The Center of Policy Attitudes—an independent non-profit—released polling data showing that 74.5 percent of the respondents believe the government is pretty much run by a few big interests looking out for themselves.

If we eliminate the unregulated, unlimited campaign gifts known as soft money, apply our campaign laws to sham issue ads, and increase disclosure, we will slam shut the open door that currently allows anyone—corporations, labor unions, wealthy individuals, even foreign nationals—to purchase limitless influence in our political system.

Under today's loophole-ridden system, advocates and special interest groups are judged not by the strength of their arguments, but by the power of their checkbooks. We urge you to consider the McCain–Feingold bill. It's high time we prove to the American people that we can close the loopholes and restore our democracy.

Thank you for your consideration of this testimony. We welcome any questions you may have.

The CHAIRMAN. Thank you, Congressman Shays.

Mr. Burchfield?

STATEMENT OF MR. BURCHFIELD

Mr. BURCHFIELD. Thank you, Mr. Chairman.

My name is Bobby Burchfield, and I am a partner in the law firm of Covington & Burling here in Washington, D.C. One area of my practice involves campaign finance regulation, and in that practice I represent individuals, campaign committees, corporations, banks, trade associations, and political party committees. I am appearing, however, on my own behalf, and the views I am expressing are my own.

It is an honor and a privilege to be invited to speak here today to this committee, and especially to appear on a panel with Congressman Shays and Congressman Meehan, both of whom I have great respect for.

I applaud the committee for addressing the issue of how campaign finance regulation will affect political parties. Nothing is more fundamental to the survival and functioning of our democracy than unrestricted political dialogue. Because campaign finance regulation has a direct and substantial effect on political debate, I applaud the committee.

Let me ask, first of all, some rhetorical questions.

The first rhetorical question: What is soft money? Soft money is money in the political process that is not subject to the source and amount limitations of the Federal Election Campaign Act. Soft money is not unregulated, however. Each State also regulates contributions to candidates for State and local offices. Soft money received by political parties must be held in separate accounts from hard money contributions, is reportable to the Federal Election Commission, and often is reportable to State election commissions.

All or virtually all political party committees raise and spend soft money. This is perfectly legal, so long as they do not use it to expressly advocate the election or defeat of Federal candidates. Instead, parties use soft money for State election activities and to pay for voter registration, get-out-the-vote drives, issue advocacy, and administrative overhead.

As shown in Exhibit 1 [Exhibits to Mr. Burchfield's testimony can be found in Appendix 12] to my testimony, which my colleague, Mr. Zubowicz, is placing on the board, soft money receipts by the Republican National Committee and Democratic National Committee and their respective Senate and Congressional Committees to-

taled almost $240 million during the 2-year 1998 election cycle, down slightly from $290 million during the 1996 election cycle.

But soft money is also used by corporations, labor unions, and other groups. Those entities use soft money to pay for issue advocacy, defined as political speech that does not expressly advocate the election or defeat of a specific Federal candidate.

Issue advocacy has grown dramatically in recent years, and efforts by Congress, the Federal Election Commission, and State election commissions to regulate it have been consistently rebuffed by the courts as infringements on the First Amendment right of free speech. Exhibit 2 to my testimony is an exemplary two dozen cases striking down such restrictions.

These private entities also use soft money on restricted-class communications. Under the Federal Election Campaign Act, corporations, labor unions, and other organizations may use soft money to communicate with their executives, administrative personnel, members, and shareholders on any subject, including to urge support for particular candidates or issues.

What are the so-called special interests? Campaign finance reform advocates often argue that a prohibition on soft money donations to political parties would "break the stranglehold" of special interests on Congress or even equalize "access" to Congress. Interest groups have many tools at their disposal, however, and soft money donations to political parties are a relatively insignificant one.

In addition to issue advocacy and restricted-class communications, interest groups also engage in lobbying. Exhibit 4 to my testimony is a table prepared by the Center for Responsive Politics, a campaign reform group, showing the top 100 spenders on lobbying during 19908, as reported under the Lobbying Disclosure Act. In every single instance, 100 out of 100, the amount spent on lobbying was far greater than the total amount spent on campaign contributions.

