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**Federal Election Commission**

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Thanks you for inviting me here today . . .

Modern campaign finance rules are obscure, complex, and understood fully by a mere handful of experts. The restrictive, porous and confusing character of campaign finance law is its own cause for concern, but that is something I will not be dwelling on today. By contrast, the broad justifications behind the rules are quite accessible, engaging, and should be debated and understood. How core concepts in this area are construed has real-world consequences for political activity. I will try to demonstrate that today by discussing how one particular fundamental idea behind campaign finance reform may, if not properly applied, prevent political communication and even thwart the press.

One idea animating American campaign finance law traces to the turn of the century. It is the Progressive-era idea that corporations, which raise

money from investors and commercial activity, and are motivated by profit, ought not be allowed to use corporate funds for political purposes. The notion is that the corporate form provides certain protections, and allow “aggregation of wealth” that would be somehow unfair to spend in politics. This idea was forcefully advocated in the early twentieth century by Elihu Root. I mention Root, an appointed official who in those days would have had a type of fame roughly akin to that now enjoyed by, for example, Condoleeza Rice or John Ashcroft, because the Supreme Court in its decision last December, upholding the Constitutionality of the McCain-Feingold bill, led off its opinion by quoting Root. In any case, speaking on behalf of state corporate contribution prohibitions in New York, Root argued that those laws were “to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly, to send members of the legislature to these halls . . .”

Root’s arguments carried the day. So, since 1907 federal law has prohibited corporations from making contributions, expenditures, independent expenditures, or, with the passage of McCain-Feingold, electioneering communications with corporate funds. If companies want to do these things, they must set up a separate account, called a PAC, and raise

money from certain individuals. There are reams of rules and decisions governing PACs that I will leave for another day.

Notwithstanding that law, corporations -- as corporations -- remain vitally interested in politics. It would be odd if they weren't. Congress holds immense power to make or break corporations through tax laws, trade restrictions, subsidies, employment rules, and environmental restrictions, to name just a few. Congress can thwart economic activity generally through regulation, and it can pit one industry against another, or competitor against competitor.

The recent history of campaign finance reform has in large measure been about how to reign in corporations (and labor unions, another aspect of the law I will leave for another day) as corporations attempt -- quite understandably -- to do indirectly what the laws will not allow them to do directly -- that is, to influence federal elections and thereby exert some control over the political and regulatory world in which they operate.

The debate over McCain-Feingold was mostly about this -- about how to keep corporations away from politics. McCain-Feingold, now law, prohibits corporations (or others using corporate money) from making broadcast ads that even mention a candidate for federal office within 30 days of a primary or 60 days of a general election -- called the electioneering

communications ban. McCain-Feingold's ban on national parties receiving any so-called "soft money" was driven by the idea that corporations should not be contributing large sums to national party committees for party building, for use in states where corporate money is allowed, or for party "issue ads". Ostensibly this was to prevent corporate representatives from buying access and legislative action through party committee contributions. Rather than propose a restriction on the size of a corporate contribution, which is how the law seeks to deal with "influence buying" by individuals or PACs, McCain and others opted for the same choice the Progressives made at the turn of the century - an outright ban on corporate contributions to national parties.

The idea of the corporate contribution and expenditure ban is not controversial anymore, and expanding the scope of the ban to include corporate contributions to political parties, or for "electioneering communications," was a policy choice Congress made and the Supreme Court upheld in *McConnell v. FEC*. Even so, policymakers and the public need to think about why corporations originally were, or now should be, barred from direct financial participation in elections, especially given that they remain free to lobby, to curry public or legislative favor by funding charities and social welfare groups, and to engage in other activities that

affect the political debate. Indeed, courts have recognized that corporations have the constitutional right to participate in ballot measure campaigns, in the *First Bank of Boston v. Bellotti* decision from 1978. And the Fortune 500 companies, even before the ban on “soft money” giving, spent roughly ten times as much money on lobbying as on all political contributions, including their hard money PACs. So it seems that neither Congress, as a policy matter, nor the Supreme Court, as a Constitutional matter, believe that any old corporate political activity should or can be banned. Rather, it is the interaction between corporate funding and *candidate* solicitation or receipt of funds, and the allegedly nefarious results that interaction produces, that seems to be at the heart of the equation.

