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cc: 'Dan Ortiz' <dortiz@virginia.edu>, '''fwertheimer@democracy21.org''' <fwertheimer@democracy21.org>, 'Trevor Potter' <TP@Capdale.com>, lnoble@crp.org, 'Paul Sanford' <psanford@crp.org>

Subject: Submission in Notice 2004-6

Attached please find a submission for the record in Notice 2004-6.

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- Cover letter to FEC for Ortiz memo.DOC

- Ortiz memo -- FINAL.DOC

April 9, 2004

By Electronic Mail

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2004-6: Political Committee Status

Dear Ms. Dinh:

Democracy 21, the Campaign Legal Center and the Center for Responsive Politics are jointly submitting for the record in the above-captioned matter the attached memorandum prepared by Professor Daniel R. Ortiz of the University of Virginia School of Law. We respectfully request this memorandum be made part of the record of this rulemaking.

Respectfully,

/s/Fred Wertheimer	*/s/ Trevor Potter*	*/s/ Lawrence Noble* */s/ Paul Sanford*
Fred Wertheimer Democracy 21	Trevor Potter Campaign Legal Center	Lawrence Noble Paul Sanford Center for Responsive Politics

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Memorandum

FROM: Daniel R. Ortiz

RE: Constitutionality of Limits on Contributions From Individuals to Political Committees That Make Only Independent Expenditures

DATE: April 9, 2004

This memo addresses whether the limit on contributions from individuals to political committees in 2 U.S.C. § 441a(a)(1)(C) can constitutionally be applied to political committees that make only independent expenditures ("independent expenditure committees").[1] *McConnell v. FEC*, 124 S.Ct. 619 (2003), makes clear that it can. In that case, the Supreme Court not only explicitly made this point, *id.* at 665-66 n. 48, and upheld bans on soft money that were inconsistent with any other result, but also reaffirmed the first principles of *Buckley v. Valeo*, 424 U.S. 1 (1976)(per curiam), which compel it.

Any doubt that Congress can limit contributions to independent expenditure committees stems largely from a single source: dicta in the Supreme Court's fractured decision in *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)(*CalMed*). In *CalMed*, the Supreme Court upheld the Federal Election Campaign Act's (FECA's) $5,000 limit on individual contributions to multicandidate political action committees. At one point, however, the plurality appeared to avoid considering "the hypothetical application" of FECA to political committees that make only independent expenditures. *Id.* at 197 n. 17 (opinion of Marshall, J.). And in a separate opinion, Justice Blackmun, whose fifth vote was necessary for the decision, appeared to suggest that FECA's $5,000 limit could not apply to such committees. He wrote:

> [a] different result would follow if [the $ 5,000 limit] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates .... [Political action committees like the California Medical Association are] essentially

[1] This memo was prepared for Democracy 21 and the Campaign Legal Center. It does not necessarily represent the views of the University of Virginia, where I am the John Allan Love Professor of Law. My professional affiliation is for purposes of contact and identification only.

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> conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat.

Id. at 203 (Blackmun, J., concurring in part and concurring in judgment). Since independent expenditures could pose no threat of actual or potential corruption, Justice Blackmun thought contributions used for that purpose could not corrupt either. The corruptive potential of contributions, he suggested, depended solely on the ultimate use to which an organization would put them. Dissenting on jurisdictional grounds, none of the remaining justices reached the merits. *Id.* at 204-09 (Stewart, J., dissenting).

CalMed necessarily decided more, however, than the plurality and Justice Blackmun suggested. First, although Justice Blackmun said he would distinguish between contributions to committees that made direct candidate contributions and those to committees that made only independent expenditures, his distinction was technically dictum. Since the California Medical Association did make direct contributions to candidates, the facts of the case implicated only the first half of his distinction and that part was all that was necessary for the decision. *CalMed* simply did not involve any of the "pure" independent expenditure committees whose coverage Justice Blackmun speculated about. Thus, even if Justice Blackmun's stated view had represented that of a majority of justices, which it did not, it would technically have had no controlling, precedential effect.

