ... of a reconciliation bill!)

You might want to remind them of last year.

Distribution:

TO: James S. Rubin
CC: Peter Jacoby
CC: William Curry .
CC: Kathleen M. Wallman
CC: Elena Kagan
CC: Paul J. Weinstein, Jr
CC: Lisa Jordan Tamagni

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

21-May-1996 12:08pm

TO: (See Below)

FROM: Paul J. Weinstein, Jr
Domestic Policy Council

SUBJECT: NTIA Letter

There has been a slight change in our strategy regarding the FCC and free tv. Harold held a meeting yesterday, and it was agreed that we should have the NTIA at the Department of Commerce send a letter in support of waiving the equal access requirement and in favor of free tv time. A draft should be ready this Friday. When I get a copy, I will circulate.

Thanks.

Distribution:

TO: Kathleen M. Wallman
TO: Elena Kagan
TO: James S. Rubin
TO: Peter Jacoby
TO: William Curry

CC: Michael Waldman

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

22-May-1996 05:24pm

TO: (See Below)

FROM: Paul J. Weinstein, Jr
 Domestic Policy Council

SUBJECT: Campaign Finance Reform

Dems in the House today introduced their campaign finance reform bill. The bill would:

- * Limit Spending to \$600,000 every 2-year cycle.
- * Limit PACs to \$2,000 per cycle, \$1,000 per election. PACS could only give \$200,000 per cycle in the aggregate.
- * \$50,000 limit on a candidate's own money, including loans to oneself.
- * Broadcast rate dicount -- 50% of the lowest unit rate for the last 30 days of primary and last 60 days of general election.
- * Postage rate discount -- third class, nonprofit, bulk rate.
- * Disincentive for non-participating opponent -- no boradcast or postage rate discounts and a 35% tax on contributions once spending limit has been breeched.
- * No bundling except fo non-affiliated, non-connected PACs (Emily's List exclusion).
- * Prohibition on Soft Money -- exception if they are new "Grass Roots Party Funds."

Republicans have announced in the House they are moving their own bill as well. The Republican bill would ban PACs and place limits on contributions coming from outside a Congressman's district, as well as increase the amount of individual contributions.

Distribution:

TO: Peter Jacoby
TO: Kathleen M. Wallman

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

22-May-1996 09:31pm

TO: (See Below)

FROM: Michael Waldman
 Office of Communications

SUBJECT: RE: Campaign Finance Reform

This is very similar to the bill in 1993.

You should check, though, to see if the \$600,000 is a real amount -- or if it has lots of loopholes and exemptions and attorney funds etc. Last time it was supposedly 600K and it was really close to a million. Probably 2 million now.

Distribution:

TO: Paul J. Weinstein, Jr

CC: Peter Jacoby
 Kathleen M. Wallman
 Elena Kagan
 William Curry
 James S. Rubin
 Jennifer M. O'Connor

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

20-May-1996 05:41pm

TO: (See Below)

FROM: James S. Rubin
 Office of Legislative Affairs

SUBJECT: tax checkoff

Sen. Thompson offered his amendment, which will probably be voted on tomorrow, when the Senate takes up a long series of stacked amendments.

Distribution:

TO: Peter Jacoby
TO: Michael Waldman
TO: William Curry
TO: Kathleen M. Wallman
TO: Elena Kagan
TO: Paul J. Weinstein, Jr
TO: Lisa Jordan Tamagni

AMENDMENT NO. _____ Calendar No. _____

Purpose: To express the sense of the Senate on the funding levels for the Presidential Election Campaign Fund.

IN THE SENATE OF THE UNITED STATES—104th Cong., 2d Sess.

S. CON. RES. 57

Setting forth the congressional budget for the United States Government for fiscal years 1997, 1998, 1999, 2000, 2001, and 2002.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. THOMPSON and ...

Viz:

1 At the appropriate place in the resolution, insert the
2 following:

3 SEC. ... SENSE OF THE SENATE ON THE PRESIDENTIAL
4 ELECTION CAMPAIGN FUND.

5 It is the sense of the Senate that the assumptions
6 underlying the functional totals in this resolution assume
7 that when the Finance Committee meets its outlay and
8 revenue obligations under this resolution the committee
9 should not make any changes in the Presidential Election
10 Campaign Fund, ^{or its funding mechanism} and should meet its revenue and outlay
11 targets through other programs within its jurisdiction.

cc: Elena

DEMOCRATIC * NATIONAL * COMMITTEE

Donald L. Fowler
National Chair

Christopher J. Dodd
General Chair

**OFFICE OF THE GENERAL COUNSEL
FAX TRANSMITTAL SHEET**

DATE: 5/15 FAXED: _____ VERIFIED BY: _____

TO: KATHY WALLMAN

OF PAGES: (including cover): _____ FAX #: 456 6279

FROM: JOE SANDLER

PHONE #: JOE SANDLER 202-863-7110, WANDA WHEELER 202-863-7108, NEIL REIFF 202-479-5111

IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION,

PLEASE CALL _____ AT (202) _____

COMMENTS: Per our discussion -- for your review.

PHONE #: (202) 863-8000
FAX #: (202) 863-8081/8012

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED. THIS MESSAGE MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR A AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT. YOU ARE NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ADDRESS BELOW VIA THE U.S. POSTAL SERVICE. THANK YOU.

**COMMENTS ON
CONSTITUTIONALITY OF SELECTED PROVISIONS
OF S. 1219, MCCAIN-FEINGOLD CAMPAIGN FINANCE REFORM BILL**

I. BAN ON PAC CONTRIBUTIONS

Senate Bill 1219, the McCain-Feingold campaign finance reform bill, would ban contributions by political action committees in federal elections. Specifically, the bill would prohibit the making of contributions and expenditures "for the purpose of influencing an election for federal office" by anyone other than an individual or political committee, and would define "political committee" to include only the candidate's authorized campaign committee, and the national, state, district, local and joint committees of political parties. S. 1219, 104th Cong., 1st Sess. (1995) (hereinafter, "S. 1219"), § 201(a) (amending 2 U.S.C. § 301, et seq.). In addition, McCain-Feingold would eliminate 2 U.S.C. § 441b(b)(2)(C), the provision of current law which permits corporations, labor unions, membership organizations, cooperatives and non-profit corporations to establish segregated funds, that is, connected PACs. S. 1219, § 201(b)(2). The bill further provides that, in the event that the PAC ban is invalidated, the limit on contributions by a PAC to a federal candidate would be reduced to \$1,000 per election and a candidate would be allowed to accept an aggregate of 20% of the applicable spending limit from PACs.

The constitutionality of a flat ban on federal political activity by PACs has been hotly debated. The

campaign finance decisions of the Supreme Court provide little more than hints of how the present Court might view a flat ban on PAC activity, in part because those cases have produced deep splits and shifting majorities among the Justices, resulting in few bright line rules to guide lawmakers. It is far from clear, therefore, whether a challenge to the constitutionality of McCain-Feingold's PAC ban would succeed. In any event, though, if the flat PAC ban were struck down, the bill's fallback provisions would become effective, and those provisions are clearly constitutional.

Those who contend that a flat ban is unconstitutional make several arguments. First, they suggest that the First Amendment rights of freedom of speech and association protect from government limitation a PAC's ability to make independent expenditures in connection with a federal campaign, relying primarily on Buckley v. Valeo, 424 U.S. 1 (1976); F.E.C. v. National Conservative Political Action Committee, 470 U.S. 480 (1985) ("NCPAC"); and F.E.C. v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"). In Buckley, the Supreme Court drew a distinction between contributions and expenditures, ruling that the First Amendment permits limits on campaign contributions, but forbids limits on candidate and independent expenditures. 424 U.S. at 12-23, 23-37, 39-59. Employing the "rigorous" standard of review set forth in Buckley for laws governing campaign finance, the NCPAC Court invalidated restrictions on independent PAC expenditures on the ground that the

government's asserted interest in combatting corruption and the appearance of corruption was insufficiently compelling to justify the restrictions. 470 U.S. 500-501. In MCFL, the Court applied the framework of Buckley and its progeny to invalidate a restriction on independent campaign expenditures by corporations, but only as applied to a noncommercial, non-profit corporation "formed to disseminate political ideas, not to amass capital." 479 U.S. at 259. Together, opponents argue, these decisions will render unconstitutional a flat ban on efforts by PACs to influence the outcomes of federal elections. In addition, opponents assert that the rights of association and free speech similarly protect a PAC's right to make contributions directly to candidates.

Those who contend that a flat PAC ban is constitutional argue that none of the Court's cases squarely resolves constitutionality of such a ban. For example, the NCPAC Court based its decision in part on the fact that federally-funded presidential candidates are unlikely to be influenced by independent PAC expenditures, and it is unclear how such reasoning would apply to a system, such as that in McCain-Feingold, in which candidates agree to voluntary limits in exchange for benefits that do not include public financing. It has also been noted that there have been statutory prohibitions against direct participation in federal elections by corporations since 1907, see Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified at 2 U.S.C. § 441b (1988)), and by labor unions since 1943, see Pub. L. No. 78-

89, 57 Stat. 163, 167 (1943) (codified at 2 U.S.C. 441b (1988)). Most significantly, those who argue a PAC ban is constitutional look to Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), for evidence that a flat PAC ban might survive the "rigorous" scrutiny prescribed by Buckley. In Austin, the Court upheld a state law prohibiting corporations (except for media corporations) from making independent expenditures from corporate treasury funds to support or oppose candidates for state office. The significance of Austin appears to be broader than the scope of its holding, because the majority adopted a significantly broader definition of the governmental interest which could justify limitations on expenditures. Prior to Austin, the Buckley decision had suggested that the Court would recognize only the prevention of corruption, defined as quid pro quo exchanges of money for political favors, as a compelling interest sufficient to sustain campaign finance restrictions. See 424 U.S. at 26-27; see also NCPAC, 470 U.S. 497-98 ("We held in Buckley . . . that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."). In Austin, however, the Court recognized that the state has a compelling interest in preventing "the corrosive and distorting effects . . . immense aggregations of wealth" could have on the political process. 494 U.S. at 660. Some commentators have even suggested that Austin signals a departure from the

jurisprudence of Buckley, see David Cole, First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance, 9 Yale L. & Pol'y Rev. 236, 240 (1991); and that Austin articulates a new, more deferential constitutional standard for evaluating campaign finance regulation, see Samuel M. Taylor, Austin v. Michigan Chamber of Commerce: Addressing a "New Corruption" in Campaign Financing, 69 N.C. L. Rev. 1060, 1060 (1991). Accordingly, supporters argue, the dramatic decline in public confidence in our system of representative democracy, combined with the broader definition of governmental interest acknowledged in Austin, indicates that a flat PAC ban may survive First Amendment scrutiny.