Is that interaction really sufficient to delimit a complete ban on corporate expenditures and contributions? I am not so sure it is. Indeed, if we do not begin to think seriously about why the relation between corporate money and politics is problematic, we may be on course to do unprecedented damage to free speech, including the freedom of the press.

Most press activity, you will not be surprised to be reminded, is pursued by corporations. Much press activity is about politics, and commentary and editorials, as well as movies and books, can be quite pointed in their criticism of politicians and candidates. I would hazard that

everyone here has either read about, heard about or seen Michael Moore's movie Fahrenheit 9/11. His movie, and books like the bestseller, "Unfit for Command," are developed, disseminated and promoted by corporations. They express unambiguous and harsh views of people running for federal office, by name. They may be intended to influence the election. This is certainly activity where corporate money is used to promote or oppose *candidates*. Moreover, remember that the greatest complaints about "media bias," whether from the right or the left, usually concern not overt commentary and editorials, but news coverage. Certainly many on the political left view Fox News coverage as promoting Republican candidates, just as many on the right view the news pages of the New York Times and Washington Post as heavily favoring Democrats.

The Federal Election Campaign Act exempts from treatment as prohibited political expenditures, "any news story, commentary, or editorial distributed through the facilities of any broadcast station, newspaper, magazine, or other periodical publication unless such facilities are owned or controlled by any political party, political committee or candidate." But what amounts to a "newspaper, magazine, or other periodical publication"? An in-flight airline magazine? The magazines produced by investment houses such as Fidelity? Does "any... magazine" include the catalogue-type

publications one can receive from stores, such as BJ's Journal or the magazines produced by Costco and Walmart for customers? Newsletters? Both the Act and our regulations are silent. And these, I think, are the easy questions. Is the list of distribution facilities exclusive? Do movies benefit from the press exemption? They would certainly not seem to be "broadcast[s]," or "newspaper[s], magazine[s], or other periodical publication[s]," at least not as those terms are defined in the dictionary or used in everyday parlance. What about books? They don't seem to fit that definition, either. What does it mean to be "under the control of a candidate?" Should a journalist who runs for office be allowed to keep his job, since his work would necessarily be "under the control" of a candidate? How about commentary distributed through sales of DVDs? Is a blog a "periodical publication?" What if the book, or movie, or blog is promoted in advertising material – is that ad protected or not?

As with many laws, what might have made sense when written has become archaic over time. But here, the contours are critical: note that if a corporation funds a movie, book, or article, and it is not entitled to the press exemption, then that book, movie, or article is illegal – not simply limited, but *prohibited*.

A handful of early court decisions discuss the press exemption, but in contexts not merely as challenging as those I've just suggested. Even there, however, courts have hinted that the Federal Election Commission could apply the exemption to the "institutional press" in one way, but not extend it to more unconventional or upstart organizations. While the statute itself does not draw that distinction, the legislative history of the "press exemption" suggests to some that this is an appropriate analytical posture. The House Report from 1974 stated that the exemption "ensures the unfettered right of the *newspapers, TV networks, and other media* to cover and comment on political campaigns."

So some argue that the exemption extends only to newspapers, TV networks, and other media. Or they argue that if it does apply to other forms of publishing, such as books and DVDs, it does so only for "established" entities. As Professor Foley put it in an article this week in the New York Sun, "Books that contain express advocacy would appear to be subject to federal campaign finance rules and not eligible for the media exception, unless an argument could be made that mainstream publishers who spent money to produce and distribute those books do so without a campaign motivation." On the other hand, Craig Holman, a lobbyist at Public Citizen, was quoted as saying, "This is a new issue and there is some confusion as to



how far the media exception will go," but further predicting that publishers would be protected as long as they were engaged in a "business enterprise." But almost any publisher can claim to be in a business enterprise, including any vanity press. Similarly, Norm Ornstein, a prominent supporter of McCain-Feingold and other regulation, says that as long as the publisher is publishing a book to make money and not to help a candidate, it is exempt from the law. Well, note that many prominent "think" magazines, such as Reason, Commentary, Foreign Affairs, Washington Monthly, The New Republic, the Weekly Standard, and many others are published without it ever being presumed that they will make a profit – rather, they are funded at a loss by foundations, public donations, or wealthy publishers. And some of these magazines are clearly published to help certain candidates – many of them make no bones about whom they are rooting for, and one will not find articles supporting George Bush in the New Republic, or supporting John Kerry in National Review.

