

September 22, 1997

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

Dear Senators McCain and Feingold:

We are academics who have studied and written about the First Amendment to the United States Constitution. We submit this letter to respond to a series of recent public challenges to two components of S.25, the McCain-Feingold bill. Critics have argued that it is unconstitutional to close the so-called "soft 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 offer candidates benefits, such as reduced broadcasting rates, in return for their commitment to cap campaign spending. 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; indeed, we do not all agree on the constitutionality of various provisions of the McCain-Feingold bill itself. Nor are we endorsing every aspect of the bill's soft money and voluntary spending limits provisions. We all agree, however, that the current debate on the merits of campaign finance reform is being sidetracked by the argument that the Constitution stands in the way of a ban on unlimited contributions to political parties and a voluntary spending limits scheme based on offering inducements such as reduced media time.

I. Limits on Enormous Campaign 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 "in connection with" federal elections. The money raised under these strictures is commonly referred to as "hard 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 ("FECA") 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. 2 U.S.C. § 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 ("FEC") 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 "soft 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 last presidential elections, soft money contributions soared to the unprecedented figure of \$263 million. It was not merely the total amount of soft money contributions that was unprecedented, 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 and would prohibit state and local political parties from spending soft money during a federal election year for any activity that might affect a federal election (with exceptions for specified activities that are less likely to impact on federal elections).

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. 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. *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 recent Supreme Court decision in *Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (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 "could 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 2316.

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.

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. Efforts to Persuade Candidates to Limit Campaign Spending Voluntarily by Providing Them with Inducements Like Free Television Time Are Constitutional.

The McCain-Feingold bill would also invite candidates to limit campaign spending in return for free broadcast time and reduced broadcast and mailing rates. In *Buckley*, the Court explicitly declared that "Congress . . . may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 56 n.65. The Court explained: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.*

That was exactly the *Buckley* Court's approach when it upheld the constitutionality of the campaign subsidies to Presidential candidates in return for a promise to limit campaign spending. At the time, the subsidy to Presidential nominees

was \$20 million, in return for which Presidential candidates agreed to cap expenditures at that amount and raise no private funds at all. The subsidy is now worth over \$60 million and no Presidential nominee of a major party has ever turned down the subsidy.

In effect, the critics argue that virtually any inducement offered to a candidate to persuade her to limit campaign spending is unconstitutional as a form of indirect "coercion." But the *Buckley* Court clearly distinguished between inducements designed to elicit a voluntary decision to limit spending and coercive mandates that impose involuntary spending ceilings. If giving a Presidential candidate a \$60 million subsidy is a constitutional inducement, surely providing free television time and reduced postal rates falls into the same category of acceptable inducement. The lesson from *Buckley* is that merely because a deal is too good to pass up does not render it unconstitutionally "coercive."

Respectfully submitted,

Ronald Dworkin
*Professor of Jurisprudence and Fellow of
University College at Oxford University;
Frank H. Sommer Professor of Law
New York University School of Law*

Burt Neuborne
*John Norton Pomeroy Professor of Law
Legal Director, Brennan Center for Justice
New York University School of Law*

Scholars Affirming the Constitutionality of McCain-Feingold Bill's Soft Money Ban and Incentives to Restrain Campaign Spending

TOTAL NUMBER OF SCHOLARS: 126

Barbara Bader Aldave
Dean & Ernest W. Clemens Professor of
Corporation & Securities Law
St. Mary's University of San Antonio School
of Law

George J. Alexander
Elizabeth H. & John A. Sutro Professor &
Director, Institute of International &
Comparative Law
Santa Clara University School of Law

Peter Arenella
Professor of Law
UCLA School of Law

Thomas E. Baker
James Madison Chair in Constitutional Law
and Director of the Constitutional Law
Resource Center
Drake University Law School

Jack M. Balkin
Lafayette S. Foster Professor of Law
Yale Law School

William C. Banks
Professor of Law
Syracuse University College of Law

Jerome A. Barron
Lyte T. Alverson Professor of Law
George Washington University National Law
Center

Loftus E. Becker
Professor of Law
University of Connecticut School of Law

Martin H. Belsky
Dean
University of Tulsa College of Law

Robert W. Benson
Professor of Law
Loyola University School of Law

Arthur L. Berney
Professor of Law
Boston College Law School

Craig M. Bradley
James Louis Calamaras Professor of Law
Indiana University School of Law,
Bloomington

Daan Braveman
Dean & Professor of Law
Syracuse University College of Law

Judith Olans Brown
Professor of Law
Northeastern University School of Law

G. Sidney Buchanan
Baker & Botts Professor of Law
University of Houston Law Center

Thomas D. Buckley
Professor of Law
Cleveland State University, Cleveland-
Marshall College of Law

William G. Buss
O.K. Patton Professor of Law
University of Iowa College of Law

Kenneth M. Casebeer
Professor of Law
University of Miami School of Law

Mary M. Cheh
Elyce Zenoff Research Professor of Law
George Washington University National Law
Center

SOFT MONEY CONT.