Moreover, if we look at the five most influential organizations in Washington, as ranked by *Fortune* magazine, it is clear that none of them derive their influence from soft money donations.

Number one, the American Association of Retired Persons. As shown on Exhibit 6 to my testimony, during the 1998 election cycle AARP made no hard or soft money contributions, had no reportable restricted-class communications, and apparently paid for no issue advocacy. AARP did, however, spent $9,840,000 on lobbying. No one would argue that AARP has achieved its influence through soft money donations to political parties.

Number two, the National Rifle Association. As shown in Exhibit 7, during the 1998 election cycle the NRA made $1,633,211 in hard dollar PAC contributions, which would not be regulated under the soft money bills; spent $690,000 on candidate-specific restricted-class communications and perhaps much more on non-reportable get-out-the-vote efforts; spent a reported $1,400,000 on issue advocacy; and spent $3,525,000 on lobbying activity. The NRA's soft money donations of $350,000 were less than 5 percent of the spending, much lower than any other pertinent category.

Number three, the National Federation of Independent Businesses. Exhibit 8 shows comparable data for the NFIB. It made

$1.2 million of hard dollar contributions, spent $330,000 on candidate-specific communications to its restricted class, and $6.5 million for lobbying. It made a mere $20,000 in soft money donations, one-quarter of 1 percent of its spending.

Number four, the American–Israeli Public Affairs Committee. Exhibit 9 shows that AIPAC has reached its position of influence with no hard or soft money donations, no reported restricted-class communications, and only $2 million of spending on lobbying during the 1998 cycle.

And, number five, the AFL–CIO. Exhibit 10 shows that during the 1998 election cycle the AFL–CIO made $1,113,140 in hard money contributions to Federal candidates. It spent $1,380,309 on candidate-specific restricted-class communications, and perhaps much more on non-reportable communications; an estimated $50,250,000 on issue advocacy; and $7,400,000 on lobbying. The AFL–CIO's soft money donations of $778,059 were only 1.2 percent of its pertinent spending.

During the 1998 election cycle, Congress considered legislation that would have imposed hundreds of millions of dollars of costs on the tobacco industry. As shown on Exhibit 11, soft money donations from the five major tobacco companies actually declined by more than 20 percent, $1.3 million, in comparison to the 1996 cycle. The figures are $6.2 million in the 1995–96 cycle versus $4.9 million in 1997–98. This is just the opposite of what would be expected if the reformers were correct in their hypothesis that soft money is used as the driver of public policy in this town.

The tobacco industry, rather, used its resources elsewhere. As shown in Exhibit 12, during the 1998 cycle the tobacco industry made soft money donations of $4.9 million and hard money donations of $2.1 million. But both of these figures were dwarfed by its reported $40 million issue advertising campaign and its $77.5 million in lobbying spending.

Other evidence confirms the point that soft money is not, in fact, a device used to buy influence. Exhibit 13 is a chart showing lobbying disbursements and non–Federal donations of the top ten corporate soft money donors during the 1998 election cycle. In only two of ten instances did soft money donations exceed lobbying expenditures and then only minimally.

Looking at these facts, it is simply not reasonable to conclude that a ban on soft money donations to political parties would reduce the influence of special interests in Washington; rather, the soft money going to political parties would instead be redirected into restricted-class communications, issue advocacy, or lobbying, thus further enhancing the power of special interests.

Third question: Do political parties have a moderating effect on special interests? In Federalist No. 10, James Madison addressed special interest groups, which he referred to as "factions." Madison observed that there are but two ways of "removing the causes of faction." Continuing the quotation, "the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests." Madison observed that both of these routes are foolhardy, and that the object of principled government must be to control the effects of factions.

As Madison observed in 1787, elimination of special interests would require suppression not just of soft money donations to political parties, but of other activities that are basic to our democracy—lobbying, communications with membership, and public debate about important issues—all in derogation of the rights of petition, speech, and association protected by the First Amendment. A prohibition on soft money donations to political parties by itself would merely rechannel those dollars to other interest group activities.

