BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

March 12, 2001

Senator John McCain
Senator Russell Feingold
United States Senate
Washington, DC 20510

Dear Senators McCain and Feingold:

We are scholars who have studied and written about the First Amendment to the United States Constitution. We submit this letter to respond to a series of public challenges to two components of S.27, the McCain-Feingold Bill. Critics have argued that it is unconstitutional to close the so-called Asoft money loophole@ by placing restrictions on the source and amount of campaign contributions to political parties. Critics have also argued that it is unconstitutional to require disclosure of campaign ads sponsored by advocacy groups unless the ads contain explicit words of advocacy, such as Avote for@ or Avote against.@ We reject both of those suggestions.

As constitutional scholars, we are deeply committed to the principles underlying the First Amendment and believe strongly in preserving free speech and association in our society, especially in the realm of politics. We are not all of the same mind on how best to address the problems of money and politics. However, we all agree that the nation=s current campaign finance laws are on the verge of being rendered irrelevant, and that the Constitution does not erect an insurmountable hurdle to Congressional efforts to adopt reasonable campaign finance laws aimed at increasing disclosure for electioneering ads, restoring the integrity of the long-standing ban on corporate and union political expenditures, and reducing the appearance of corruption that flows from Asoft money@ donations to political parties.

The problems of corruption and the appearance of corruption that the McCain-Feingold Bill attempts to address are ones that inhere in any system that permits large campaign contributions to flow to elected officials and the political parties. These problems have been brought to the public=s attention in a rather stark manner through the recent presidential pardon issued to fugitive financier Marc Rich. Regardless of underlying merits of that presidential decision, the public perception that flows from the publicly-reported facts is that large political contributors receive both preferred access to and

preferential treatment from our elected government officials. These perceptions, regardless of their truth or falsity in any individual case, are ultimately very corrosive to our democratic institutions.

I. Limits on ASoft Money@ Contributions to Political Parties from Corporations, Labor Unions, and Wealthy Contributors Are Constitutional.

To prevent corruption and the appearance of corruption, federal law imposes limits on the source and amount of money that can be given to candidates and political parties Ain connection with@ federal elections. The money raised under these strictures is commonly referred to as Ahard money.@ Since 1907, federal law has prohibited corporations from making hard money contributions to candidates or political parties. *See* 2 U.S.C. ' 441b(a) (current codification). In 1947, that ban was extended to prohibit union contributions as well. *Id*. Individuals, too, are subject to restrictions in their giving of money to influence federal elections. The Federal Election Campaign Act (AFECA@) limits an individual=s contributions to (1) $1,000 per election to a federal candidate; (2) $20,000 per year to national political party committees; and (3) $5,000 per year to any other political committee, such as a PAC or a state political party committee. *Id*. ' 441a(a)(1). Individuals are also subject to a $25,000 annual limit on the total of all such contributions. *Id*. ' 441a(a)(3).

The soft money loophole was created not by Congress, but by a Federal Election Commission (AFEC@) ruling in 1978 that opened a seemingly modest door to allow non-regulated contributions to political parties, so long as the money was used for grassroots campaign activity, such as registering voters and get-out-the-vote efforts. These unregulated contributions are known as Asoft money@ to distinguish them from the hard money raised under FECA=s strict limits. In the years since the FEC=s ruling, this modest opening has turned into an enormous loophole that threatens the integrity of the regulatory system. In the recent presidential election, soft money contributions soared to the unprecedented figure of $487 million, which represented an 85 percent increase over the previous presidential election cycle (1995-96). It is not merely the total amount of soft money contributions that raises concerns, but the size of the contributions as well, with donors being asked to give amounts of $100,000, $250,000, or more to gain preferred access to federal officials. Moreover, the soft money raised is, for the most part, not being spent to bolster party grassroots organizing. Rather, the funds are often solicited by federal candidates and used for media advertising clearly intended to influence federal elections. In sum, soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials.