Given the complexity of these issues, it is impossible to predict with any certainty how the Supreme Court would rule on a flat PAC ban for federal congressional elections. It is clear, however, that a reasonable argument can be made in favor of the constitutionality of the McCain-Peingold approach.

Even if the prohibition on PAC involvement in federal election campaigns were invalidated, it is clear that the fallback provision is constitutional. A reduction in the PAC contribution limit in no way alters the analysis upholding such limits in Buckley, 424 U.S. at 35-36. Moreover, (aggregate limitations on PAC contributions) have been upheld against constitutional challenge in Gard v. Wisconsin State Elections Board, 156 Wisc.2d 28, 456 N.W.2d 809 (1990), cert. denied, 111 S.Ct. 512 (1990).

speaker ban
restrict -? -5-

II. TIGHTER DEFINITION OF INDEPENDENT EXPENDITURES

The McCain-Feingold bill clarifies the definitions relating to independent expenditures. S. 1219, § 251. The constitutionality of these changes cannot seriously be challenged. Under Buckley, 424 U.S. at 46-47, Congress may, consistent with the constitution, treat controlled, coordinated or prearranged expenditures by a non-party political committee as campaign contributions. The Supreme Court has recognized Congress's interest in preventing individuals and non-party political committees from evading the applicable contribution limits for particular candidates "through prearranged or coordinated expenditures amounting to disguised contributions." Buckley, 424 U.S. at 47; see also id. at 35-36.

The McCain-Feingold clarifications adhere to the basic definition of independent expenditures articulated in Buckley, while providing greater guidance to candidates and potential contributors.

III. LIMITS ON BUNDLING OF CONTRIBUTIONS

McCain-Feingold provides that contributions made by an individual, whether directly or indirectly through a conduit, will continue to be treated as contributions from the individual. S. 1219, § 231. The bill would add a new requirement that contributions made through an intermediary or a conduit will also be treated as contributions from the intermediary or conduit if (1) the contribution was

originally made payable to the intermediary, or (2) the intermediary or conduit is a political committee or party committee; a person whose activities are required to be reported under the Federal Regulation of Lobbying Act or the Foreign Agents Registration Act; a corporation, union or partnership; or an officer, employee or agent of any of the foregoing.

At the outset, it should be noted that the DNC strongly supports the work of Emily's List and, while we have no specific proposals at this time, we do hope that a means could be devised to eliminate the problem of bundling that McCain Feingold is trying to reach, while permitting Emily's List to continue to operate.

We do believe that the anti-bundling provisions of McCain-Feingold are constitutional. The provisions do not limit what individual contributors may give, nor what candidates may receive from individuals. Under McCain-Feingold, organizations can still inform members and others about candidates and provide information about how to contact campaigns and make contributions themselves.

Further, to the extent that these anti-bundling provisions treat certain classes of intermediaries and conduits differently than other types of organizations and individuals, the distinction will presumably pass constitutional muster if it merely has a rational basis. The distinctions drawn by the bill are neither viewpoint nor content-based, nor do they burden a suspect class. See Perry

why?

Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 95 (1983). See also Rotunda and Nowak, Treatise on Constitutional Law, 2d, § 20.11 n.24 ("[O]nce the Supreme Court has determined that there is no first amendment violation, it will then determine that the classification does not relate to a fundamental right and, consequently, there is no equal protection violation."). Just as the Supreme Court in Buckley upheld differential treatment of PAC and individual contributors, 424 U.S. at 23-26, McCain-Feingold rationally distinguishes between classes of conduits and intermediaries based on their unique characteristics and the differing roles they play in the financing of campaign activity.

Submitted by
Joseph E. Sandler
General Counsel
Democratic National Committee

We gratefully acknowledge the assistance of Andrew McLaughlin of the law firm of Jenner & Block, and a member of the DNC National Lawyers Council, in the preparation of these comments.

To: Elena

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-May-1996 12:24pm

TO: (See Below)
FROM: James S. Rubin
Office of Legislative Affairs
SUBJECT: tax checkoff

Paul Brown is faxing me the Thompson amendment "fix" language. I'll circulate it as soon as I get it.

Distribution:

TO: Peter Jacoby
TO: Michael Waldman
TO: William Curry
TO: Kathleen M. Wallman
TO: Elena Kagan
TO: Paul J. Weinstein, Jr
TO: Lisa Jordan Tamagni

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-May-1996 12:54pm

TO: (See Below)

FROM: Michael Waldman
Office of Communications

SUBJECT: RE: tax checkoff

was there a statement issued by Panetta?
was it put out by the White House press office?
can we have it circulated in any event?

Distribution:

TO: James S. Rubin

CC: Peter Jacoby
CC: William Curry
CC: Kathleen M. Wallman
CC: Elena Kagan
CC: Paul J. Weinstein, Jr
CC: Lisa Jordan Tamagni

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-May-1996 01:08pm

TO: (See Below)
FROM: Paul J. Weinstein, Jr
Domestic Policy Council
SUBJECT: RE: tax checkoff

a statement did go out from panetta around 1:00 pm. Elana has a copy.

Distribution:

TO: Michael Waldman
CC: James S. Rubin
CC: Peter Jacoby
CC: William Curry
CC: Kathleen M. Wallman
CC: Elena Kagan
CC: Lisa Jordan Tamagni

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

16-May-1996 11:15am

TO: (See Below)

FROM: James S. Rubin
 Office of Legislative Affairs

SUBJECT: RE: update on campaign finance

Apparently the amendment that would fix the McConnell provision is being offered by Sen. Thompson and may come up as soon as today or tonight, so time really is of the essence. Thompson, CC, League of Women Voters and others are holding a press conference today at 1 in the Capitol

Distribution:

TO: Kathleen M. Wallman

CC: Michael Waldman

CC: Peter Jacoby

CC: William Curry

CC: Elena Kagan

CC: Paul J. Weinstein, Jr

CC: Lisa Jordan Tamagni

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

16-May-1996 11:18am

TO: (See Below)

FROM: Kathleen M. Wallman
 Office of the Counsel

SUBJECT: RE: update on campaign finance

Are there any Democratic members who are going to participate in that conference? Wouldn't that be a good idea? Jamie, can you please talk with Peter Jacoby and see if we can make that happen if it isn't already (assuming Peter thinks it's a good idea, too)?

Distribution:

TO: James S. Rubin

CC: Michael Waldman

CC: Peter Jacoby

CC: William Curry

CC: Elena Kagan

CC: Paul J. Weinstein, Jr

CC: Lisa Jordan Tamagni

Withdrawal/Redaction Marker

Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|--------------------------|------------------------------|------------|-------------|
| 002. memo | Phone No. (Partial) (1 page) | 05/16/1996 | P6/b(6) |

COLLECTION:

Clinton Presidential Records
Counsel's Office
Elena Kagan
OA/Box Number: 808

FOLDER TITLE:

Campaign Finance Materials [2]

2009-1006-F

kc143

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EXECUTIVE OFFICE OF THE PRESIDENT

16-May-1996 10:54am

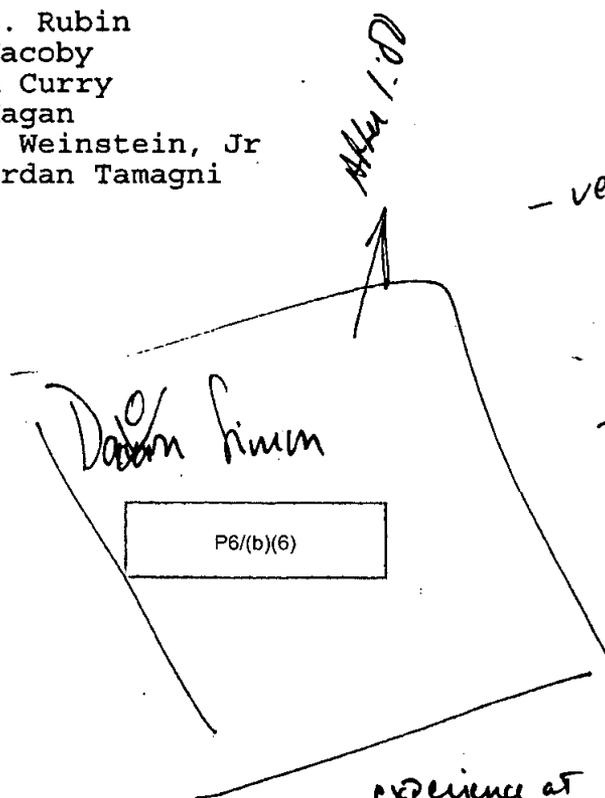
TO: (See Below)
FROM: Kathleen M. Wallman
Office of the Counsel
SUBJECT: RE: update on campaign finance

I think we should do an updated version of last year's statement. The timing is crucial, since I understand from Common Cause that the vote is likely to be at the end of the day today or tomorrow. I've asked Elena to work with Paul to prepare a statement that we can all review and then present to Harold and Leon this afternoon.

Distribution:

TO: Michael Waldman
CC: James S. Rubin
CC: Peter Jacoby
CC: William Curry
CC: Elena Kagan
CC: Paul J. Weinstein, Jr
CC: Lisa Jordan Tamagni

*McConnell -
figure out how
to bill in diff
way.*



*- vehicle a bit diff
this year.
last yr - delete
check OK*

*This year
change
e-off to add-on
functionally bills
S45T.*

*experience at
st level w/ add-on
didn't work*

\$3 more.

EXECUTIVE OFFICE OF THE PRESIDENT

15-May-1996 06:09pm

TO: (See Below)

FROM: Michael Waldman
Office of Communications

SUBJECT: RE: update on campaign finance

FYI -

I just got a call from Common Cause. The Senate budget resolution repeals the presidential checkoff and replaces it with an "add-on." This would kill presidential public financing.

Last year, McConnell and Dole tried the same thing. John Kerry successfully amended the bill to preserve the checkoff. (It's a budget resolution, so that amendment is nonfilibusterable. It got 54 votes then, pre Wyden.) The White House put out a statement then, and lobbied a bit; also, Don Fowler & Dodd were quite involved.

I told CC to call all of you, since this is just a nostalgic hobby for me!

Distribution:

TO: James S. Rubin

CC: Peter Jacoby
CC: William Curry
CC: Kathleen M. Wallman
CC: Elena Kagan
CC: Paul J. Weinstein, Jr
CC: Lisa Jordan Tamagni

EXECUTIVE OFFICE OF THE PRESIDENT

15-May-1996 04:24pm

TO: (See Below)

FROM: James S. Rubin
Office of Legislative Affairs

SUBJECT: update on campaign finance

This morning's Senate hearing on free television apparently was uneventful. Feingold expects to introduce the bill no later than next week, holding to his May introduction pledge. Dole's retirement may mean that McCain will play a more active role, without fear of putting Dole in an untenable position.