Second, Justice Blackmun's own vote (as well as the plurality's) undercut his dictum. The political committee in *CalMed* argued not just that the $5,000 contribution limit was generally unconstitutional but that it was unconstitutional in a particular way. Even if Congress could limit contributions that the committee would ultimately use for candidate contributions, it argued, Congress could not limit those ultimately used for administrative expenses and possibly for independent expenditures. Brief of Appellants at 34-35, *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981)("Like other political committees, CALPAC may make independent expenditures as well as direct contributions to candidates. To the extent it makes independent expenditures CALPAC engages in first amendment activity that cannot be limited given the result in *Buckley*.) Indeed, on the court below, several judges would have invalidated the $5,000 limit precisely because of its effect on political committees' independent expenditures. *California Medical Ass'n v. FEC*, 641 F.2d 619, 647 (1980) (Wallace, J., dissenting) ("A limitation on donations to committees restricts not only funds available for contributions by the committees to candidates, but also the funds available for independent expenditures through the committee framework. It is by repeatedly forgetting this incontestable fact that the majority erroneously likens the ... donation restriction to the contribution limitations upheld in *Buckley*.").

These other uses, however, did not trouble the Court in *CalMed*. It upheld the $5,000 limit without regard to how the political committee would ultimately use a contribution—a position flatly inconsistent with Justice Blackmun's stated misgivings. If Justice Blackmun's view—that a contribution's ultimate use determined whether Congress could limit it—had controlled, the Court would necessarily have struck down the $5,000 limit at least in part. That limit would clearly have been overbroad insofar as it applied to contributions to political committees that would not be used in ways that counted as contributions to candidates. Congress could have addressed any fear of corruption from candidate contributions in a much more limited and focused way—by limiting only those contributions that political committees would use to contribute directly to candidates. That the Court (with Justice Blackmun's vote) did not strike down the limit on this ground necessarily undercuts Blackmun's own stated position. Despite his misgivings, he himself actually voted to support a broad limit which covered contributions that could be used for purposes of making independent expenditures.

In *McConnell*, the Supreme Court made clear that this reading—that *CalMed* necessarily upheld limits on contributions to independent expenditure committees—is correct. In rejecting Justice Kennedy's "crabbed view of corruption," 124 S.Ct. at 665, which held that only concern for traditional *quid pro quo* corruption could support campaign finance regulation, *McConnell* pointed to *CalMed* as precedent for recognizing "more subtle but equally dispiriting forms of corruption," *id.* at 666. The Supreme Court made clear first that *CalMed* upheld limits on exactly those contributions that Justice Blackmun had questioned:

> [In *CalMed*], we upheld FECA's $ 5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 ... limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, *but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures.*

124 S.Ct. at 665-66 n. 48 (emphasis added). As the last sentence states unmistakably, *CalMed* held that Congress could limit contributions to entities that would use them solely for independent expenditures. *McConnell* then made clear why: *CalMed* necessarily found that such contributions pose a danger of actual or apparent corruption. As the very next sentence in *McConnell* explains, *CalMed* could not have upheld FECA's broad limit on contributions to party and multicandidate committees without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell* itself, the next sentence argues:

> If indeed the First Amendment prohibited Congress from regulating contributions to fund [express advocacy and numerous other noncoordinated expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (*e.g.*, a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id. at 666 n. 48. In other words, if contributions ultimately used to make independent expenditures had no corruptive potential, the overall limit on contributions to multicandidate committees would have been unsustainable. Congress could have justified the limit only insofar as it remedied so-called "pass-through" corruption and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed that. Thus, the overall limit on contributions to multicandidate committees would have been unconstitutionally overbroad if Justice Blackmun's view had been correct. *CalMed*, then, despite its ambivalent dicta, stands for two propositions: (i) that contributions can corrupt independently of their ultimate use and (ii) that Congress can limit contributions to political committees that the recipients would use to make independent expenditures. Any other reading of *CalMed* supplants its holding with dicta.

McConnell's own treatment of FECA's soft money provisions reinforces both these *CalMed* holdings. If contributions that were eventually used as independent expenditures on federal elections posed no corruptive potential—if they were always and necessarily sacrosanct—then the Court would have had to strike down many of the soft money provisions it upheld in *McConnell*, particularly § 323(a), the "core" soft money provision. *Id.* at 659. This provision provides that "national committee[s] of a political party ... may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of th[e] Act." 2 U.S.C. § 441i(a)(1)(Supp. 2003). It makes all funds that the national party committees solicit, receive, spend, or direct—*regardless of how the committees intend to use them*—subject to FECA's amount, source, and disclosure requirements. Contributions that would be spent in coordination with candidates, contributions that would be spent independently on candidates' behalf, and contributions that would be spent on advertisements that do not even mention the party or its candidates are all subject to FECA's requirements.