Banning donations of soft money to political parties and, thus, channeling more resources to the promotion of those special interests simply does not sound like the best of all ideas.

In contrast to the narrow focus of interest groups, political parties must pursue the broader public interest, as they understand it, since their objective is to get a majority of votes on election day. No single interest group can control a political party because no single interest group comprises a majority of the electorate.

Further, political parties are accountable for the long-term effects of their proposals since their success depends on voter approval at each election. A ban on political party receipt of soft money would reduce the resources available to parties, a shortfall that could not be filled by simply wishing into existence more hard money. Such a ban would, accordingly, weaken the ability of parties to participate in the public debate while simultaneously enhancing the relative power of special interests to dominate that debate. Political parties already complain that interest group spending threatens to marginalize parties as interest groups increasingly control the agenda, crowd out political party comment, and confuse the electorate.

A ban on political party soft money would make matters worse. Voters would have a less clear idea of the party agenda, and parties would find it more difficult to translate election returns into a public mandate. Effective government would suffer.

Finally, if parties were to lose financial resources and, ultimately, influence, interest groups would have less incentive to work with parties. Interest groups would instead choose to spend and speak on their own or form their own alliances with candidates or with other interest groups, thus depriving parties of their salutary moderating role.

Fourth question: Do soft money donations to political parties create actual or apparent corruption? Most advocates of a ban on political party soft money assert that soft money donations buy "access" to officeholders, and thus create an appearance of corruption. Such groups at the Center for Responsive Politics, Common Cause, and the Brennan Center, through their ceaseless, strident, and I believe irresponsible rhetoric, have created unnecessary cynicism about honorable public officeholders.

I have had the privilege of representing many honorable public servants, including some of your colleagues. These are men and women of the highest integrity. As a lawyer and as a citizen, I take umbrage at the suggestion that any corporation, union, or interest group that wants something done on Capitol Hill need only make a large soft money donation to the RNC or the DNC to make it happen. The pro-reform rhetoric has gone well beyond acceptable

hyperbole and has begun to corrode confidence in government. Once the public is persuaded that Congress is dishonorable, merely passing new campaign legislation will not restore public confidence.

Back to the facts. Any individual soft money donation is minimal in relation to total political party fundraising. During the 1998 cycle, the largest soft money donor to the national Republican Party committees provided only 0.62 percent—less than 1 percent—of the $327 million of total funds raised by the national Republican Party committees during that cycle. Similarly, the largest soft money donor to the national Democratic Party committees accounted for only 0.77 percent—again, less than 1 percent—of the $189 million raised by the national Democratic Party committees during that cycle. It is not persuasive to suggest that an entity contributing less than 1 percent of a party's funding could have any significant effect on the party's policies.

Finally, the reformers' claim that soft money has caused confidence in the political system to decline is not supportable. As Exhibit 15 shows, the decline in voter turnout that began after 1960 has continued unabated by the sweeping campaign finance reforms of 1974. Exhibit 16 shows the rapidly declining participation in the taxpayer checkoff that supports public funding of Presidential campaigns. Taxpayers are overwhelmingly telling us that they want campaigns funded by private money, not public money. Further, I am aware of no evidence that campaign finance reforms are likely to enhance voter participation in elections or public confidence in government.

In short, the rhetoric surrounding soft money is not borne out by the facts.

And, finally, are there constitutional issues raised by a proposed ban on political party soft money? A prohibition or limitation on political party receipt and expenditure of soft money raises three separate constitutional concerns. The first concern is the infringement of free speech and violation of the First Amendment. Restrictions on the ability of political parties to engage in issue discussion, like restrictions on the ability of independent groups to engage in issue discussion, restrict the right to free speech.

In addition, campaign finance advocates recognize that merely restricting soft money donations to political parties would be wholly ineffective in reducing the perceived ills. Thus, reform legislation necessarily imposes restrictions such as quiet periods before the election in the weeks preceding an election in which even independent groups may not exercise their First Amendment rights to engage in issue advocacy. These ancillary restrictions on speech are a blatant affront to the First Amendment.