One interesting piece of news: McConnell put in the FY97 Budget Committee Report some language that would effectively change the public financing system from "checkoff" to "voluntary." It's non-binding, but is nonetheless a bad precedent.

Jamie

Distribution:

TO: Peter Jacoby
TO: Michael Waldman
TO: William Curry
TO: Kathleen M. Wallman
TO: Elena Kagan
TO: Paul J. Weinstein, Jr
TO: Lisa Jordan Tamagni

Steve - do you agree with what I've said on #1? Background material attached. (w)

DRAFT

May 14, 1996

MEMORANDUM FOR TODD STERN

FROM: KATHLEEN M.H. WALLMAN
 SUBJECT: PROPOSED COMMENTS ON FREE TV FOR PRESIDENTIAL CANDIDATES

I know that Greg Simon has some views on this idea. Have you heard from him on this? *i.e.*

I favor weighing in in support of the proposals. The question is how the Administration should do this.

1. Should the President send a letter in his own name, or should the Administration's position be conveyed through the more traditional route via the Department of Commerce's NTIA?

There is precedent for the President sending a letter to the FCC in support of a proposal pending before it -- broadcasters' obligations with respect to children's TV. That was an extraordinary act, and we need to consider whether we want to put our position on free TV on par with our position on children's TV by submitting a presidential letter. I believe that Greg Simon may have some views on this particular point. Given the President's repeated support for free TV as a key element of campaign finance reform, I believe that this issue is as important in its own way as children's TV, but I defer to Greg's views on whether this issue is of the same magnitude as children's TV.

2. Should the Administration's position be confined to free time for presidential candidates, or should the Administration use this as a springboard for expressing support for free TV for congressional and senatorial candidates?

Coming out in support of free TV for presidential candidates only risks looking self-serving, even where, as here the proposal is to accommodate broadcasters' voluntary provision of free TV time, not to mandate it. It seems to me that we ought to say we support finding ways to allow broadcasters to volunteer free TV time to congressional and senatorial candidates, too.

Likewise, make clear that support for these proposals is independent of the specifics of how such TV should be provided

2

3. Is an Administration position in support of voluntary free TV proposals likely to be viewed as undercutting its support for mandatory free TV as proposed in the legislation?

It would be important that the Administration's position in the FCC proceedings not be susceptible to the reading that we are contenting ourselves with voluntary free TV because we have given up on the prospect of campaign finance reform legislation passing this year. That is just a matter of careful phrasing. Voluntary free TV might even be described as a warm-up for what the bill will afford once it is implemented. The FCC (and the industry and public sector proponents of the proposal) could be praised for their forward thinking. We need not and should not take that position that voluntary free TV is enough to serve the public interest.

g:\dau\wullman\freety

Letter to Bill Clinton
K 66598

96 MAY 8 4 9:43

6 May 1996

MEMORANDUM TO THE PRESIDENT
THE VICE PRESIDENT

CC: Leon Panetta
Evelyn Lieberman

From: Harold Ickes (HI)

Re: Free television

Attached is a self explanatory 2 May 1996 memorandum to Leon Panetta, et al., from Paul Weinstein, about the "growing movement to provide Presidential candidates with free television airtime during the fall campaign." According to him, there are two petitions before the Federal Communications Commission. Given that the President has made free tv a core component of his campaign finance reform agenda, Mr. Weinstein wants to submit comment to the FCC in general support of these petitions.

Let's discuss.

THE WHITE HOUSE
WASHINGTON
May 2, 1996

MEMORANDUM FOR LEON PANETTA
HAROLD ICKES
GEORGE STEPHANOPOULOS

FROM: Paul Weinstein

SUBJECT: Free Television

There is a growing movement to provide Presidential candidates with free television air time during the fall campaign. There are two petitions before the Federal Communications Commission (FCC): the first from Fox chairman Rupert Murdoch, who has proposed providing candidates with ten minutes to address ten issues identified by the public and an additional one hour on election eve; the second, from a bipartisan coalition led by former journalist Paul Taylor, calls for the networks to provide the major candidates with two to five minutes of prime time television time every night during the last month of campaign. The Taylor petition was signed by: Senators Feingold, McCain, Roth, Simon, Pell, Thompson, Cohen, and Simpson; former DNC chairs Charles Manatt, Paul Kirk, and Robert Straus; former RNC chairs Bill Brock and Mary Louise Smith; Ralph Reed of the Christian Coalition; Bill Gray of the United Negro College Fund; and former news anchors Walter Cronkite, Howard K. Smith, and John Chancellor.

In addition, PBS announced today that it is willing to provide the major '96 Presidential candidates with "free, regular, prime-time opportunities to speak directly to American voters during this fall's election campaign."

The President has consistently made free TV a core component of his campaign finance reform agenda. In order to keep the President at the forefront of this issue, we would like to submit comments to the FCC in general support of these petitions.

FROM

(SAT) 01. 16 ' 93 16:15/ST. 16:14/NO. 3561050737 P 1

DEMOCRATIC NATIONAL COMMITTEE

File: campaign
image
cc: Elena

Donald L. Fowler
National Chair

Christopher J. Dodd
General Chair

OFFICE OF THE GENERAL COUNSEL
FAX TRANSMITTAL SHEET

DATE: 5/10 FAXED: _____ VERIFIED BY: _____
TO: KATHY WALLMAN
OF PAGES: (including cover): 2 FAX #: 456 6279
FROM: JOE SANDLER

PHONE #: JOE SANDLER 202-863-7110, WANDA WHEELER 202-863-7108, NEIL REIFF 202-479-5111

IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION,

PLEASE CALL _____ AT (202) _____

COMMENTS: Please see attached. We are preparing a brief response
(supporting the constitutionality of these provisions) which is now
due next Wednesday-- I would like to run it by you before we
submit it. Thanks!

PHONE #: (202) 863-8000
FAX #: (202) 863-8081/8012

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS
ADDRESSED. THIS MESSAGE MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND
EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE
INTENDED RECIPIENT OR THE EMPLOYEE OR A AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE
TO THE INTENDED RECIPIENT. YOU ARE NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR
COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS
COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND RETURN THE
ORIGINAL MESSAGE TO US AT THE ADDRESS BELOW VIA THE U.S. POSTAL SERVICE. THANK YOU.

MARK O. HATFIELD, OREGON
JESSE HELMS, NORTH CAROLINA
ROBERT DOLE, KANSAS
TED STEVENS, ALASKA
MITCH MCCONNELL, KENTUCKY
THAD COCHRAN, MISSISSIPPI
RICK SANTORUM, PENNSYLVANIA
DON NICKLES, OKLAHOMA

WENDELL H. FORD, KENTUCKY
CLARABURNE PELL, RHODE ISLAND
ROBERT C. BYRD, WEST VIRGINIA
DANIEL K. INOUE, HAWAII
DANIEL PATRICK MOYNIHAN, NEW YORK
CHRISTOPHER J. DODD, CONNECTICUT
DIANNE FEINSTEIN, CALIFORNIA

GRAYSON WINTERLING, STAFF DIRECTOR
KENNETH L. GILL, DEMOCRATIC STAFF DIRECTOR AND CHIEF COUNSEL

United States Senate

COMMITTEE ON
RULES AND ADMINISTRATION
WASHINGTON, DC 20510-6325

*Joe -
4/1
Carol*

April 18, 1996

Mr. Donald L. Fowler
Chairman
Democratic National Committee
430 South Capitol Street, S.E.
Washington, D. C. 20003

Dear Mr. Fowler:

I want to thank you for the outstanding testimony you gave at the Rules Committee hearing this past Wednesday. I very much share your concern that the voice of the political parties must not be constrained unfairly or unwisely in their efforts to educate citizens and support their candidates.

It remains my sincerest concern that many of the reform proposals carry a high risk of being held unconstitutional, and that the American people are done a disservice by those who suggest to them that these empty "solutions" will bring about the reform that is needed.

In this vein, the Committee would appreciate your analysis of the constitutionality of the ban on Political Action Committees, as well as the constitutionality of the limitations placed on independent expenditures, the political party soft money provisions, and contributions through intermediaries and conduits that have been offered in the various campaign finance proposals in the Senate.

Along with this review, please feel free to add any specific ideas you have for improving our current campaign finance laws and implementing regulations. The Committee would appreciate having your comments in time for our next campaign finance hearing this May 8th.

Sincerely,

[Handwritten signature]
John Warner
Chairman

ABC JOINS OTHERS OFFERING TV TIME

Top Presidential Contenders May Get Free Broadcasts

By LAWRIE MIFFLIN

ABC joined its network brethren yesterday in offering free television time to the major Presidential candidates, announcing that it would invite them to appear on a live one-hour special in prime time, during the last week before the election.

The candidates would discuss issues without interruption from journalists or "any third party," ABC said.

Now all four major broadcast networks — plus PBS, the Cable News Network and a collection of cable operators — have agreed to provide some measure of unmediated television time to the candidates this fall, each in a different format. Some are promising the access in prime time, from 8 to 11 P.M.; some are not. Some say it will be presented in a news program; some do not.

"It's important to do this not just for the gesture, but to improve the quality of information getting out to viewers as they make decisions," David Westin, president of ABC, said yesterday by telephone from Los Angeles. "It's constructive to have a number of different approaches among the networks, so we can see what will work or not work."

Rupert Murdoch, chairman of the News Corporation, which owns the Fox television network, started this parade with a speech at the National

Continued From Page A1

Press Club in February. He said Fox would provide one prime-time hour to the major candidates, without interviewers, on the eve of the election. In addition, he said, the network would broadcast 10 one-minute position statements from each candidate at regular intervals in prime time in the month before the election.

In his speech, Mr. Murdoch also challenged the other networks to join him and said he would match them in offering additional time segments if they were all broadcast at the same time, so no network would suffer a competitive disadvantage.

At the time, executives at the other three broadcast networks said they believed they gave more than adequate amounts of coverage to the candidates and their positions on major issues in normal network news and interview programs and in special coverage closer to the election.

Also at that time, Paul Taylor, a former correspondent for The Washington Post, had quit his job and begun a crusade to persuade the networks to provide free speaking time for candidates. Enlisting dozens of prominent politicians, journalists and others to help him, he made sure to touch all corners of the civic landscape — including Ralph E. Reed Jr., executive director of the Christian Coalition, and the actor Alec Baldwin, president of the Creative Coal-

tion.

In February, ABC was the most outspoken of the other networks in rejecting Mr. Murdoch's appeal to join the experiment.