Erwin Chemerinsky
Legion Lex Professor of Law & Political
Science
University of Southern California Law
Center

Gordon A. Christenson
Wallace S. Fujiyama Distinguished Visiting
Professor of Law
University of Cincinnati College of Law

Joshua Cohen
Arthur & Ruth Sloan Professor of Political
Science & Professor of Philosophy
Massachusetts Institute of Technology

Charles D. Cole
Lucille Beeson Professor
Cumberland School of Law of Samford
University

George Dargo
Professor of Law
New England School of Law

Michael D. Devito
Professor of Law
Golden Gate University School of Law

C. Thomas Dienes
Patricia Roberts Harris Professor of Law
George Washington University National Law
Center

Victoria J. Dodd
Professor of Law
Suffolk University Law School

Jameson W. Doig
Professor, Department of Politics &
Woodrow Wilson School
Princeton University

Norman Dorsen
Stokes Professor of Law
New York University School of Law

Donald W. Dowd
Professor of Law
Villanova University School of Law

Melvyn R. Durchslag
Professor of Law
Case Western Reserve University Law
School

Susan R. Estrich
Robert Kingsley Professor of Law & Political
Science
University of Southern California Law
Center

Antonio Fernos
Professor of Law
Inter American University Law School

Nancy H. Fink
Professor of Law
Brooklyn Law School

Edwin B. Firmage
Samuel D. Thurman Professor of Law
University of Utah College of Law

Thomas C. Fischer
Professor of Law
New England School of Law

Joan M. Fitzpatrick
Professor of Law
University of Washington School of Law

Edward B. Foley
Associate Professor of Law
The Ohio State University College of Law

SOFT MONEY CONT.

W. Ray Forrester
Professor of Law
University of California, Hastings College of
the Law

Arthur N. Frakt
Dean
Widener University School of Law

William F. Funk
Professor of Law
Lewis & Clark Northwestern School of Law

Donald H. Gjerdingen
Professor of Law
Indiana University School of Law,
Bloomington

Michael J. Glennon
Professor of Law
University of California at Davis School of
Law

Alvin L. Goldman
Dorothy Salmon Professor
University of Kentucky College of Law

Roger L. Goldman
Professor of Law
St. Louis University School of Law

Frank I. Goodman
Professor of Law
University of Pennsylvania Law School

David L. Gregory
Professor of Law
St. John's University School of Law

Joel B. Grossman
Professor of Political Science
John Hopkins University

David Haber
Professor Emeritus of Law
Rutgers University, S.I. Newhouse Center
for Law & Justice

Leora Harpaz
Professor of Law
Western New England College School of
Law

Richard L. Hasen
Associate Professor of Law
Loyola University School of Law

Francis H. Heller
Roy A. Roberts Professor of Law & Political
Science Emeritus
University of Kansas School of Law

Richard A. Hesse
Professor of Law
Franklin Pierce Law Center

Philip B. Heymann
James Barr Ames Professor of Law
Harvard Law School

Thomas P. Huff
Lecturer in Law & Professor of Philosophy
University of Montana School of Law

Howard Owen Hunter
Dean & Professor of Law
Emory University School of Law

Joseph Richard Hurt
Dean & Professor of Law
Mississippi College School of Law

Stewart M. Jay
Professor of Law
University of Washington School of Law

SOFT MONEY CONT.

John Paul Jones
Professor of Law
University of Richmond, T. C. Williams
School of Law

Stephen Kanter
Professor of Law (Dean 1986-1994)
Lewis & Clark Northwestern School of Law

William A. Kaplin
Professor of Law
Catholic University of America, Columbus
School of Law

Gregory C. Keating
Professor of Law
University of Southern California Law
Center

Robert B. Keiter
Professor & Director, Wallace Stegner
Center for Lands, Resources & the
Environment
University of Utah College of Law

Philip C. Kissam
Professor of Law
University of Kansas School of Law

Laurence W. Knowles
Professor of Law
University of Louisville School of Law

Donald P. Kommers
Joseph & Elizabeth Robbie Professor of
Government & International Studies &
Professor of Law
Notre Dame Law School

Milton R. Konvitz
Professor Emeritus of Law
Cornell Law School

John Robert Kramer
Dean & Professor
Tulane University School of Law

James A. Kushner
Professor of Law
Southwestern University School of Law

Lewis Henry LaRue
Alumni Professor of Law
Washington & Lee University School of Law

Bruce Ledewitz
Professor of Law
Duquesne University School of Law

L. Harold Levinson
Professor of Law
Vanderbilt University School of Law

Rosalie Berger Levinson
Professor of Law
Valparaiso University School of Law

Martin L. Levy
Professor of Law
Thurgood Marshall School of Law

Peter Linzer
Law Foundation Professor of Law
University of Houston Law Center

Stephen Loffredo
Associate Professor of Law
CUNY School of Law

Ira C. Lupu
Louis Harkey Mayo Residential Professor
George Washington University National Law
Center

Jim Macdonald
Professor of Law
University of Idaho College of Law

SOFT MONEY CONT.