A soft money ban would also run afoul of the Tenth Amendment and the Federalist system. The political parties located in Washington, D.C., are national parties, not Federal parties. They support candidates not just in Federal races but in State and local races, in compliance with State and local law. At the present time, 30 States allow corporate contributions and 37 allow labor union contributions in State and local elections. Imposition of Federal contribution limits on national parties would improperly arrogate authority over State campaign financing decisions to the Federal Government.

Legislative proposals to ban party receipt of soft money also seek to impose restrictions on State parties as well. They cannot be effective otherwise. Never before has the Federal Government taken the position that it can regulate such a basic element of State governance as how candidates for State office are allowed to campaign.

A third constitutional infirmity results from the proposed unequal treatment of political party speech in relation to speech of other entities. Whereas a corporation or labor union can use unregulated funds to engage in issue advocacy, the reform proposals would extensively regulate and burden political party issue advocacy. This unequal treatment is a violation of the due process clause of the Fifth Amendment.

Once the facts are carefully analyzed, the case for banning political party soft money is, in my view, weak indeed. Even if such a ban passed judicial review—an unlikely prospect—it would be wholly ineffective at reducing the influence of special interest. It might well have the opposite effect of enhancing the influence of special interests. Political parties would be further weakened and marginalized, and effective government would suffer.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Burchfield follows:]

STATEMENT OF BOBBY R. BURCHFIELD, PARTNER, COVINGTON & BURLING, WASHINGTON, DC

My name is Bobby R. Burchfield, and I am a partner in the law firm of Covington & Burling located here in Washington, D.C. One area of my practice involves campaign finance regulation, and in that practice I represent individuals, campaign committees, corporations, banks, trade associations, and political party committees. I am appearing, however, on my own behalf, and the views stated here are my own.

It is a distinct honor and privilege to be invited to appear before this Committee. In my opinion, nothing is more fundamental to the survival and functioning of our democracy than unrestricted political dialogue. For over 200 years, the citizens of this country have grappled with truly great issues, almost always in the context of political campaigns. I know this Committee is keenly aware that campaign finance regulation has a direct and substantial effect on political debate, and I applaud your concern about the effect of such regulations on political parties.

The Committee has asked me to address the functions and importance of political parties, and the effect on them of proposed legislation prohibiting them from receiving so-called "soft money." This morning, I will first describe soft money. In particular, I will address the various types and uses of soft money and the perceived growth of soft money spending over the last decade.

My testimony then addresses the use of soft money by the so-called "special interests." I will examine the various avenues for use of soft money available to special interests, and from publicly available information suggest that a ban on soft money donations to political parties would fail to limit the influence of such groups.

Next, I will discuss the importance of political parties in the American political system, and especially the moderating effect political parties have on special interests. Limitations on the ability of political parties to raise money would place parties at a disadvantage in relation to interest groups, undermine the ability of local parties to moderate and focus debate on key public issues, and ultimately impair the ability of political parties to govern effectively.

Next, I will examine the propositions that soft money has a tendency to corrupt the political process, and to reduce public confidence in government. On the facts, these propositions are difficult to sustain.

Finally, I will briefly address the constitutional problems with a prohibition on political party receipt and disbursement of soft money.

I. WHAT IS SOFT MONEY?

Soft money is money in the political process that is not subject to the source or amount prohibitions in the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §431, *et seq.* Since 1974, FECA has limited contributions to political parties to $20,000 per individual per year. FECA prohibits individuals from making aggregate annual contributions greater than $25,000 per year. Contributions subject to these limits are called "hard dollars." Contributions by an individual to a political party in excess of $20,000 per year, or in excess of the individual's $25,000 aggregate limit, are called soft money. It is worth emphasizing that these limits were set in 1974 and have never been adjusted for inflation or population growth. If such adjustments were made, the limits would now approach or exceed $100,000.

The FECA also prohibits parties and federal candidates from accepting contributions from corporations and labor unions for use in federal elections. Donations to political parties from corporations and labor unions are also called soft money.

Each state also regulates contributions to candidates for state and local offices. State limits on contributions by individuals range from around $100 upward, with some states imposing no limits on contributions by individuals. At the present time, 30 states allow corporate contributions, and 37 allow labor union contributions for use in state and local elections.