The Constitution makes no distinctions between the institutional press and average citizens. Nothing suggests that the Framers intended to limit the press exemption to members of the National Press Club or reporters for major dailies and network affiliates. Rather, the press was to be free to all citizens. But if we decline to draw a distinction between the institutional

press and other information outlets, then the exemption for news, editorials and commentary is available to anyone. At that point, the law effectively expires. All ads would become exempt. In fact, nothing in the statute excludes paid advertising from the press exemption. Further, if not distinctions are made, a group of political operatives could, it seems, raise funds from corporations, and publish a newspaper with the purpose of touting the corporations' favored candidate. Does the exemption require that this activity remain unregulated, or can the government consider whether the publication has a bona fide "news" purpose behind it? Students of history in the audience may recall that at the time of the Founding of our nation and for easily a century thereafter, many newspapers were the partisan mouthpieces for political parties. The authors of the Constitution understood such partisan press activity, restricted by the common law standards for libel and slander, as protected speech. Should we? Would CNN, or CBS News, meet Norman Ornstein's requirement that they not be attempting to help a candidate? Who is to decide?

Consider: according to press reports, yesterday a group filed a complaint with the FEC, against CBS, arguing that the knowing publication of false documents, with the intent of influencing the election – they were referring to the documents, which have been shown to most people's

satisfaction to have been forgeries, that purported to show that President Bush had disobeyed direct orders and failed to fulfill his National Guard duty three decades ago – or publication in coordination with a campaign, for partisan purposes, are not covered by the press exemption. And CNN now has on its payroll, providing on-air political analysis, two men – James Carville and Paul Begala – who hold formal positions in the Kerry campaign.

Retaining this favoritism for certain types of “established” entities is a troubling analytical distinction. Recall the underlying logic of the corporate contribution ban, as explained by good old Elihu Root: it was that entities with the ability to accrue wealth through the corporate form should not be able to use that wealth directly in elections by making contributions and expenditures. It was big railroads, big insurance companies and big telephone monopolies whose activities were to be feared. It cannot be consistent with the “spirit of the press exemption,” if I may use such a phrase, that we protect Big Media from regulation but restrict other speakers – when they are doing exactly the same thing. The group that regularly produces documentaries seemingly can get a pass but the groups new to the field cannot? If so, then the law extends protection to large powerful media conglomerates but not to part-time or new outlets.

If “size matters” in campaign finance law, as Root argued, then the presumption should run the other way. The small, upstart kinds of organizations should be less regulated. That might apply not just in the area of press activity, but generally. Much has changed in corporate law over the past 100 years. In 1907, when the original corporate ban was passed, corporations were still the exception, rather than the norm, for doing business. There were no Subchapter S corporations for sole proprietors, and the idea of non-profit corporations surviving off small donations was all but unheard of. Today, on the other hand, almost every small business and every little charity or local advocacy group is incorporated.

Do we have the same governmental interest in regulating a nonprofit organization, a limited liability company, or a subchapter-S corporation as we do a for-profit, multinational on the Forbes 400? If the rationale for the corporate expenditure ban is to prevent wealth accrued through the corporate form from unduly influencing elections, should the wealth of a group be part of the analysis? The Supreme Court approached this question in the *Massachusetts Citizens for Life* decision, where it declared that small, nonprofit corporations that do not take support from other corporations and do not have as their purpose the promotion of political ideas should not be prohibited from making expenditures, but this standard would seem more

stringent that what is necessary to prevent large corporations from unduly influencing elections. Moreover, in last year's decision in *FEC v. Beaumont*, the Supreme Court indicated that it would interpret that Constitutional exception very narrowly, and might be prepared to revoke it entirely, were it to be challenged.