ABC executives' minds were changed, Mr. Westin said, by "what we perceive as a desire by our viewers to receive more information unfiltered from the Presidential candidates." ABC had gotten that perception, he said, "anecdotally," from newspaper coverage of the idea and from Mr. Taylor.

He said that every four years, the networks reassess how to cover Presidential campaigns. In 1992, he said, the novelty was having candidates answer viewers' questions on morning programs like ABC's "Good Morning America" and NBC's "Today."

"So innovation and progression are not surprising, but Paul has certainly caused us to focus quite specifically and at an earlier stage, and he should be commended," Mr. Westin said of Mr. Taylor.

Details remain to be settled, not least among them whether the candidates will accept all these invitations to speak without benefit of questioners or advertising enhancements.

But as it stands now, neither NBC nor CBS has specified how long the candidates' appearances would be permitted to run or how often. ABC has set aside one hour, in prime time, the week before the election. CNN

has said each candidate will be given five minutes of free time a week for four weeks leading up to the election. PBS has promised to broadcast statements in prime time, but has issued no further details.

NBC has said that the unfiltered time will be offered during its news magazine "Dateline" and that excerpts from the candidates' stump speeches will be broadcast in a regular feature on the NBC "Nightly News."

CBS has not specified programs, except to say the statements will appear during "regularly scheduled news programs," and will not interrupt prime-time shows.

Meanwhile, since September the cable industry has been offering cable systems a one-hour weekly program that includes unedited taped messages from various candidates. Called "Race for the Presidency," the program is produced by TCI News, a unit of Tele-Communications Inc., the nation's second-largest cable operator. It is available on some cable systems through local-access channels, on four regional cable news channels, on some public television stations and on scattered other stations that pick it up by satellite.

All the broadcast networks took pains to point out that these experiments with free time come in addition to their normal political news coverage. "These initiatives are extensive, and shouldn't be glossed over as old hat," said Bill Wheatley, a vice president of NBC News.

THE NEW YORK TIMES
THURSDAY, MAY 9, 1996

A New Charter Wins Adoption In South Africa

By SÚZANNE DALEY

CAPE TOWN, May 8 — South Africa adopted a new Constitution today, officially and peacefully completing the country's transition from centuries of white supremacy to a nonracial democracy.

In the austere parliamentary chamber where many of apartheid's laws were created, the Constitutional Assembly embraced a document that renounces the racism of the past and guarantees all South Africans broad freedoms of speech, movement and political activity.

The 140-page document establishes a federal system with a strong presidency and a two-chamber legislature. It also includes a bill of rights that is one of the broadest in the world. Besides barring discrimination on the basis of race, gender, age, sexual orientation, pregnancy and marital status, it also includes, in an inscription of often unmet hopes, the right to housing, health care, water, food and education, including basic adult education.

It creates a strong central government, certain to be dominated for now by Nelson Mandela's African National Congress, which garnered more than 60 percent of the vote in the last election. Supporters of the largely white Nationalist Party and the Inkatha Freedom Party of Chief Mangosuthu Gatsha Buthelezi had called for greater provincial autonomy.

Mr. Buthelezi's supporters, Zulu nationalists who are engaged in an

Continued on Page A12, Column 3

Continued From Page A1

often violent struggle with the African National Congress for control over the province of KwaZulu/Natal, marched out of the constitutional negotiations months ago, and were absent from the proceedings today.

In a country where capital punishment has often been used, mainly against blacks, the new document has a clause that legal experts believe will effectively outlaw the death penalty.

Before voting today, leaders of the country's two major white political parties, which control about 25 percent of seats in the Parliament, took to the podium to speak out against aspects of the document such as the lack of guarantees that minority parties will have places in the Cabinet, and the apparent ban on capital punishment.

But when the votes were counted, the new Constitution, which took nearly two years to draft, had been adopted by a margin of 421 to 2. There were 10 abstentions.

"And so it has come to pass that South Africa today undergoes her rebirth, cleansed of a horrible past, matured from a tentative beginning, and reaching out to the future with confidence," Mr. Mandela said after the vote.

"Our pledge is: Never and never again shall the laws of our land rend our people apart or legalize their oppression and repression."

Then leaving his prepared text, Mr. Mandela acknowledged the complaints of the minority parties and promised that his Government would keep trying to address their concerns. And he cautioned all South Africans — black and white — to rise above ethnic loyalties.

"If you talk to whites, they think only whites exist and they look at the problems from the point of view of whites," Mr. Mandela said. "They forget also that blacks exist. But we have another problem. If you talk to blacks, coloreds and Indians, they make the same mistake. They think whites do not exist. They are triumphant. The think they are deafing with a community that is lying prostrate on the ground begging for mercy. Both tendencies are wrong."

When he had finished speaking, Mr. Mandela received a standing ovation.

The new Constitution will take effect gradually over the next three years. The country has been operating under an interim constitution negotiated before the first universal-suffrage elections in April 1994.

Much of the new charter resembles that interim document. It retains the 400-member Assembly and the country's nine provinces. The president will continue to be chosen by the party that gets the most votes.

But the coalition government that was created to soothe white fears during the transition will end in 1999. Also the Senate, now a 90-member chamber, will be reconstituted as a Council of Provinces, with only 60 permanent members and slightly broader powers over local issues. In a partial concession to minority demands for more powers for provincial governments, the new government gives provinces exclusive powers in specific areas, such as provincial planning, sports, recreation and roads.

The bill of rights in many ways clearly reflects the country's history of oppression and racial separation. For instance, almost two pages are devoted to specifying the rights of arrested, detained and accused persons. The Constitution also specifically states that everyone has the

Racism and repression are renounced, and equality is embraced.

right "to enter, to remain in, and to reside anywhere in the republic."

At the same time, the new Constitution goes even farther than the interim constitution in creating a wide array of social and economic rights. Children have a page of their own that includes the right to a name, to basic nutrition, to social services and to be protected from exploitative labor practices.

South Africa, with its vast poor population, is hardly in the position to deliver on many of these rights. But having them enshrined in the Constitution will force the government to consistently spend money in areas such as housing and medical services, experts said.

The new Constitution also reiterates the right to life, a provision that the country's Constitutional Court has interpreted as barring capital punishment. Several of its privacy clauses are being interpreted by experts as laying the ground work for legal abortion.

Unlike the framers of the United States Constitution, who worked in secret, South Africans worked hard to make the writing of the Constitution a public process. To keep people informed about the effort, more than 4 million draft copies of the document were printed last fall and distributed at community centers or as pull outs in newspapers. Advertisement and posters everywhere asked citizens to contribute their views.

About 2 million did, sending in letters or E-mail.

But much of the wrangling took place behind closed doors at the last minute. Just a few weeks ago, more than 40 issues had yet to be decided. In recent days, the negotiators — 46 members of Parliament representing all the parties — seemed to reach an impasse over three issues: education, property rights and the right of employers to lock out workers.

The National Party of former President F. W. de Klerk and the smaller, liberal Democratic Party both wanted to insure that property owners would be fully compensated if the Government decided to expropriate property in its efforts to redistribute as much as 30 percent of the country's land. In the end, they got a partial commitment to compensation.

Under apartheid many blacks were stripped of their land with little compensation and sent to live on small remote areas called "homelands."

The National and Democratic parties also felt that employers needed the right to lock out workers, in order to combat the country's powerful labor unions. While this was not written into the Constitution, reference was made to a labor relations law that includes that right.

In addition, the National Party and the more conservative Freedom Front were pressing to have single-language schools guaranteed in the Constitution. This is widely seen as a way of continuing segregated schools by making language the barrier to the classroom. Afrikaners argue that they must have such schools to preserve their culture. While in the end the education clause mentions single-language schools, it does not guarantee state financing for them.

Mr. de Klerk, who is the Deputy President, said that he would support the document because it was a reasonable starting point and because a long, drawn-out period of uncertainty over the shape of government could damage the country.

"We have placed the positives and the negatives on the scale and we have decided the positives outweigh the negatives," Mr. de Klerk said. "And that is why we are voting in favor of this Constitution."

The Democratic Party Leader, Tony Leon, also endorsed the document though he said he would challenge some clauses before the Constitutional Court, which has the authority to review the new charter to make sure it is in keeping with the spirit of the interim document.

Gen. Constand Viljoen, leader of the Freedom Front, which has been pushing for the right to establish an Afrikaner homeland, praised many aspects of the document but said his party would have to abstain. The Inkatha Freedom Party, which had boycotted the negotiations, boycotted the vote as well, leaving its 48 seats in parliament empty.

Despite the criticism voiced before the vote, the atmosphere in the chamber was one of unity as several speakers mentioned the falling value of the South African rand and the need to pull together and show the world that South Africa was now a stable country capable of negotiating solutions to its disputes.

"Whatever the setbacks of the moment," said the Deputy President Thabo Mbeki. "Nothing can stop us now."

THE NEW YORK TIMES

THURSDAY, MAY 9, 1996

relatively young Republican governor like Engler be eager to latch onto a seasoned political figure like Dole and reap the publicity benefits? Well, for a lot of reasons. ... A poll taken last month by EPIC/MRA showed a Clinton-Al Gore ticket leading an imaginary Dole-Engler matchup by 12 points, 53-41 percent in Michigan. ... Could an Engler presence on the ticket cause it to flip-flop? Not likely. Does Engler want to take the chance? Engler's no martyr. He'd like to take his rightful place in the world almanac, but not alongside forgettable veep also-rans like Henry Cabot Lodge and William Miller, R. Sargent Shriver and Geraldine Ferraro. And for Engler to run and not carry his own state is not even worthy of consideration" (5/5).

FREE TV: NBC, CNN TO OFFER SEGMENTS OF FREE TIME

"The bandwagon is rolling for free TV time for candidates" (Moore, USA TODAY, 5/8). "Two dominoes fell and a third began to teeter" as NBC and CNN both announced they would offer segments of free TV time to the major pres. candidates in the weeks leading up to the election. NBC said it would invite the candidates "to address viewers directly" during "Dateline" and during the "NBC Nightly News" as part of the regular feature "In Their Own Words." The feature will also use excerpts from the candidates' stump speeches. The candidates would be invited to appear and answer questions on "Today" and "Meet the Press" and its new MSNBC cable venture with Microsoft. If "such appearances include interviewers they would not differ from what NBC did" in '92. But NBC News VP Bill Wheatley "said 1992's arrangement was the first" in which pres. candidates "had ever appeared for a full hour on 'Today,' and he pointed out that only two -- Bill Clinton and Ross Perot -- took questions from viewers," while George Bush agreed to an interview only. CNN pres. Tom Johnson announced CNN would offer the major candidates five minutes of time each week for the four weeks leading up to the election during "Inside Politics" at 4:00p (EDT) and 8:30p. CNN will also offer the VP candidates one such time slot apiece (Mifflin, N.Y. TIMES, 5/8). The announcements, "coming a day after CBS unveiled a similar offer" (see HOTLINE 5/7), mean Pres. Clinton and Bob Dole "will have more unpaid access to the national airwaves, without interference by journalists, than in any previous campaign" (Kurtz, W. POST, 5/8).

