S. 25: Bipartisan Campaign Reform Act

John McCain and Russell Feingold

This summary of the McCain-Feingold bill, written by its supporters, Senators McCain (R, Ariz.) and Feingold (D, Wisc.), appears more reasonable and less restrictive of freedom of speech than many commentators consider it to be. It greatly extends the scope of federal limitations on contributions and expenditures and limits extensively political speech outside the confines of federal election law.

Obviously people—an agency of the federal government funded by the U.S. Congress—must be put in charge of making the decisions about what would and would not be permissible under such legislation.

SOFT MONEY

Federal election law currently allows individuals to contribute $20,000 and PACs to contribute $15,000 to the national parties. These fully disclosed, regulated contributions are referred to as "hard money" contributions.

However, a gaping loophole, known as "soft money," allows corporations, labor unions and wealthy individuals to make unlimited contributions—totaling over $260 million in the 1996 elections—to the national political parties. "Soft money" is then transferred in unlimited amounts to state parties, which are able to make "soft money" expenditures on activities intended to influence the outcome of a federal election. Thus, funds that are barred by federal law from being contributed directly to federal candidates, such as corporate and labor union treasury monies, are nonetheless being raised and spent by the parties on the candidates' behalf and poured into federal elections.

The McCain-Feingold-Thompson proposal bars the national parties, federal officeholders, and candidates from soliciting, receiving, or spending any funds that are not subject to the limitations and reporting requirements in federal election law. This provision would categorically

shut down the Washington soft money fund-raising machine. The legislation also provides that state and local parties that engage in activities during a federal election year that might affect the outcome of a federal election, such as voter registration and get-out-the-vote efforts, may only do so with funds raised under the federal limits.

INDEPENDENT EXPENDITURES

An *independent expenditure* is defined as an expenditure expressly advocating the election or defeat of a clearly identified candidate that is made without cooperation or consultation with any candidate. Current law requires independent expenditures to be paid for with federally regulated and fully disclosed hard money dollars. For example, corporations and labor unions may only fund independent expenditures through their PACs and are not permitted to use their treasury monies. Further, any expenditure made by an outside organization in consultation with a candidate is considered an in-kind contribution to that candidate.

The legislation requires outside groups to promptly report independent expenditures aggregating $10,000 or more to the Federal Election Commission. If the targeted candidate of the independent expenditure is complying with the spending limits, the FEC must transmit a copy of that advance report to the complying candidate and inform such candidates that they are entitled to an increase in their spending limit equal to the amount of the independent expenditure made against them or for their opponent. This will enable complying candidates to respond on a timely basis to such expenditures without the constraint of a spending cap.

In June 1996, the Supreme Court ruled that political parties could make unlimited hard money independent expenditures when certain circumstances apply. Current law establishes population-based limits on how much parties may spend on "coordinated expenditures" with a particular senate campaign in a given state in connection with a general election. S. 25 allows parties to continue to make coordinated expen-

ditures but only if they agree not to make independent expenditures in the same campaign. Simply put, parties will be unable to make both coordinated expenditures and unlimited independent expenditures in the same federal election.

The bill also tightens current statutory language to ensure that independent expenditures made by political parties are truly independent of any coordination with federal candidates.

"ISSUE ADVOCACY"

Current law and Supreme Court precedent permit the government to regulate campaign expenditures that "expressly advocate" the election or defeat of a candidate but not "issue advocacy" expenditures that only attempt to raise and discuss issues without advocating a particular candidate.

For example, if a corporation or labor union runs a television ad deemed to "expressly advocate" the election or defeat of a candidate, the ad must be funded from their PAC, composed of voluntary and disclosed contributions from their employees or members. If the same entity makes an issue advocacy expenditure, it is permitted to use its treasury monies, usually from shareholder profits or from member dues. These funds are unregulated and undisclosed.

The statutory definition of what constitutes express advocacy has been exploited in recent elections to the point where attack ads disguised as issue advocacy are dominating many federal campaigns. By purposely avoiding the use of such key phrases as "vote for" or "oppose," groups have been able to fund undisclosed, million-dollar electioneering activities completely outside the scope of federal election law.

This proposal includes language that expands the definition of what constitutes express advocacy. True issue ads that do not attempt to advocate the election or defeat of a particular candidate will not be affected by this new law.

The legislation includes a new definition of *express advocacy* to include any general public communication that advocates the election

or defeat of a clearly identified candidate for federal office by using such expressions as "vote for," "support," or "defeat." Further, any disbursement aggregating $10,000 or more for any general public communication that is made within thirty days of a primary election or sixty days of a general election shall be considered express advocacy if the communication refers to a clearly identified candidate and if a reasonable person would understand it as advocating the election or defeat of that candidate.

If a disbursement aggregating $10,000 or more for any general public communication is made prior to thirty days before a primary election or prior to sixty days before a general election, it shall be considered express advocacy if a reasonable person would understand it as advocating the election or defeat of a clearly identified candidate and if the communication is made with the purpose of advocating the election or defeat of a candidate as shown by one or more factors including a statement or action by the person making the communication, the targeting or placement of the communication, or the use by the person making the communication of polling or other similar data relating to the candidate's campaign or election.

FRANKED MASS MAILINGS

Mass mailings are often used by incumbents in an election year to improve their name recognition and share their accomplishments with constituents who have not solicited such a response. Current law recognizes this inherent incumbent advantage by barring the use of such mass mailings ninety days before a House election and sixty days before a Senate election. The McCain-Feingold-Thompson proposal extends this prohibition to the entire calendar year of an election.

ENFORCEMENT

Current law provides campaigns with the option of electronically filing their disclosure statements with the FEC, but many campaigns continue to file handwritten reports that are difficult for the FEC to process and

make available to the public. The McCain-Feingold-Thompson proposal grants authority to the FEC to begin requiring all federal candidates to file their reports electronically, thus improving efficiency and allowing the public greater access to candidate campaign reports.

The McCain-Feingold proposal toughens penalties for "knowing and willful" violations of federal election law by tripling the amount of the penalty the FEC is permitted to assess for such violation. The proposal allows the FEC to randomly audit campaigns to ensure violations have not occurred and to obtain temporary restraining orders or preliminary injunctions for the most flagrant and egregious violations that may be occurring in the closing days and weeks of a campaign.

FOREIGN CONTRIBUTIONS

This provision would prohibit anyone who is ineligible to vote in a federal election, including legal permanent resident aliens, from contributing to federal candidates.