The McCain-Feingold bill would ban soft money contributions to national political parties by requiring that all contributions to national parties be subject to FECA=s hard money restrictions. The bill also would bar federal officeholders and candidates for such offices from soliciting, receiving, or spending soft money. Additionally, state parties that are permitted under state law to accept unregulated contributions from corporations, labor unions, and

wealthy individuals would be prohibited from spending that money on activities relating to federal elections, including advertisements that support or oppose a federal candidate.

We believe that such restrictions are constitutional. The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. In *Buckley v. Valeo*, the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections. *See* 424 U.S. 1, 23-29 (1976). Significantly, the Court upheld the $25,000 annual limit on an individual=s total contributions in connection with federal elections. *See id*. at 26-29, 38. In later cases, the Court rejected the argument that corporations have a right to use their general treasury funds to influence elections. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). Under *Buckley* and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections.

Moreover, Congress has the power to regulate the source of the money used for expenditures by state and local parties during federal election years when such expenditures are used to influence federal elections. The power of Congress to regulate federal elections to prevent fraud and corruption includes the power to regulate conduct which, although directed at state or local elections, also has an impact on federal races. During a federal election year, a state or local political party=s voter registration or get-out-the-vote drive will have an effect on federal elections. Accordingly, Congress may require that during a federal election year, state and local parties= expenditures for such activities be made from funds raised in compliance with FECA so as not to undermine the limits therein.

Any suggestion that the Supreme Court=s decision in *Colorado Republican Federal Campaign Committee v. FEC,* 1518 U.S. 604 (1996), casts doubt on the constitutionality of a soft money ban is flatly wrong. *Colorado Republican* did not address the constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA=s limits. Indeed, the Court noted that it Acould understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute=s limitations on contributions to political parties.@ *Id*. at 617.

In fact, the most relevant Supreme Court decision is not *Colorado Republican*, but *Austin v. Michigan Chamber of Commerce*, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries. 494 U.S. at 657-61. Surely, the law cannot be that Congress has the power to prevent corporations from giving money directly to a candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from

pouring unlimited funds into a candidate=s political party in order to buy preferred access to him after the election. *See also Nixon v. Shrink Missouri Govt. PAC*, 120 S. Ct. 897 (2000) (reaffirming *Buckley*=s holding that legislatures may enact limits on large campaign contributions to prevent corruption and the appearance of corruption).

Accordingly, closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals= contributions to amounts that are not corrupting.

II. Congress May Require Disclosure of Electioneering Communications, and It May Require Corporations and Labor Unions to Fund Electioneering Communications With Money Raised Through Political Action Committees.

The current version of the McCain-Feingold Bill adopts the Snowe-Jeffords Amendment, which addresses the problem of thinly-disguised electioneering ads that masquerade as Aissue ads.@ Snowe-Jeffords defines the term Aelectioneering communications@ to include radio or television ads that refer to clearly identified candidates and are broadcast within 60 days of a general election or 30 days of a primary. A group that makes electioneering communications totaling $10,000 or more in a calendar year must disclose its identity, the cost of the communication, and the names and addresses of all its donors of $1,000 or more. If the group has a segregated fund that it uses to pay for electioneering communications, then only donors to that fund must be disclosed. Additionally, corporations and labor unions are barred from using their general treasury funds to pay for electioneering communications. Instead, they must fund electioneering communications through their political action committees.

The Supreme Court has made clear that, for constitutional purposes, electioneering is different from other speech. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (A*MCFL*@). Congress has the power to enact campaign finance laws that constrain the spending of money on electioneering in a variety of ways, even though spending on other forms of political speech is entitled to absolute First Amendment protection. *See Buckley v. Valeo*, 424 U.S. 1 (1976). Congress is permitted to demand that the sponsor of a campaign ad disclose the amount spent on the message and the sources of the funds. And Congress may prohibit corporations and labor unions from spending money on campaign ads. This is black letter constitutional law about which there can be no serious dispute.