ABC: In a statement, ABC News stood by its position that its regular campaign coverage was "comprehensive" and offered "no shortage of air time for the candidates." But ABC execs. "are expected to announce a plan" 5/9 for offering the major pres. candidates a one-hour "dialogue" in prime time on a night in the last week of the campaign (N.Y. TIMES, 5/8). The debate, with no moderator will be "modeled" on last spring's NH encounter between Clinton and Speaker Gingrich (W. POST, 5/8)

REAX: "While Fox and PBS have made similar commitments, each of the six networks plans to offer the access at different times and in different ways, undermining the plan for a nightly conversation that would be carried across the dial" (W. POST, 5/8). Paul Taylor, leader of the Free TV for Straight Talk Coalition said, "At the moment we're getting a delightfully scattershot approach" from the nets and CNN. "If we can begin to regularize it, it can be adaptable to state and local races" (N.Y. TIMES, 5/8). Taylor said he is "very encouraged" by the proposals and described the nets as engaged in "a little bit of virtuous bidding war at the moment" (W. POST, 5/8). Dole spokesperson Christina Martin: "This could be very enlightening.

A show with Bill Clinton juggling his centrist rhetoric and his liberal record might be very educational." Clinton spokesperson Joe Lockhart said Clinton "believes that it's very positive to be able to speak directly to the voters" (USA TODAY, 5/8).

LINE-UP: Here's a listing of free TV proposals by broadcast and cable networks for major pres. candidates:

ABC: Expected to announce a plan for offering a one-hour "dialogue" in prime time in the last week of the campaign.

CBS: Up to a minute and a half taped comments on the "CBS Evening News" and CBS "This Morning," probably daily, for the last couple of weeks of the campaign. Plus possible time on "48 Hours" and "60 Minutes" in the closing days of the campaign.

CNN: Five minutes, taped, each week for the four weeks leading up to the election during "Inside Politics." Plus one five-minute segment for the VP candidates.

FOX: Ten one-minute prime time segments for each candidate during the final weeks of the campaign. One total hour on election eve to be divided among the candidates.

NBC: Invites to appear on "Dateline," "Nightly News," plus interviews on "Today," "Meet the Press," and MSNBC.

PBS: Has agreed to give free time, will consult with member stations on details.

TCI: Has been giving free air time since last fall.

OTHERS: U.S. Satellite Broadcasting Co. and Court TV have made offers of air time.

===== NATIONAL BRIEFING =====

GAS TAX: DOLE TIES REPEAL TO WAGE AND ANTI-UNION MEASURES

Senate Dems blocked a GOP plan to "roll back" a 1993 federal gasoline tax hike after Majority Leader Bob Dole "refused to permit an up-or-down vote on increasing the minimum wage." The Senate "ground to a halt as both sides jockeyed for position on two issues sure to resonate with voters" in Nov. (Kessler, L.I. NEWSDAY, 5/8). Dems "said they would keep tying up the Senate until GOPers granted them an up-or-down vote on raising the minimum wage" 90 cents. Dole responded by linking the wage vote to the gas-tax repeal and a labor-relations bill opposed by Dems. "But Democrats did not take the bait" (Wines, N.Y. TIMES, 5/8). "Seeking political advantage from rising gasoline prices," Dole tied together legislation on the two issues for the first time. "Observers said Dole did not want to appear to be caving in after rebuffing Democratic attempts to increase the minimum wage for more than a month. At the same time, he wants to capitalize on the recent increase in gasoline prices as a way to give his stalled presidential campaign some traction." Dole: "Some people say 4.3 cents is not really worth it, but it is important to send a message to the American people that we are serious about tax reform. We need to cut taxes for the average family" (Black, BOSTON GLOBE, 5/8). NPR's Arnold: "Dole makes no pretense about the political side of his proposal. Yesterday he held a presidential campaign event on the sidewalk in front of the Internal Revenue Service to announce his plans" (5/8). Dole aides "say the repeal plan is deliberately crafted to remind voters that Clinton raised their taxes and never delivered on his 1992 campaign promise of a middle-class tax cut" (Crawford, ORLANDO SENTINEL, 5/8). THE STANDARD's Fred Barnes: "Finally, after floundering for weeks, Bob Dole has found an issue that the public agrees with him on. Whenever taxes are the issue that's on the agenda ... that helps Republicans, that helps Bob Dole"

NBC and CNN Offer Candidates Air Time

By LAWRIE MIFFLIN

Two dominoes fell and a third began to teeter yesterday, as NBC and CNN both announced that they would offer segments of free television time to the major Presidential candidates in the weeks leading up to the November election. CBS made a similar announcement Monday, and Fox did so in February.

ABC News, in a statement yesterday, stood by its position that its regular coverage of the campaign was "comprehensive" and offered "no shortage of air time for the candidates."

But ABC network executives are expected to announce a plan tomorrow for offering the major Presidential candidates a one-hour "dialogue" in prime time on a night in the last week of the campaign.

The three original broadcast networks have been feeling pressure from a public-interest lobbying group, led by Paul Taylor, a former correspondent for The Washington Post, to give the candidates unfettered speaking time of two to five minutes a night during prime time, 8 P.M. to 11 P.M.

The NBC News announcement yesterday said the network would invite the candidates "to address viewers directly" during broadcasts of "Dateline," its prime-time news magazine program that appears four nights a week, and during the 6:30 P.M. newscast, "NBC Nightly News," as part of a regular feature, "In Their Own Words." The feature will also use excerpts from the candidates' stump speeches, NBC said.

NBC's announcement also said the candidates would be invited to appear and answer questions on the NBC News morning show, "Today," and its Sunday interview program, "Meet the Press." If such appearances include interviewers they would not differ from what NBC did in the 1992 campaign.

But Bill Wheatley, vice president of NBC News, said 1992's arrangement was the first in which Presidential candidates had ever appeared for a full hour on "Today," and he pointed out that only two — Bill Clinton and Ross Perot — took questions from viewers, while then-President George Bush agreed to an interview only. "The candidates have to participate in this, if its going to work," Mr. Wheatley said.

Uncertainty about the candidates' cooperation is one reason CBS's announcement on Monday did not go into program details, an executive there said. But CBS did specify that the "free, unfiltered access" being offered to candidates would be in "regularly scheduled news program-

ming," meaning the prime-time programs "48 Hours" and "60 Minutes" were possibilities.

CNN's president, Tom Johnson, announced yesterday that the cable network would offer the major Presidential candidates five minutes of time each week for the four weeks leading up to the election, during its "Inside Politics" program at 4 P.M. and 8:30 P.M. daily. CNN will also offer the Vice-Presidential candidates one such time slot apiece.

Mr. Taylor and his loose coalition, which includes the former CBS anchor Walter Cronkite and some 70 others, hope to help reduce the num-

The networks are feeling pressure to provide free service.

ber of negative advertisements broadcast by candidates and to increase the time devoted to substantive political issues in the course of news programs, which in recent years have cut candidates' statements down to shorter and shorter "sound bites."

Some ABC executives painted this assertion as a matter of semantics, saying that the major networks usu-

ally afforded Presidential candidates some segments of time to speak uninterrupted, especially close to Election Day, and that they also broadcast special campaign news programs, in prime time.

"The most important things to accomplish this year," Mr. Taylor said by telephone yesterday, "are having the candidates always on the screen, and having them appear in the heart of prime time. Then you can begin to change the language of politics."

Currently, he said, "the majority of paid political advertising is attack ads, where the candidate never appears, you have some unseen narrator, and some eerie music, and trick imagery or putting up some silly vote the opponent cast 12 years ago which is presented entirely out of context."

Mr. Taylor hopes to influence the future tone of television campaigning as well as news coverage at the state and local levels.

"At the moment we're getting a delightfully scattershot approach" from the major broadcast networks and CNN, he said. "If we can begin to regularize it, it can be adaptable to state and local races, where we get the worst of the attack ads and the most corrosive burden of campaign fund raising."

In the fall Presidential campaigns, candidates receive Federal money (about \$60 million), and their spending cannot exceed that amount.

House G.O.P. Complains of Babbitt Trips

WASHINGTON, May 7 (Reuters) — Accusing Interior Secretary Bruce Babbitt of violating election rules, House Republicans today ordered an investigation into dozens of trips he has made over the last three years to stir up opposition to Republican environmental proposals.

Representative Don Young, the Alaska Republican who heads the House Resources Committee, singled out a series of 15 trips that Mr. Babbitt made across the country last year. Mr. Young described these as campaign trips, which under the rules of the Federal Election Commission are supposed to be paid for by campaign organizations.

"The taxpayers should not be paying for Secretary Babbitt's politicking," Mr. Young said at a news conference where he announced that the General Accounting Office, Congress's watchdog agency, would review the Interior Department's travel reimbursement procedures.

Mr. Young had no estimate of how much money was at issue. But he said it was not until after he began asking Mr. Babbitt about trips the Secretary made in 1994 that the department started collecting Democratic campaign money with which to reimburse the Government for them.

At the Interior Department, officials said that less than \$5,000 was now owed to the Treasury for Mr. Babbitt's political appearances. The Secretary's spokesman, Michael Gaudin, acknowledged that the department had been slow in collecting money for the trips from the Democratic campaign but said the reason was that the Bush Administration had not left any record of procedures for reimbursing the Government.

"It was a disconnect between a couple of offices early in the Administration," Mr. Gaudin said.

Wage Issue Stalls Effort To Lower Tax On Gasoline

By MICHAEL WINES

WASHINGTON, May 7 — Republicans in the Senate tried briefly today to roll back the 4.3-cents-a-gallon gasoline tax that Congress enacted in 1993, but Democrats once again ensnared them in a debate over raising the minimum wage. So the tax repeal — and the Senate — ground to a halt again.

Democrats said they would keep tying up the Senate until Republicans granted them an up-or-down vote on raising the base wage. Republicans tried to link such a vote to a measure that Democrats oppose, a labor-relations bill criticized by unions, but Democrats did not take the bait.

The Senate majority leader, Bob Dole of Kansas, scolded the Democrats, saying, "Your leader is telling us the only way we can move the Senate on anything is to vote on your version of the minimum wage. We have the majority in this body."

A few minutes later, the Democratic leader, Tom Daschle of South Dakota, concluded, "We're obviously in a situation now where nothing is going to get done."