In themselves, however, these different party activities pose very different threats of corruption. Coordinated expenditures create a significant danger of corruption, *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 457-60 (2001)(*Colorado II*), independent expenditures create less danger, *id.* at 441; *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996)(*Colorado I*)(opinion of Breyer, J.), and speech on pure issues that does not refer to any candidates still less. Yet, those different threats of corruption made no difference to the Court. No matter how a national party committee would put a soft money contribution to use, Congress could ban it. The contribution's ultimate use did not determine its corruptive potential. Rather, the corruptive potential stemmed from the party's ability to give donors access to and influence over its candidates. 124 S.Ct. at 662-63 (influence), 664 (access and influence), 665(access). In upholding FECA's central soft money provision, then, *McConnell* necessarily found that even though independent party expenditures on behalf of candidates could not directly corrupt, *see Colorado I*, 518 U.S. 604 (1996), contributions to party political committees for this purpose could. The corruptive potential of the one was a sufficient but not necessary condition for that of the other.

The same analysis applies to *McConnell's* treatment of FECA's ban on the use of soft money contributions by state and local party committees for federal election activities. Section 323(b) restricts the use of nonfederal funds by state and local party committees to help finance "Federal election activity." 2 U.S.C. § 441i(b)(1) (Supp. 2003). As the Court noted in *McConnell*,

> [t]he term "Federal election activity" encompasses four distinct categories of electioneering: (1) voter registration activity during the 120 days preceding a

> regularly scheduled federal election; (2) voter identification, get-out-the-vote (GOTV), and generic campaign activity that is "conducted in connection with an election in which a candidate for federal office appears on the ballot"; (3) any "public communication" that "refers to a clearly identified candidate for Federal office" and "promotes," "supports," "attacks," or "opposes" a candidate for that office; and (4) the services provided by a state committee employee who dedicates more than 25% of his or her time to "activities in connection with a Federal election." §§ 431(20)(A)(i)-(iv).

124 S.Ct. at 671. Significantly, none of these four categories necessarily involves contributions to candidates and categories 1, 2, and 3 necessarily do *not* unless there is coordination. Thus, if Congress could restrict the use of only those contributions to state and local party committees that the committees in turn contribute to candidates, § 323(b), just like § 323(a), would have necessarily been overbroad and unconstitutional. *McConnell* held, however, that Congress could restrict the use of *all* nonfederal contributions by state party committees "for the purpose of influencing federal elections." *Id.* at 674. The reason was clear. Although these activities might not pose a threat of state and local parties themselves corrupting federal candidates, they would allow the contributors to corrupt through these committees. As the Court explained it,

> Congress ... made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to §323(a)[, the national party committee ban,] by scrambling to find another way to purchase influence. It was neither novel nor implausible for Congress to conclude that political parties would react to §323(a) by directing soft-money contributions to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. .... Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

Id. at 673 (internal citations and quotation marks omitted). Section 323(b) is premised on the simple "judgment that if a large donation is capable of putting a federal candidate in the debt of the contributor, it poses a threat or corruption or the appearance of corruption." *Id.* at 674. *McConnell* identified, moreover, precisely which contributions "pose the greatest risk of this kind of corruption: *those contributions ... that can be used to benefit federal candidates directly.*" *Id.* (emphasis added).

Contributions to political committees pose exactly this same "greatest risk" of corruption. Since an organization not under the control of a candidate must necessarily have the "major purpose" of nominating or electing candidates for federal office to qualify as a political committee, *Buckley v. Valeo*, 424 U.S. at 79, contributions to them, even more than those covered by § 323(b), will likely be used "to benefit federal candidates directly." It does not matter how the political committee actually uses them. Contributions used for direct candidate contributions, coordinated expenditures, and independent expenditures all represent "contributions ... that can be used to benefit federal candidates directly."

This is not to say, of course, that all funds "used to benefit federal candidates directly" necessarily pose this risk. As *McConnell* makes clear, "Congress could not regulate financial contributions to political talk show hosts or newspaper editors *on the sole basis* that their activities conferred a *benefit* on the candidate." 124 S.Ct. at 668 n. 51 (first emphasis added). Something more is needed. In the case of political parties, the added risk comes from their "close relationship … [to] federal officeholders and candidates." *Id.* Parties, the Court thought, were "entities uniquely positioned to serve as conduits for corruption." *Id.*

Independent expenditure committees pose two special dangers long recognized by the Court that make them more like parties than like "political talk show hosts or newspaper editors." First, just as in the case of § 323(b), it is safe to "ma[k]e a prediction …. [that] soft-money donors w[ill] react to § 323(a) [and § 323(b)] by scrambling to find another way to purchase influence." *Id.* at 673. If independent expenditure committees are exempted from coverage as political committees, they will become the primary means for donors to circumvent FECA's new soft money provisions. Donors seeking to influence federal officeholders—donors who previously would have contributed large amounts of soft money to party committees for use in independent campaign advertising and other federal election activities—will contribute instead to independent expenditure committees for exactly the same uses. Such circumvention, all members of the Court agree, "is a valid theory of corruption." *Colorado II*, 533 U.S. at 456.