There are, of course, limits to Congress=s power to regulate election-related spending. But there are two contexts in which the Supreme Court has granted Congress freer reign to regulate. First, Congress has broader latitude to require disclosure of election-related spending than it does to restrict such spending. *See id.* at 67-68. In *Buckley*, the Court declared that the governmental interests that justify disclosure of election-related spending are considerably broader and more powerful than those

justifying prohibitions or restrictions on election-related spending. Disclosure rules, the Court opined, in contrast to spending restrictions or contribution limits, enhance the information available to the voting public. Plus, the burdens on free speech rights are far less significant when Congress requires disclosure of a particular type of spending than when it prohibits the spending outright or limits the funds that support the speech. Disclosure rules, according to the Court, are Athe least restrictive means of curbing the evils of campaign ignorance and corruption.@ *Id.* at 68. Thus, even if certain political advertisements cannot be prohibited or otherwise regulated, the speaker might still be required to disclose the funding sources for those ads if the governmental justification is sufficiently strong.

Second, Congress has a long record, which has been sustained by the Supreme Court, of imposing more onerous spending restrictions on corporations and labor unions than on individuals, political action committees, and associations. Congress banned corporate and union contributions in order Ato avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital.@ *United States v. UAW*, 352 U.S. 567, 585 (1957). As recently as 1990, the Court reaffirmed this rationale. *See Austin v. Michigan Chamber of Commerce*, 491 U.S. 652 (1990); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982). The Court emphasized that it is constitutional for the state to limit the electoral participation of corporations because A[s]tate law grants [them] special advantages -- such as limited liability, perpetual life, and favorable treatment of the accumulation of and distribution of assets.@ *Austin*, 491 U.S. at 658-59. Having provided these advantages to corporations, particularly business corporations, the state has no obligation to Apermit them to use >resources amassed in the economic marketplace= to obtain >an unfair advantage in the political marketplace.=@ (quoting *MCFL*, 479 U.S. at 257). Snowe-Jeffords builds upon these bedrock principles, extending current regulation cautiously and only in the areas in which the First Amendment protection is at its lowest ebb.

Contrary to the suggestion of some of the critics of Snowe-Jeffords, the Supreme Court in *Buckley* did not promulgate a list of certain Amagic words@ that are regulable as Aelectioneering@ and place all other communications beyond the reach of campaign finance law. In *Buckley*, the Supreme Court reviewed the constitutionality of a specific piece of legislation -- FECA. One section of FECA imposed a $1,000 limit on expenditures Arelative to a clearly identified candidate,@ and another section imposed reporting requirements for independent expenditures of over $100 Afor the purpose of influencing@ a federal election. The Court concluded that these specific provisions ran afoul of two constitutional doctrines -- vagueness and overbreadth -- that pervade First Amendment jurisprudence.

The vagueness doctrine demands clear definitions. Before the government punishes someone -- especially for speech -- it must articulate with sufficient clarity what conduct is legal and what is illegal. A vague definition of electioneering might Achill@ some political speakers who, although they desire to engage in discussions of political issues, may fear that their speech could be punished.

Even if a regulation is articulated with great clarity, it may still be struck as overbroad. A restriction that covers regulable speech (and does so clearly) can be struck if it sweeps too broadly and covers a substantial amount of constitutionally protected speech as well. But under the overbreadth doctrine, the provision will be upheld unless its overbreadth is substantial. A challenger cannot topple a statute simply by conjuring up a handful of applications that would yield unconstitutional results.

Given these two doctrines, it is plain why FECA=s clumsy provisions troubled the Court. Any communication that so much as mentions a candidate -- any time and in any context -- could be said to be Arelative to@ the candidate. And it is difficult to predict what might Ainfluence@ a federal election. The Supreme Court could have simply struck FECA, leaving it to Congress to develop a clearer and more precise definition of electioneering. Instead, the Court intervened by essentially rewriting Congress=s handiwork itself. In order to avoid the vagueness and overbreadth problems, the Court interpreted FECA to reach only funds used for communications that Aexpressly advocate@ the election or defeat of a clearly identified candidate. In an important footnote, the Court provided some guidance on how to decide whether a communication meets that description. The Court stated that its revision of FECA would limit the reach of the statute Ato communications containing express words of advocacy of election or defeat, such as >vote for,= >elect,= >support,= >cast your ballot for,= >Smith for Congress,= >vote against,= >defeat,= >reject.=@ *Buckley*, 424 U.S. at 44 n.52.