It is perfectly legal for political parties to accept contributions from individuals above the pertinent federal limits, and to accept contributions from corporations and labor unions. Such money may not be used, however, to expressly advocate the election or defeat of federal candidates. Soft money received by political parties must be held in separate accounts from hard money contributions. All, or virtually all, political party committees raise and spend soft money. Soft money donations and disbursements by the national political parties are reportable to the Federal Election Commission, and in many instances are reportable to state election commissions.

Political parties use soft money for state election activities, and to pay for a portion of party-building activities such as voter registration, get-out-the-vote drives, issue advocacy, and administrative overhead.

As shown in Exhibit 1 to my testimony [Exhibits referenced herein are found in Appendix 12], soft money receipts by the Republican National Committee and Democratic National Committee and their respective Senate and Congressional committees totaled almost $240 million during the two-year 1998 election cycle. This reflects a decline from almost $290 million raised by those six committees during the 1996 election cycle, a decrease most likely explained by the absence of a presidential election in 1998.

It is also important to bear in mind that soft money donations to political parties do not go unregulated. First, both receipts and disbursements of soft money by political parties are publicly reported to the Federal Election Commission, and are now available on the Internet. Second, as noted previously, much of the activity financed by soft money is regulated by state election law. And finally, political party soft money cannot be used by political parties or candidates to advocate the election or defeat of any federal candidate.

Although soft money donations to political parties have recently received much attention from the media and Congress, such donations are hardly the only types of soft money in the political system, and may not even be the most rapidly increasing. Soft money is also used for so-called "issue advocacy," defined as political speech that does not expressly advocate the election or defeat of a specific federal candidate. Issue advocacy has experienced explosive growth in recent years, as labor unions, corporations, and advocacy groups ranging from the Christian Coalition to Campaign for America and the Sierra Club have poured money into advertising and pamphlets advocating pet policies or even criticizing particular federal candidates. Except for issue advocacy paid for by political parties, which is reportable to the Federal Election Commission and sometimes to state commissions, issue advocacy is not reportable. Accordingly, it is impossible to know precisely how much issue advocacy occurred during an election cycle, or who funded it.

Efforts by Congress, the Federal Election Commission, and state election commissions to regulate issue advocacy have been repeatedly and consistently rebuffed by the federal courts as infringements on the First Amendment right to free speech. No fewer than two dozen court decisions have made clear that interest-group advertising or pamphleteering that does not expressly advocate the election or defeat of a federal candidate cannot, consistent with the First Amendment, be subject to contribution or expenditure limits, or even reporting requirements. (See Exhibit 2 for a partial listing of such case law.) Of all entities engaged in issue advocacy, only political parties currently report.

Even though issue discussion may implicate candidates, these court decisions recognize that discussion of political issues is a daily occurrence in this country, and is central to the functioning of democracy. As the Supreme Court explained in *Buckley v. Valeo*, 424 U.S. 1, 42 (1976):

> " [T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Can-

didates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions."

Yet, the Court concluded, under the First Amendment,

"[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45.

A third avenue of soft money spending involves restricted class communications. The FECA excludes from its definition of "expenditure" communications by various entities to their restricted classes. 2 U.S.C. §431(9)(B)(iii). Corporations may use corporate treasury funds to communicate with their executives, administrative personnel, and shareholders on any subject, including to urge support for particular candidates or issues. Labor unions may similarly use treasury funds to communicate with their members on any such subject. Other membership organizations—like the American Medical Association—and trade associations may do likewise. None of these restricted class communications are subject to the hard-dollar limits in FECA, although such communications are reportable if they exceed $2,000 for or against any particular candidate.

Again, this is an area of soft money activity that appears to be rapidly expanding. In the *Washington Post* on March 27, 2000, under the headline "Unions Mobilize to Beat Bush, Regain House," Thomas B. Edsall reported that:

"The AFL–CIO has commissioned extensive research to determine the most effective ways to communicate its political goals to union members. Surveys of members by Democratic pollster Geoff Garin show that a phone call from a fellow union member or a flyer distributed at the workplace by a union member or union leader are among the most effective tools, while direct mail and newsletters are among the least effective.