Let me close by briefly discussing the activities of another kind of group, much in the news these days. Independent groups organized under Section 527 of the tax code have been in the news for several months now, first when groups such as Americans Coming Together and Move On accepted very large personal contributions from a handful of rich donors to engage in activities intended to defeat President Bush, and more recently when an independent group called Swift Boat Veterans for the Truth spent a comparatively small amount for a limited advertising buy that attracted a priceless amount of free media. A substantial amount of Swift Vote funding came, again, in large personal contributions from individuals. Those facts have been publicly reported, and I will decline to say more about those matters as they are the subject of some well-publicized complaints filed before the Commission.

Prominent regulatory advocates, including Senator McCain and leading regulatory lobbyists, insist that such groups register, report and follow the contribution limits applicable to political committees. In statements made before the Commission in our recent political committee rulemaking, as well as statements made to the press more recently, they contend that if a group has as its “major purpose” influencing a federal election, it must abide by the same rules that PACs and candidates do. As some of you may know, I believe this argument is incomplete: I read the Act as requiring that a group must make a threshold \$1,000 in expenditures; that is the definition of “political committee” Congress wrote for us, and is at 2 USC 431(4) should you care to look it up. “Major purpose” sounds like a great criteria, but appears nowhere in the Act. Rather, it receives a single mention, and no elaboration, in the Supreme Court’s 1976 *Buckley* decision. What the Court did elaborate was that the statutory definition of “expenditure” must be limited to communications that explicitly advocate the election or defeat of candidates for office, or some other bright line statute. This is how the law regarding independent groups has been interpreted for nearly 30 years. The Court has never reconsidered this, and in *McConnell v. FEC*, it was not asked to reconsider this. Even Senators McCain and Feingold have admitted that the law they sponsored did not

change this. The Swift Boat group, for example, whatever its motives, must advocate the election or defeat of Kerry and spend \$1,000 doing that to meet this requirement. Perhaps they have, and perhaps they haven't – that matter is before the FEC currently and I won't say anything specific about it. But generally, intentions just aren't enough.

What is disturbing, I think, is the clamor to regulate these groups, being led by Senator McCain but now endorsed by the President, for no apparent reason other than that they might affect federal races. Note that there is not the type of interaction between these groups and candidates, nor candidate solicitation or receipt of funds, the nexus for which this regulation of political speech has been accepted. (If there were, the activity would be illegal anyway, with no need for further regulation, as “coordinated” activity is treated as a contribution). What purpose would be served by restricting them? With the Swift Boat group, some individuals with strong opinions about Senator Kerry's Vietnam service were able to bring those views before the nation because of the “soft money” funding (\$100,000 or so) of a donor, and the coverage of their activity by the press. True, that advertisement and the ensuing media storm pulled both campaigns into a debate they may have wanted to handle differently. But elections are not just for the candidates and their campaign consultants: They are the means by which we all debate

whom we want in power. It seems to me that the more participants in that process, the stronger the process. So I am not inclined to agree with those who fault such groups as part of the “problem” with our system.

What do proposals to regulate these groups, and to take a narrow view of the press exemption, have in common? In my view, the problem is that both restrict political activity to fewer and fewer actors. In so doing, they increase the power and importance of those remaining outlets for political expression – and as a result we see more and more activity through independent groups and in press outlets, which many people feel are becoming more partisan.

Once, a wealthy benefactor could fund a fledgling presidential candidate. Contribution limits prevented that, so a benefactor resorted to funding the party, hoping something of his money would help the candidate. That is no longer possible at the federal level, so the donor turns to so-called “outside groups.” Were they to be regulated as political committees, then the donor could spend the funds personally, an activity that remains, for now, constitutionally sacrosanct. Were that to change, we may see them buying media outlets. However it plays out, at each stage, fewer seem able to play the game, but those left to play seem to be precisely the large, powerful interests that Root decried.



I don't know where the stopping point is in this game. "Reform" advocates, as they like to call themselves -- though "regulatory" advocates is a more accurate name -- never announce the end game. Indeed, quite the contrary, they proudly boast that more "reform" will always be necessary, and that that "reform" will never take the shape of less regulation of speech. The resultant system is one full of contradictions and inconsistencies, and always with fewer opportunities for speech. We had better begin to think hard about what we are trying to accomplish, or we may find we have achieved something we would rather not have done.

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