The circumvention rationale applies with special force to independent expenditure committees that accept money from the general treasuries of corporations and unions. Independent expenditures from these sources have such great corruptive potential that the First Amendment allows them to be banned completely. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *but see FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238 (1986)(defining narrow category of ideological corporation not constitutionally subject to expenditure ban). Thus, corporate and union contributions to independent expenditure committees would represent direct circumvention of the corporate and union expenditure bans and so could clearly be banned in turn. The "independence" of an independent expenditure committee has no power to launder away the contribution's original source.

Second, independent expenditure committees share with parties—and not with talk show hosts and editors—a central characteristic that increases the corruptive potential of contributions made to them. As the Supreme Court has explained, political "parties' capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing … spending limits binding on other political players. And some of these players could marshal the same power and sophistication for the same electoral objectives as political parties themselves." *Colorado II*, 533 U.S. at 455. Independent expenditure committees, like parties and unlike talk show hosts and wealthy individuals, have this same "capacity to concentrate power to elect." As the Court recognized in *Colorado II*, by pooling individual resources and monitoring, rewarding, and punishing more effectively than can any individual the behavior of federal candidates and officeholders, independent expenditure committees can "marshal the same power and sophistication for the same electoral objectives as the political parties themselves." This ability heightens the risk of corruption inherent in their power to serve as conduits. To ignore its relevance would take exactly the "crabbed view of corruption" that

McConnell rejected in holding that factors like a contribution's "size, the recipient's relationship to the candidate or officeholder [it would support], [the contribution's] potential impact on a candidate's election, its value to the candidate, [and the donor's] unabashed and explicit intent to purchase influence," 124 S.Ct. at 665, are all relevant to determining a contribution's corruptive potential.

McConnell supports the constitutionality of not exempting independent expenditure committees from reasonable amount, source, and disclosure requirements in another important way. It strongly reaffirms the basic principles the Supreme Court laid down in *Buckley v. Valeo*, 424 U.S. 1 (1976) and later cases, which permit appropriate regulation to prevent corruption and the appearance of corruption. In these cases, the Supreme Court has consistently held that

> contribution limits, unlike limits on expenditures, entail only a marginal restriction upon the contributor's ability to engage in free communication. ... Because the communicative value of large contributions inheres mainly in their ability to facilitate the speech of their recipients, we have said that contribution limits impose serious burdens on free speech only if they are so low as to prevent candidates and political committees from amassing the resources necessary for effective advocacy.

McConnell, 124 S.Ct. at 655-56 (internal quotation marks and citations omitted). And, although the Court has found that "contribution limits may bear more heavily on ... associational right[s]" than on free speech rights, *id.* at 656, here too it has found their impact limited. Since

> [t]he overall effect of dollar limits on contributions is merely to require candidates and political committees to raise funds from a greater number of persons. ... [A] contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest.

Id. (internal quotation marks and citations omitted).

Subjecting independent expenditure committees to the reasonable regulation that applies to all other political committees satisfies both these tests. First, it does not in any way affect these committees' ability to make independent expenditures. They can spend all their available funds making such expenditures and can make them however they like. All such regulation does "is simply limit the source and individual amount of donations." *Id.* at 658. That this requires independent expenditure committees to seek contributions from a wider range of people causes no constitutional difficulty. *See id.* Second, such contribution limits in no way "preven[t] ... committees from amassing the resources necessary for effective advocacy." *Id.* at 655-56. Again, all they do is change the committees' fund-raising strategy so that they aim for a broader group. Third, bringing independent expenditure committees under reasonable regulation would "satisfy[y] the lesser demand of being closely drawn to match a sufficiently important interest." *Id.* at 656. It would both prevent donors from circumventing § 323(a) and (b)'s ban on soft money contributions to political party committees—money which the parties used, in part, to fund the same activities independent expenditure committees would engage in—and avoid making federal officeholders subject to improper influence by those who contributed the money that independent expenditure committees used to aid the officeholders' elections. Both of these governmental interests, the Supreme Court has held, are sufficiently important to justify reasonable amount, source, and disclosure requirements, *id.* at 661, which is all that encompassing independent expenditure committees within the category of "political committees" would do.