"Labor will in large part abandon the 'issue ad' strategy of 1996, when the AFL–CIO spent millions running television ads in the districts of vulnerable incumbent Republicans—a tactic that was costly, controversial and relatively ineffective. Instead, the AFL–CIO will concentrate on registering, persuading and turning out union members in force, capitalizing on a trend of increased political participation by union members." (Exhibit 3.)

Mr. Edsall also reports that the United States Chamber of Commerce and the National Federation of Independent Business plan to increase their political activity, although "[b]usiness lacks the readily accessible voter bloc that is the bread and butter of labor . . . ." *Washington Post,* March 27, 2000, p.A10.

II. THE SO-CALLED "SPECIAL INTERESTS"

Campaign finance reform advocates often argue that a prohibition on soft money donations to political parties would reduce the influence of special interests in Washington. We often hear that a prohibition of soft money fundraising by political parties will "break the stranglehold" of special interests on Congress, or "reduce their influence," or even equalize "access" by individuals to Congress. The Committee might find it useful in evaluating this rhetoric to examine the facts relating to interest-group activity in Washington. I will attempt to set forth some of the publicly available information concerning those activities.

Before I do so, however, a few points are worth emphasizing. First, an implicit assumption of many reformers is that donors give money to change the behavior of candidates or officeholders. Rarely do they assert so boldly that donors buy votes of Senators or Congressmen; that is known as bribery, it is illegal, and it is exceedingly rare. Rather, reform advocates often assert more vaguely that political donations, both hard and soft money, represent efforts to buy "influence" or "access."

I am far less cynical about the political process. While some donors may seek "influence" through their donations, I doubt that these efforts succeed. To the contrary, I believe that the overwhelming majority of donors make decisions about donations primarily based upon positions already taken by the candidate or party, not as an effort to change those positions. And I believe the facts bear me out.

Second, it is important to keep in mind that "special interests" are not a new phenomenon in Washington. From the mercantile interests of the early eighteenth century, to the railroad interests of the late eighteenth century, to the veterans interests following the Civil War, World War I, and World War II, to the labor interests in the 1930s and 1940s, to the plethora of interest groups active in Washington today, it is plain to most observers that participatory democracy not only breeds interest groups but needs interest groups.

It is true, by definition, that each interest group pursues a narrow range of self-interests. But it is also true that interest groups provide valuable information to decision makers in Congress and the Executive Branch, and are often able to engage the public in valuable debate about issues that might otherwise go unnoticed. For

those who believe, as do I, that freewheeling, unfettered debate is the lifeblood of democracy, interest groups are essential.

Interest groups have many tools at their disposal, and soft money donations to political parties are a relatively insignificant one. I have previously discussed the ability of corporations, labor unions, membership organizations, and trade associations to engage in issue advocacy and in communications to their restricted classes. As the Committee is well aware, interest groups also engage in lobbying as a means of pursuing their interests.

Federal lobbying expenditures are reported pursuant to the Lobbying Disclosure Act. Exhibit 4 is a table prepared by the Center for Responsive Politics, a campaign finance reform group, showing the top 100 spenders on lobbying during 1998. For each entity, the chart shows annual expenditures on lobbying and a single election cycle total for political contributions. It is worth noting that the CRP's numbers for campaign contributions include both hard and soft money, and contributions to individual candidates as well as to political parties. Exhibit 4 demonstrates that in every single instance, the amount spent on lobbying dwarfed the amount spent on campaign contributions.

Moreover, the degree of influence of a particular organization is often unrelated, or minimally related, to its political contributions. Every year, *Fortune* magazine publishes its list of the most influential organizations in Washington. *See* Jeffrey H. Birnbaum, "Follow the Money," *Fortune* (Dec. 6, 1999) p.206 (Exhibit 5) In the most recent survey, the five most influential organizations were: (1) American Association of Retired Persons ("AARP"); (2) the National Rifle Association of America ("NRA"); (3) National Federation of Independent Business; (4) American Israel Public Affairs Committee ("AIPAC"); and (5) AFL–CIO.