But the Court did not declare that all legislatures were stuck with these magic words, or words like them, for all time. To the contrary, Congress has the power to enact a statute that defines electioneering in a more nuanced manner, as long as its definition adequately addresses the vagueness and overbreadth concerns expressed by the Court.

Any more restrictive reading of the Supreme Court=s opinion would be fundamentally at odds with the rest of the Supreme Court=s First Amendment jurisprudence. Countless other contexts -- including libel, obscenity, fighting words, and labor elections -- call for delicate line drawing between protected speech and speech that may be regulated. In none of these cases has the Court adopted a simplistic bright-line approach. For example, in libel cases, an area of core First Amendment concern, the Court has rejected the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead the Court has prescribed an analysis that examines, among other things, whether the speaker acted with reckless disregard for the truth or falsity of the statement and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole. Similarly, in the context of union representation elections, employers are permitted to make Apredictions@ about the consequences of unionizing but they may not issue Athreats.@ The courts have developed an extensive jurisprudence to distinguish between the two categories, yet the fact remains that an employer could harbor considerable uncertainty as to whether or not the words he is about to utter are sanctionable. The courts are comfortable with the uncertainty of these tests because they have provided certain concrete guidelines.

In no area of First Amendment jurisprudence has the Court mandated a mechanical test that ignores either the context of the speech at issue or the purpose underlying the regulatory scheme. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

Snowe-Jeffords presents a definition of electioneering carefully crafted to address the Supreme Court=s dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court=s vagueness concerns. Any sponsor of a broadcast will know, with absolute certainty, whether the ad depicts or names a candidate and how many days before an election it is being broadcast. There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.

The prohibition is also narrow enough to satisfy the Supreme Court=s overbreadth concerns. Advertisements that name a political candidate and are aired close to an election almost invariably are electioneering ads intended to encourage voters to support or oppose the named candidate. This conclusion is supported by a comprehensive academic review conducted of television advertisements in the 1998 federal election cycle. *See Buying Time: Television Advertising in the 1998 Congressional Elections* (Brennan Center for Justice, 2000). This study examined more than 300,000 airings of some 2,100 separate political commercials that appeared in the nation=s 75 largest media markets in 1998. The study found that there were a total of 3,100 airings of only two separate commercials that met the Snowe-Jeffords criteria of naming a specific candidate within 60 days of the general election and that were judged by academic researchers to be true issue advocacy. Thus, the Snowe-Jeffords general election criteria were shown to have inaccurately captured only 1 percent of the total political commercial airings, and represented an insignificant 0.1 percent of the separate political commercial airings in the 1998 election cycle. This empirical evidence demonstrates that the Snowe-Jeffords criteria are not Asubstantially overbroad.@ The careful crafting of Snowe-Jeffords stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA.

Conclusion

McCain-Feingold is a reasonable approach to restoring the integrity of our federal campaign finance laws. The elimination of soft money will close an unintended loophole that, over the last few election cycles, has rendered the pre-existing federal contribution limits largely irrelevant. Similarly, the incorporation of the Snowe-Jeffords Amendment into the McCain-Feingold Bill is a well-reasoned attempt to define electioneering in a more realistic manner while remaining faithful to First Amendment vagueness and overbreadth concerns. It seeks to provide the public with important information concerning which private groups and individuals are spending substantial sums on electioneering, and it prohibits corporations and labor unions from skirting the ban on using their general treasury funds for the purpose of influencing the outcome of federal elections. While no one can predict with certainty how the courts will finally rule if any of these provisions are challenged in court, we believe that the McCain-Feingold Bill, as currently drafted, is consistent with First Amendment jurisprudence.

Respectfully submitted,

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