Hon. Mitch McConnell
Chairman, Committee on Rules and Administration
United States Senate
Russell Senate Office Building, Room 305
Washington, DC 20510

Dear Senator McConnell:

This responds to your October 8, 1999, request for my assessment of the October 5, 1999, letter that Common Cause sent to members of the Senate urging support of the McCain-Feingold campaign finance reform bill. That bill would close what Common Cause calls a soft money "loophole" in the law. To support its call for passage, Common Cause expresses concern that "some groups have inaccurately attacked a ban on soft money as an unconstitutional attempt to restrict the exercise of rights that are protected by the First Amendment." Claiming that the attacks are based on "a distortion of the legislation" or "a mischaracterization of the applicable law," Common Cause seeks to "correct the record" and argue that "a ban on soft money is fully constitutional."

In general, the Common Cause letter, like the bill itself, repeatedly blurs the bright line the Supreme Court has drawn between "hard money"--contributions used to expressly advocate the election or defeat of specific candidates, which may be regulated in the interest of preventing corruption or its appearance--and "soft money"--contributions used for all other purposes, including issue advocacy, which may not be regulated. Because Common Cause wants to bring all federal campaign contributions under federal regulation, its letter speaks loosely of contributions that "influence" elections and "affect" campaigns. It says, for example, that get-out-the-vote and voter registration drives and ads that name candidates are activities that "predominantly affect" campaigns and "thus require hard money funding."

Yet that, precisely, is the kind of loose language the Court took great care to avoid in its seminal campaign finance opinion, *Buckley v. Valeo*, 424 U.S. 1 (1976). In fact, in establishing the bright line test, the Court acknowledged that activities not subject to regulation, such as issue ads, would undoubtedly "influence" or "affect" federal elections. Nevertheless, it concluded that the bright line test must be employed because of the unconstitutionally chilling effect of a vague test--such as activities that "predominantly affect" campaigns. And in a string of cases decided since *Buckley* was handed down, the Court has only reinforced its distinction between hard and soft money.

More generally still, with that distinction blurred, Common Cause claims that Congress has "broad" power to protect the political process from corruption or its

appearance. That gets the *Buckley* framework exactly backwards. To be sure, Congress may act to prohibit corruption or its appearance, but not by any means. Rather, given that such legislation implicates the First Amendment, the means must serve that corruption-preventing end and must be narrowly tailored to do so. The presumption, that is, is against Congress's acting and in favor of free campaign contributions and expenditures, which the Court has repeatedly said are core political speech protected by the First Amendment. Only for the limited purpose of preventing corruption or its appearance may Congress act, and then only by effective and narrowly tailored means.

Because the Common Cause letter is so broad, vague, and ambiguous in its assertions, it is difficult to know precisely what those assertions are. Nevertheless, the letter seems to say, at the bottom of page two, that because [hard money] "contributions" to political parties can be regulated, [soft] "money used for purposes other than influencing [sic] federal campaigns, such as for issue ads," can also be regulated. If that is what Common Cause is claiming, two points stand out. First, no court has ever sustained such a conclusion. And second, not surprisingly, whatever the precise contention may be, no legal authority is cited for it.

Earlier in its letter, Common Cause cites *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1989). But *Austin* has nothing to do with soft money or issue ads. It involves express advocacy--an ad specifically urging voters to "elect Richard Bandstra." Later in its letter, Common Cause cites *Buckley* for the general power to regulate federal elections; and it cites a pair of cases upholding vote-buying convictions unrelated to speech or issue advocacy. Beyond those irrelevant citations, the only other "authority" Common Cause cites is "a letter sponsored by the Brennan Center for Justice expressing confidence that a ban on soft money would meet constitutional scrutiny"--a letter signed by "125 constitutional scholars." That is not legal authority, of course. Moreover, it should be noted that the Brennan Center has been on the losing side in every reported campaign finance case in which it has participated. That is hardly a record to inspire confidence in its constitutional judgment.

Here, then, is the legal authority that cuts the other way. First, it is well established that Congress cannot regulate issue ads. See e.g. *Buckley v. Valeo,* 424 U.S. 1 (1976); *Federal Election Commission v. Massachusetts Citizens for Life* 479 U.S. 238 (1986); *Maine Right to Life Committee v. FEC*, 98 F. 3d 1 (1st Cir. 1996), cert den. 118 S. Ct. 52 (1997); *FEC v. Furgatch*, 807 F. 2d 857 (9th Cir. 1987); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F. 2d 45 (2nd Cir. 1980).

Second, while Common Cause is correct that corporate expenditures can be barred for express advocacy in candidate elections, it is equally well established that

corporations have a constitutionally protected First Amendment right to engage in unlimited expenditures for purposes of issue advocacy. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

And that includes the right to make corporate contributions to other groups engaged in issue advocacy. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *C & C Plywood Corp. v. Hanson*, 583 F.2d 421 (9th Cir. 1978).

Third, political parties have at least the same rights to engage in political activity as other groups. In *FEC v. Colorado Republican Federal Campaign Committee*, 116 S. Ct. 2309 (1996), the Supreme Court held that national political parties have the same rights as other private groups to engage in independent expenditures in support of their candidates. (Common Cause participated on the losing side in that case, arguing, much as it does here, that the Constitution allowed greater regulation of political parties.) If political parties have the same rights as other groups to engage in *express* advocacy, which Congress has the power to regulate, surely they have the same rights as other groups to engage in *issue* advocacy, which Congress lacks the power to regulate. That conclusion is supported by a substantial line of cases holding that political parties generally have the same rights as other groups engaged in political activity. See, *e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989);*Geary v. Renne*, 911 F. 2d 280 (9th Cir. 1990), reversed on other grounds 501 U.S. 312 (1991).

Any other result would be absurd: it would suggest that groups such as the Sierra Club, the AFL-CIO, and the National Rifle Association have greater rights to raise and spend money to promote their views on issues than do political parties, which exist largely for that purpose.

The Supreme Court has never ruled specifically, of course, that a ban on soft money for issue ads is unconstitutional. Nevertheless, the precedents just cited, none of which Common Cause addresses, clearly suggest that a ban on soft money used "for purposes other than influencing federal campaigns, such as issue ads," would be found unconstitutional. At the least, given those precedents, it is simply irresponsible to assert, as Common Cause does, that such a ban is constitutional.

In sum, the Constitution provides broad protection for political speech, not broad power to regulate such speech. Indeed, the central holding of *Buckley v. Valeo*, which struck down numerous provisions of the Federal Election Campaign Act, is that Congress's power to regulate political speech is quite narrow: most certainly, it does not reach to issue advocacy or to the funds needed to pay for such advocacy. To the extent that McCain-Feingold regulates such speech or the money to fund it, the act would likely be found unconstitutional.

Yours truly,

Roger Pilon