Not a lot has been done for six weeks, since the minimum-wage standoff began. It was not clear when the impasse would break.

Some suggested that the draw-out tug of war was being driven by election-year politics, particularly Presidential politics.

"All this is obviously and clearly — but it needs restating — a struggle that is under way to define the terms of debate in the campaign," Tom Mann, a Brookings Institution scholar who is an expert on Congress, said in an interview today. "It really matters what's on the agenda and how it's framed, and there's no easy way to cut the differences."

Indeed, both parties' unanointed Presidential candidates were in the thick of the day's inaction.

Mr. Dole made an impromptu appearance this morning at Internal Revenue Service headquarters to advocate the repeal of the gasoline tax and, in passing, to note that it had been part of a five-year, \$265 billion tax package that President Clinton orchestrated in 1993. That, Mr. Dole said, was "the largest tax increase in American history."

Mr. Clinton's campaign struck back by fax. A statement charged that Mr. Dole "more than tripled the gas tax in the 1980's" by backing two such increases of 5 cents a gallon, and added that it was Mr. Dole who "pushed through the largest tax increase in U.S. history" in 1982.

Yes, and no. Adjusted for inflation, the \$214 billion tax increase that Mr. Dole supported in 1982 totals \$320 billion in 1993 dollars. That eclipses the \$265 billion increase that Mr. Clinton sponsored in that year as part of a deficit-reduction package.

Still, the 1982 increase was effectively a partial rollback of a 1981 tax cut of \$750 billion, which Mr. Dole also backed. In 1993 dollars, the 1981 cut totals \$1.19 trillion.

"It's basically a useless argument," said David Wyss, research director for DRI/McGraw-Hill, a Boston economic forecasting company. "Both passed tax increases, and both were probably justified, given the budget problems at the time."

It was one of several arguments played out in the Senate today.

As the Senate stood idle, Republicans tried to juggle the Federal budget to offset the loss of gasoline-tax revenues. They elected to lift the tax temporarily, until November, and to pay the \$2 billion cost by cutting the Energy Department budget and selling another slice of the broadcast spectrum. Mr. Dole said the next Republican budget, to be sketched out on Wednesday, would propose a permanent tax repeal.

Democrats, meanwhile, tried to decide whether to bow to the tax cut, which Mr. Daschle has called inevitable.

Mr. Clinton had been poised to send Mr. Dole a letter accepting the repeal in exchange for a minimum-wage increase and a guarantee that oil companies would not pocket the tax cut's proceeds. But he held off after Democratic senators debated over lunch whether to oppose the tax cut, period.

Mr. Daschle was mum. But another Democrat, Senator John B. Breaux of Louisiana, said later that he believed there were enough Democrats to filibuster the tax repeal.

That did not occur. As a bill dubbed the Taxpayer Bill of Rights came up, Mr. Dole tried to amend it to repeal the gasoline tax and increase the minimum wage 90 cents, as Democrats have sought. But he also put in something Democrats oppose: a separate bill expanding businesses' right to hold discussions with employee groups.

Democrats argued that the bill's true purpose was to permit businesses to create rump unions, run by companies. So Mr. Daschle rejected the offer, calling the labor amendment a "poison pill."

Mr. Dole affected befuddlement, saying the Democrats were opposing their own minimum-wage increase.

"I didn't think we'd be rejected when we offered our colleagues what they wanted," he said.

Adoption Bill Facing Battle Over Measure On Indians

By ERIC SCHMITT

WASHINGTON, May 7 — When the House this week considers a major adoption bill that President Clinton supports, lawmakers will also consider a very emotional question: Who decides if someone is an American Indian?

The answer carries sweeping consequences not only for the nearly two million Indians nationwide, but also for thousands of non-Indian couples whose ability to adopt Indian children is limited.

At issue is the 1978 Indian Child Welfare Act, which says tribal courts, not state ones, have jurisdiction over cases involving the custody of Indian children. The law gives priority to placing Indian children with Indian families whenever possible.

Critics say the tribal courts are interfering in the adoption of children and cite several cases where tribes are trying to reclaim Indian children, sometimes years after adoption.

The adoption bill before the House will exempt custody proceedings from tribal court jurisdiction if they involve children whose parents do not maintain "significant social, cultural or political affiliation with the tribe." The bill does not define what that means.

"The law's original intent was to protect Indian children and culture," said Representative Deborah Pryce, the Ohio Republican who has sponsored the measure, "but over the last 20 years it's been misapplied."

Indian leaders argue that the measure will create a giant loophole that will undermine tribal sovereignty and let state courts, which may have little understanding of Indian culture, decide who is affiliated with a tribe.

"This would be devastating to Indian tribes," said Terry Cross, executive director of the National Indian Child Welfare Association, a tribal welfare group in Portland, Ore.

Conservative groups like the Christian Coalition and the Heritage Foundation, as well as the National Council for Adoption, have lined up behind Ms. Pryce's measure.

President Clinton has endorsed the adoption bill's other provisions, including a tax credit for most adoptive families, but the White House has voiced concern that Ms. Pryce's measure could violate tribes' self-governance.

Moreover, many Republicans are angry that Ms. Pryce and the House leadership inserted the measure into the adoption bill without first holding hearings. Representative Don Young, the Alaska Republican who heads the House Resources Committee, which has jurisdiction over Indian affairs, said he would offer an amendment to kill the provision.

The Indian child welfare law was passed after hundreds of Indian children were removed from their homes by social agencies and put up for adoption in the 1960's and 1970's, often without their parents' consent or due process of law.

"It was a horrible, shameful practice, what happened then," Ms. Pryce said.

But Ms. Pryce's support for the law soured after she became involved in an adoption case involving two constituents. The adoptive parents, Jim and Colette Rost of Columbus, Ohio, are fighting to retain custody of 2-year-old twin girls, Bridget and Lucy, who are three thirty-second Pomo Indian.

The Rosts adopted the girls from an unmarried couple in Southern California who gave up the twins at birth. But four months after the adoption, the girls' paternal grandmother, with the Pomo tribe's support, said she wanted the children. The Rosts learned belatedly that the girls' father, to speed final placement, had not disclosed his Indian background as the law requires.

In January a California appellate court reversed a lower-court order that the Rosts return the girls. The tribe has appealed to the California Supreme Court, which is to decide by the end of the month whether it will hear the case.

Indian leaders acknowledge that the law has flaws, but they insist that unfortunate cases like the Rosts' are an exception that can be avoided by punishing lawyers and other people who violate the statute.

No agency has kept track of the number of Indian children put up for adoption since the bill became law in 1978, but Mr. Cross estimated that of "thousands" of adoptions, about 40 had been contested. Ms. Pryce said the number of "horror stories" was much higher and often involved cases of children having only minute traces of Indian ancestry.

Each of the nation's 554 Indian tribes sets its own standards on membership and when a person can be enrolled, a prerogative that Indians hold dear.

Henry M. Cagey, chairman of the Lummi nation, a 4,000-member tribe in Washington State, said, "Congresswoman Pryce is listening to a small minority of voices who want to adopt Indian children without consideration of our heritage, traditions and extended families."

Campaign Finance Reform

Senate

Sen. McCain (R-AZ) and Sen. Feingold (D-WI) spearhead the reform effort. Last week, McCain asked Sen. Dole for guaranteed floor time for S1219, the Administration-supported measure. Dole apparently either refused or stalled, because last Wednesday, McCain stated publicly that he would bring the measure to the floor sometime in May. Feingold said the same thing on the floor on Thursday. Feingold's staff is actively seeking a vehicle for their bill in the event it cannot be treated independently. They had discussed attaching it to term-limits legislation or Kennedy/Kassebaum. Despite McCain's strong ties to Dole, Feingold's staff believes he is serious about pushing reform.

A Senate vote on the bill would be close, and would depend on the support of Republican conservatives like Kyl (AZ) and Abrams (R-MI), who haven't yet shown their cards. The active sponsorship of Thompson (R-TN) has helped. Opposition to the bill is led by Sen. McConnell (R-KY). Sen. Warner (R-VA) has held several hearings on the various proposals and is unfavorably disposed to them. The next such hearing is scheduled for May 1 and will highlight the problems with free tv. Feingold's staff has asked us for help in preparing for this hearing.

House

Speaker Gingrich confirmed last week that the House will vote on reform this summer. Meanwhile, it was announced at a meeting of the House Democratic Caucus last week that there will be a leadership campaign finance reform bill May 1. Gephardt will sponsor the bill, which will include the following provisions: limitation of \$8,000 on PAC contributions; \$600,000 spending caps in general elections; Emily's List loophole, free tv; and some unspecified soft money provisions.

The anti-union backlash has the most momentum in the House, where Rep. Fawell (R-IL) has indicated he will try to put legislative weight behind the 1988 Supreme Court decision that requires unions to return dues where requested by members who object to the unions' political activity.

Independent Alternatives

Ex-Journalist Paul Taylor has published petitions asking the networks to supply the candidates five minutes of free prime time every night during the final month of the election. He hopes that the candidates will use the time for "talking head" presentations -- substantive events as opposed to journalist-driven ones. The petition was signed by a number of well-respected public figures, among them Walter Cronkite and a number of former legislators.

JOSEPH E. SANDLER
GENERAL COUNSEL

Joe
Campaign
fund

202/863-7110 PHONE 202/863-8081 FAX

LC: *Elene*

Kathy--

Attached for your information and files are copies of the testimony given by Don Fowler and Haley Barbour at the Senate Rules Committee hearing.

Thanks again for your help.

Joe

DEMOCRATIC NATIONAL COMMITTEE
430 S. CAPITOL ST., SE
WASHINGTON DC 20003

**STATEMENT OF HALEY BARBOUR
CHAIRMAN
REPUBLICAN NATIONAL COMMITTEE
BEFORE THE COMMITTEE ON RULES AND ADMINISTRATION
U.S. SENATE
APRIL 17, 1996**

Mr. Chairman and Members of the Committee, I want to express my appreciation for the opportunity you have afforded me to testify as an advocate for strong political parties. I know many Members of this Committee have been and continue to be committed to preserving and, more importantly, strengthening political parties and commend this Committee for taking time to focus on the important role political parties play in the American political process.

A political party is an association of like-minded individuals who debate issues, attempt to influence government policies and help elect candidates to local, state and federal office. Parties also provide voters a starting point to begin their evaluation of the candidates running under their party banner and what these candidates would do if elected. In short, a political party is the epitome of a First Amendment association which has been given a unique and responsible role in our democratic political process.

The Republican Party is a "grassroots", bottom up organization. It is a federation of state political parties. It is directed from the local level, not from the top down. This is evidenced by the creation of the Republican National Committee (RNC) which is responsible for the management of the Republican Party nationwide.