Hugh C. Macgill
Dean
University of Connecticut School of Law

Joan Mahoney
Professor of Law & Dean Emeritus
Western New England College School of
Law

Harold G. Maier
David Daniels Allen Distinguished Professor
of Law
Vanderbilt University School of Law

Christopher N. May
James P. Bradley Chair in Constitutional
Law
Loyola University School of Law

Frank I. Michelman
Harvard Law School

Arval A. Morris
Professor of Law
University of Washington School of Law

William P. Murphy
Henry Brandis Professor Emeritus of Law
University of North Carolina School of Law

Carol Nackenoff
Chair, Department of Political Science
Swarthmore College

Thomas Nagel
Professor of Philosophy & Law
New York University School of Law

Gene R. Nichol
Dean Emeritus & Professor of Law
University of Colorado School of Law

John E. Nowak
David C. Baum Professor of Law
University of Illinois College of Law

James M. O'Fallon
Frank Nash Professor of Law
University of Oregon School of Law

Daniel R. Ortiz
Professor of Law
University of Virginia School of Law

Vernon Valentine Palmer
Thomas Pickles Professor of Law
Tulane University School of Law

Richard D. Parker
Professor of Law
Harvard Law School

Michael J. Polelle
Professor of Law
John Marshall Law School

Daniel H. Pollitt
Kenan Professor Emeritus of Law
University of North Carolina School of Law

H. Jefferson Powell
Professor of Law
Duke University School of Law

Robert C. Power
Professor of Law
Widener University School of Law

Albert T. Quick
Dean & Professor of Law
University of Toledo College of Law

Jamin Ben Raskin
Professor of Law & Pauline Ruyle Moore
Scholar
American University, Washington College of
Law

Clifford Rechtschaffen
Associate Professor of Law
Golden Gate University School of Law

SOFT MONEY CONT.

David A. J. Richards
Edwin D. Webb Professor of Law
New York University School of Law

William J. Rich
Professor of Law
Washburn University School of Law

Joel E. Rogers
Professor Of Law & Sociology
University of Wisconsin Law School

Irene Merker Rosenberg
Royce R. Till Chair
University of Houston Law Center

Rand E. Rosenblatt
Professor of Law & Associate Dean,
Academic Affairs
Rutgers University School of Law, Camden

David Rudenstine
Dr. Herman George & Kate Kaiser
Professor of Constitutional Law
Benjamin N. Cardozo School of Law

John E. Ryan
Dean, Vice-President & Professor
Roger Williams University School of Law

Rosemary C. Salomone
Professor of Law
St. John's University School of Law

Terrance Sandalow
Edson R. Sunderland Professor of Law
University of Michigan Law School

Thomas O. Sargentich
Professor of Law
American University, Washington College of
Law

Lawrence Schlam
Professor of Law
Northern Illinois University College of Law

Gary J. Simson
Associate Dean for Faculty Development &
Professor of Law
Cornell Law School

David M. Skover
Professor of Law
Seattle University School of Law

W. David Slawson
Torrey H. Webb Professor
University of Southern California Law
Center

Barbara R. Snyder
Professor of Law
The Ohio State University College of Law

Elizabeth K. Spahn
Professor of Law
New England School of Law

Margaret G. Stewart
Professor of Law
Chicago-Kent College of Law

Frank R. Strong
Cary Boshamer Distinguished Professor
Emeritus of Law
University of North Carolina School of Law

Allen N. Sultan
Professor of Law
University of Dayton School of Law

Michael C. Tolley
Associate Professor of Political Science
Northeastern University

SOFT MONEY CONT.

Jon M. Van Dyke
Professor of Law
University of Hawaii, William S. Richardson
School of Law

Eldon D. Wedlock
David H. Means Professor of Law
University of South Carolina School of Law

Philip Weinberg
Professor of Law
St. John's University School of Law

Harry H. Wellington
Dean & Professor
New York Law School

Michael B. Wise
Professor of Law
Willamette University College of Law

Larry W. Yackle
Professor of Law
Boston University School of Law