The Republican National Committee represents millions of Republicans voters, hundreds of thousands of Republican volunteers, scores of thousands of Republican activists who choose their representatives on the RNC and thousands of officeholders at the local state and federal level. As the evidence suggests, the RNC itself, is a broadbased, grassroots organization.

The RNC is an unincorporated association. There is no "RNC Inc." It is re-established, recreated every four years by the elected delegates to the Republican National Convention and operates under rules adopted by those convention delegates for the next four years. These RNC Rules remain in effect until modified by the delegates at the next Republican National Convention. The Rules of the Republican Party as adopted by the 1992 Republican National Convention held in Houston, Texas in 1992 are currently in effect and will be until the 1996 Convention in San Diego, California.

The RNC consists of one hundred and sixty-five Members, including a national committeeman and national committeewoman elected in each of the 50 states and territories and the District of Columbia along with the chairman of each state Republican party.

Under its Rules, the RNC is required to meet at least twice a year to conduct any necessary business. At these RNC meetings issues are debated, strategies are discussed on how to best influence government policies and how to elect Republicans at all levels.

The notion that this RNC business is narrowly focused on federal activity is simply wrong. As I have said, the RNC is not just the party for congressmen and senators. The Republican National Committee is also the official party organization for Republican governors, legislators, county commissioners, mayors, city councilmen and all other state and local Republican officials and candidates.

The RNC has no problem with the proper regulation of its federal election-related activities through federal legislation or rulemaking. The regulation of state and local activity, however, is another matter. It would be altogether fitting and proper for Congress to require an allocation of expenditures for party expenditures that impact on federal, state and local candidates, and for Congress to prohibit the expenditure of funds not subject to the limitation of the Federal Election Campaign Act to pay for the portion of the cost allocated to the federal candidates. Indeed, the Federal Election Commission has already done so. The Republican National Committee, however, opposes the Federal Government's preemption of state law and usurpation of the state's authority to conduct and regulate elections for its state and local officials. This would be the practical effect of any ban on the use of non-federal money by party committees. This has been a centerpiece of many campaign finance proposals.

Non-federal money refers to so-called "soft money" legally raised to support non-federal candidates and the non-federal share of party activities.

Any prohibition against the use of party "non-federal dollars" for legitimate non-federal purposes is bad policy, and the Republican National Committee opposes it.

Forty-five of the 50 states elect their governors in even-numbered years on the same day as the federal elections. State legislative elections have a similar overlap. Skeptics ignore these facts and argue that any kind of 'non-federal money' financial activity is merely backdoor support for our presidential nominee or our congressional candidates. This argument is preposterous. Just ask the fourteen governors elected from 1993 through 1995, 11 in 1994 alone, giving the Republicans control of 31 Executive Mansions. Ask the 469 Republicans elected to state legislatures in 1994, giving Republicans new majorities in 19 legislative bodies in 18 states, so today, for the first time in two generations, most state legislative chambers have GOP majorities. These legislative wins enable 15 of our Republican Governors to work with both houses of their

legislatures controlled by Republicans. Our success and the RNC's effort extended down the ticket, and we made major gains in other state constitutional offices in 1994 including a net gain of 8 Lt. Governors, 7 Attorneys General, 7 Secretaries of State and 8 State Treasurers. The RNC primarily spent non-federal dollars to accomplish this.

In the 1994 election cycle, for example, the RNC spent over \$23 million in non-federal funds to support state and local candidates and the non-federal activities of state and local party committees and itself. This amounted to millions of dollars directly spent on the campaigns of Republican gubernatorial candidates and state legislative candidates. These non-federal dollars were spent simultaneously with the RNC's federal dollar effort to financially support the successful "Republican Revolution", and to become the majority Party in the United States Congress. We plan to match this non-federal support, if not exceed this funding in 1996. These figures do not include the millions of dollars spent by the RNC on behalf of gubernatorial and state legislative candidates in the non-federal election years of 1993 and 1995. All of these "non-federal dollars" were spent under the legal requirements of each state.

By the way, Mr. Chairman, for the record, only twenty-five percent of the RNC's total revenue in the 1994 election cycle was in non-federal contributions. Over seventy percent of RNC revenue came from contributions of \$100 or less. In 1993, 90% of revenue was made up of FEC dollars while in the '93/'94 cycle less than 1% came from PACs. Even though non-federal dollars make up a relatively small percentage of RNC revenue, they were indispensable in supporting our non-federal candidates and our non-federally related programs.

Every penny of RNC non-federal dollars revenue is disclosed as to how and when it is raised and how, when and for what purpose it is distributed. Do not confuse the so-called "party soft money" with "street money". There is total disclosure under current law of every penny of RNC non-federal dollars. Additionally, every penny of RNC money contributed or transferred to state and local candidates or party committees is legal under the laws of the state in which those campaigns occur. The Republican National Committee does not think the Federal Government has or should usurp the authority of the individual states to authorize the raising or the expenditure of funds in campaigns for state and local office.

Many states have very stringent campaign finance laws, and the national parties must abide by those laws as their activities relate to state and local elections. One state, however, has no right to impose its laws on another state, which may choose to have an entirely different set of campaign finance laws. And the Federal Government has no business dictating the campaign finance laws affecting state and local elections in either of those states or in any other.

How can the Federal Government justify making the contributions and expenditures of the state party on behalf of its candidate for governor for the purposes of voter registration subject to federal law? What about county parties? Would county party

voter registration efforts be subject to the limitations of the state party and the prohibitions against the national party? Why would the Federal Government and Federal Election Commission have any authority to limit contributions to state parties, if those contributions are to be used to affect state and local elections? Why would the Federal Government have any right to limit state party fundraising or expenditures for the purposes of voter registration?

I am sure, Mr. Chairman, that you have worked with Governor Allen, with Republican legislators and county and municipal officials in Virginia. The vertical, party relationship among Republican elected officials at the various levels of government is important. It is important not just in theory but in practical effect. Witness the tremendous influence our outstanding Republican governors have had on the congressional agenda of the new Republican majorities in Congress. Witness the successful drive for a prohibition to stop unfunded mandates from being imposed by the Federal Government on state and local governments. Witness the reform of welfare by converting federal expenditures for most welfare programs to block grants.

Both politically and governmentally it is important that the tie between federal officials and state and local officials within the party not be broken.

The practical effect of any Congressional ban on the use of "non-federal dollars" would largely sever the tie between the national party and our state and local parties and officials. Many states choose to allow corporate contributions and individual contributions in excess of the Federal Election Campaign Act limits to candidates for state and local office. Contributions to state and local candidates and party committees by the national party from funds which are raised and distributed in compliance with state law, even though those funds would not be eligible for use on behalf of candidates for federal office, are legal and proper under the laws of such states, and a preponderance of our contributions to state and local candidates and parties are derived from such funds, where allowed.

The RNC as a nationwide, grassroots, political association, has and is committed to continue to support Republican election activity at *all* levels. This includes not only giving direct financial support to our candidates to the extent allowed by federal, state and local laws, but also through voter registration efforts, absentee ballot programs, list development projects as well as through other voter programs and party building activities.

Many ignore these facts and attempt to categorize all national party expenditures as federal. They also want to view all state and local party generic voter programs for any election where both federal and non-federal candidates are on the ballot as exclusively subject to federal spending restrictions. As a result, they would require all costs associated with these activities to be paid with contributions raised under federal campaign finance laws. These "reformers" would totally ban the use of non-federal dollars to fund the non-federal portion of such expenses. If this kind of a measure were

adopted it would result in an unwarranted federal intrusion into state activity and would be constitutionally suspect.

Not only would a ban on raising and spending non-federal dollars preempt state law and sever the tie between national parties and their state and local candidates and party organizations, it does nothing about non-disclosed, non-party soft money. Perversely, the effect would be to increase the power and influence of special interest groups not subject to the law. The more political parties are cut out of the election process the more potential there is for special interests to control the outcome of elections and to influence policy agendas. This is not what should result from campaign finance reform.

Allow me to provide a couple of examples of how special interest money has pervaded recent campaigns. The amount of money already spent by special interests on negative advertising against Congressman Randy Tate of Washington amounts to more than Congressman Tate spent for media in his campaign when he was elected in 1994. Also, in the recent special Oregon Senate election, Gordon Smith felt the impact of special interest money. Although both campaigns spent approximately \$1.1 million on advertising, Ron Wyden's campaign received the additional benefit of more than \$850 thousand spent on media advertising by special interest groups, mostly attacking Smith.

I am sure the members of this Committee have read or heard about the AFL-CIO's multimillion dollar effort to elect Democrats. The AFL-CIO has announced it will spend \$35 million to try to buy back control of the House for Democrats this year. They are getting the money for this massive, partisan campaign to defeat Republicans through compulsory union dues, even though 40% of their membership voted for Republicans in 1994.

To fund this unprecedented political undertaking the AFL-CIO leadership rammed through a resolution at its convention last month that requires members of its affiliated unions to pay a \$25 million surcharge in union dues for next year. This surcharge, which was imposed beginning April 1, 1996, is an involuntary 36% increase in union dues for each of its 13.1 million union members. This \$25 million dollars is only part of the aforementioned \$35 million House effort, and only a part of a greater union expenditure for other races. It comes on top of the \$20 million spent last year to attack the balanced budget and Republican Members of Congress, all paid for with compulsory union dues.

A gross injustice is being visited upon the 40% of union members who voted for Republicans in 1994. Imagine that you are a rank and file union member who voted for a Republican Congressman and/or Senator. Now comes the hand of the union boss dipping into your pocket taking your hard-earned money to defeat the person you voted for. It is unconscionable.

No union member should be forced to make compulsory campaign contributions to support any candidate or issue unless they freely choose to do so. That is the foundation of our constitutional form of government and the First Amendment freedoms we enjoy as

citizens. To be forced, as a condition of employment, to do otherwise is wrong. But that is exactly what is happening here. Further, none of this spending of compulsory union dues is disclosed to the public or reported by the unions.

Genuine campaign finance reform requires an end to the use of compulsory union dues and full disclosure of all funds that unions spend for political activity. The parties and candidates fully report but unions do not. This is campaign finance reform you should adopt.

The AFL-CIO's public plan is to spend \$35 million to defeat 73 Republicans and put Democrats back in control of the House. That is an average of \$479,000 per race. In 1994, the average House candidate spent about \$409,000. All party committees combined can legally spend only about \$70,000 to help one of their House candidates.

More importantly, how can you favor campaign spending limits when special interests can and do pour in hundreds of thousands or millions of dollars to defeat a candidate? Spending limits would be greatly unfair to the targeted candidates but also would greatly increase the influence of special interests.

As you know Mr. Chairman, many in Congress were concerned that the federal campaign finance laws, adopted in the 70's were smothering grassroots participation in federal elections. As a result, when the law was amended in 1980 one of the primary goals of the legislation was to revitalize grassroots party participation. To some degree that effort has been successful but much more needs to be done to enhance the ability of parties at all levels, national, state and local, to support their candidates and party membership. We must recognize parties' unique and necessary role in our political process. What is disheartening to me, however, is that we fail to learn from past mistakes by over regulating and restricting the political speech of our party organizations.

Although the law has not been amended in 15 years, the Federal Election Commission continues to churn out unnecessary and overly burdensome regulations. It forces political committees like ours to bear the additional cost of litigation expenses in order to challenge these overbroad and sometimes constitutionally suspect rules. The alternative would be to limit our political speech. Frequently, we are required to spend additional party funds if we attempt to comply with these unnecessary rules.

Currently, for example, the RNC is litigating the FEC's newly revised "best efforts" regulations. These regulations attempt to set FEC guidelines on how political committees are to comply with the law's requirement to obtain certain contributor information. The RNC fully endorses full disclosure and attempts to comply with the statutory mandate to obtain contributor information. We strongly believe, however, that the FEC's approach is in direct conflict with legislative intent. We also argue that the FEC rule actually discourages compliance with the "best efforts" requirement.

At the same time the RNC is litigating this issue, however, the Commission has brought an enforcement action against the RNC for not complying with its new rule, even though the RNC has one of the best, if not the best, contributor disclosure rate of any party committee.

We encourage this Committee to correct such administrative abuses through appropriate oversight of the FEC while being sensitive to its status as an independent regulatory agency. The RNC also encourages this Committee to recommend to the Congress legislative amendments when necessary to prevent the FEC's unnecessary overreaching into the affairs of party committees.

I would like to re-emphasize that the RNC is a grassroots association established to elect candidates, to facilitate the exchange of ideas, debate issues and to effect government policies at all levels. Political parties are unlike any other kind of association. Given their unique role and responsibility in our democratic process, Congress should not only be cognizant of that distinction but should make every effort to strengthen the political party process. Congress must actively affirm the fundamental First Amendment right to associate and to speak through political parties.

Mr. Chairman, as you and this Committee contemplate amendments to federal campaign laws, I would like to leave you with these closing thoughts. Campaign finance laws should result in campaigns and elections being more open, fair and more competitive. Parties should be recognized for the unique role they play this process.

The reasons to tread warily in limiting the first Amendment rights of free speech and free association as they relate to campaigns are many. One is particularly overlooked, and that is the practical effect of such things as spending limits and even contribution limits on the body politic.

Americans get their political and campaign information almost exclusively from three sources: the campaigns and parties; special interest groups; and the news media. As government limits or reduces the ability of campaigns and parties to communicate directly with the public, it results in more control over the flow of political and even public policy information being given to the special interests and the news media. Parties and campaigns have no right to a monopoly on political debate. Special interests have a constitutionally protected right to speak and be heard in this debate, and, of course, the news media's right to observe, report and comment is also protected. But if the goal of campaign reform is to reduce the power and influence of special interests, limiting or reducing the ability of campaigns and parties to communicate is 180 degrees off the mark; for the result is to increase the power and influence of special interests, whose funding and spending are generally undisclosed and unlimited, and to give more control over the flow of information to the news media. That is not what the American people want, and it is not what the political process needs.

Mr. Chairman, thank you again for this opportunity.



DEMOCRATIC * NATIONAL * COMMITTEE

Donald L. Fowler, *National Chair* • Christopher J. Dodd, *General Chair*

**TESTIMONY OF DONALD L. FOWLER
NATIONAL CHAIRMAN
DEMOCRATIC NATIONAL COMMITTEE**

**before the
Committee on Rules and Administration
United States Senate**

April 17, 1996

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before you today to discuss the issue of campaign finance reform.

The President has made clear his strong commitment to reforming our campaign finance system. We are proud of that commitment and of the hard work the President has already put into this challenging endeavor. Together with lobbying and ethics reforms, on which the Administration and the Congress have already made so much progress, reforming the campaign finance system is something we have to do as part of the massive task of restoring the confidence of ordinary citizens in our institutions of government. Democracy does not and cannot work when vast numbers of people believe the government no longer belongs to them. For these reasons, we support S. 1219, the McCain-Feingold bill, as a bipartisan framework for campaign finance reform. Through enactment of McCain-Feingold, we can achieve meaningful campaign finance reform while preserving and enhancing the role of the political parties.

Let me offer some thoughts about the need to strengthen the political parties. Although I am here as National Chairman of the Democratic National Committee, I view these issues from the perspective of my own experiences--as a person who has long been interested in and involved in the political process and, most of all, as someone who has spent 30 years working at every level of party organization. It has been my privilege to serve, over those years, as chairman of my own state party in South Carolina and, for almost 25 years, as a member of the DNC.

During those years, I have witnessed--as all of us have--a significant weakening of the parties as institutions and a decline in their role in American political life. It used to be that the

parties were one of the key means by which citizens felt connected to the people who represented them. Through precinct and neighborhood organizations, ordinary citizens were directly involved in the workings of the party; local party officials were in touch with the citizens and in turn reflected their views and needs to the party hierarchy and elected officials. Because parties provided many of the resources their candidates needed to get elected and re-elected, candidates were directly dependent on parties, and once in office, felt a responsibility to the party leadership in the Congress and legislative bodies. The result was a linkage between the people, the party and elected officials that has been sorely lacking in recent years.

There are many reasons for the decline of political parties; volumes have been written on the subject. One key factor, to be sure, is the dominance of television. Campaigning used to be a retail business in which parties played a central role in linking people with their government, by performing many basic public and political functions, including voter registration, persuasion and get out the vote. Television shifted campaigning to a business of wholesale, mass communications in which each candidate is required to formulate her own message, to create her own organization and to raise her own substantial funds to get the message on television. And so we have seen candidates increasingly forced to act as individual entrepreneurs, less and less connected to parties.

It is not surprising (and no accident) that the shrinking role of parties has been accompanied by growing alienation of the American people from, and cynicism about, politics and politicians. The linkage, the involvement, once provided by parties is missing. And into the vacuum created by that shrinkage have come any number of institutions, primarily special interest groups of all sorts who now play the key role in brokering the relationship between the citizens and their elected officials. It is these special interest groups who now represent, or purport to represent, various segments of the population to members of Congress and legislators at all levels of government.

If this entire trend has been an unhealthy one for our democracy--and I believe it has been--then surely part of the solution is to find ways to strengthen political parties as institutions and to enhance and expand their role in American political life.

Part of that burden falls on the party organizations themselves. And in that regard, I am proud to say that our General Chairman, Senator Chris Dodd, and I have made it a priority to begin the business of rebuilding the Democratic Party at the grassroots. We are intensively involved, right now, in building and developing a stronger staff, improving our technology and strengthening the infrastructure of our state party organizations. We have initiated a new national precinct organization program that

I believe will be the first step in getting ordinary citizens in their neighborhoods involved in the actual work of the party once again.

We can already point to one significant accomplishment in this respect, which is the development of a model we call the "Coordinated Campaign." Beginning in the 1990 election cycle, and increasingly since that time, the National Democratic Party has made it a priority to have our state parties create and carry out plans to perform the core functions of voter registration, identification, voter contact and get out the vote jointly on behalf of Democratic candidates up and down the ticket.

These Coordinated Campaigns make use of the current legal ability of state parties to conduct grassroots volunteer activities on behalf of federal candidates without counting against contribution and expenditure limits. Coordinated campaigns have been extremely successful--not only in getting our candidates elected, but in unifying candidates around common messages and themes and making the parties, as institutions, once again, a principal vehicle of support for candidates--and thus critically important players in the system.

With that background, let me turn to some fundamental principles that I believe should guide the Congress in formulating campaign finance reform legislation. As the President has articulated, real campaign finance reform must focus on four objectives:

- First, limit campaign spending;
- Second, restrict the role of special interests, including PACs;
- Third, open up the airwaves to all viable candidates; and
- Fourth, ban the use of soft money, directly or indirectly, in federal campaigns.

As you know, Mr. Chairman, the President has expressed his support for S. 1219, the McCain-Feingold bill, as the bipartisan framework for accomplishing meaningful campaign finance reform. I am pleased to note that this legislation is also co-sponsored by our General Chair, Senator Dodd.

The McCain-Feingold bill would effectively serve the major goals of campaign finance reform as outlined by the President. First, it would limit campaign spending. The bill would encourage candidates to observe voluntary spending limits in exchange for reduced rate broadcast time and low-cost mailing rates, and by raising contribution limits for a complying candidate facing a non-complying opponent.

Second, the bill would restrict the role of special interests by banning PAC contributions to candidates.

Third, the bill would open up the airwaves by offering reduced rates for broadcast time to candidates complying with the spending limits.

Finally, the bill would ban the use of soft money to help federal candidates. Specifically, the bill would prohibit national parties from raising or spending soft money for their own operations. It would also prohibit state parties from spending non-federal, or soft, money for generic campaign activity and for any portion of candidate-specific activity that affects federal candidates. The bill would, however, permit state parties to use non-federal funds, as permitted by state law, for a portion of their administrative expenses, for party meetings and conventions and for activities affecting only state and local candidates.

Under McCain-Feingold, the state parties would continue to be able to conduct an unlimited amount, not only of generic voter registration and get out the vote activity, but also of candidate-specific activity using volunteers--distribution of literature, signs and other materials, mailings handled by volunteers and, for the Presidential campaign, get out the vote phoning, door to door canvassing and similar activities.

These provisions would enhance the role of the parties in several ways. First, with PAC contributions eliminated, the role of the parties' activity on behalf of candidates would become relatively more important. The resources the parties could contribute would consist not only of cash expenditures subject to section 441a(d) limits, but also volunteer grassroots activities which would remain unlimited. These would represent a greater proportion than they now do of the candidate's total resources.

Second, with spending caps imposed on candidates, candidates would require less total contributions than they do now, and more federally-permissible funds would be freed to be contributed to the parties.

Third, the spending caps would mean that parties would be spending more than they now do relative to candidates, both for candidate specific activity and for activity that benefits the entire ticket. In the total universe of political money, the parties would become more significant players.

In closing, Mr. Chairman, let me say that the Democratic National Committee stands ready to work with your Committee and its staff on the McCain-Feingold bill to develop a bipartisan measure that will achieve real reform while preserving and enhancing the role of the political parties. I know the President remains more strongly committed than ever to seeing this task completed, during

the current session of Congress. And if this Congress can accomplish that task, you will have rendered an enormous service to the American people and you will have done much to brighten the future of our democracy.

Thank you very much and I would be pleased to answer any questions you may have.