AARP. As shown on Exhibit 6, AARP does not have a political action committee, and during the 1998 election cycle made no hard- or soft-money contributions, had no reportable restricted-class communications, and apparently paid for no issue advocacy. AARP did, however, spend $9,840,000 on lobbying. No one would argue that AARP has achieved its influence through soft money donations to political parties.

NRA. As shown on Exhibit 7, during the 1998 election cycle the NRA contributed only $350,000 of soft money, but made $1,633,211 in hard dollar PAC contributions. Also during the 1998 election cycle, the NRA spent at least $690,000 on candidate-specific restricted-class communications and perhaps much more on non-reportable get-out-the-vote efforts, a reported $1,400,000 on issue advocacy, and $3,525,000 on lobbying activity. The NRA's soft money donations were much lower than any other category of its spending.

NFIB. Exhibit 8 shows comparable data for the NFIB. Although reporting a mere $20,000 in soft money donations, again the lowest amount for any of the pertinent categories, it made $1.2 million of hard-dollar contributions, spent $330,000 on candidate-specific communications to its restricted class, and $6.5 million for lobbying.

AIPAC. Exhibit 9 shows that AIPAC has reached its position of influence with no hard- or soft-money donations, no reportable restricted-class communications, and only $2 million of spending on lobbying during the 1998 cycle.

AFL–CIO. Exhibit 10 shows that the AFL–CIO spent $778,059 on soft money donations during the 1998 election cycle, but made $1,113,140 in hard money PAC contributions to federal candidates. Also during the 1998 election cycle, the AFL–CIO incurred expenses of $1,380,309 on candidate-specific restricted-class communications and perhaps much more on non-reportable communications, and spent an estimated $50,250,000 on issue advocacy. Also during the 1998 election cycle, the AFL–CIO spent $7,400,000 on lobbying activity. Again, soft money donations rank lowest of the pertinent categories by far.

If soft money donations were in fact used to buy results or influence on Capitol Hill, one would expect to see a dramatic increase in soft money donations from an industry whose very existence was threatened by pending legislation. The facts, however, are to the contrary. During the 1998 election cycle, Congress considered legislation that would have imposed hundreds of millions of dollars of costs on the tobacco industry. As shown on Exhibit 11, soft money donations from the five major tobacco companies actually declined during the 1998 cycle in comparison to the 1996 cycle by $1,300,000 ($6.2 million in 1995–96 versus $4.9 million in 1997–98). That is more than a twenty percent decrease during a time when the industry was vigorously opposing legislation it deemed a threat to its very existence.

During this period, the industry used its resources elsewhere. As shown on Exhibit 12, during the 1998 cycle the tobacco industry made soft money donations of $4.9 million and hard money donations of $2.1 million, but both of these figures were dwarfed by its reported $40 million issue advertising campaign and its $77.5 million in lobbying spending.

Other evidence confirms the point that soft money is not, in fact, a device used to buy influence. Exhibit 13 is a chart showing lobbying disbursements and nonfederal donations of top corporate nonfederal donors during the 1998 election cycle, and Exhibit 14 shows such expenditures for various technology firms. Again, these charts show the relative insignificance of soft money donations to political parties in relation to total interest group spending.

Looking at these facts, it is simply not reasonable to conclude that a ban on soft money donations to political parties would reduce the influence of special interests in Washington. Rather, the overwhelming probability is that the soft money going to political parties would instead be redirected into restricted-class communications, issue advocacy, or lobbying, thus further entrenching the very special interests that the reformers are trying to control.

III. THE MODERATING EFFECT OF POLITICAL PARTIES ON SPECIAL INTERESTS

As stated earlier, interest groups are not just an inevitable part of a free democracy, they are a desirable part of democracy. Nevertheless, interest groups do have a propensity to lose sight of the public good by focusing on their narrow self-interests. It is my firm belief, shared by many preeminent political scientists, that political parties serve as a moderating force on interest groups.

In Federalist Number 10, James Madison addressed special interest groups, which he referred to as "factions." Madison defined a faction as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent aggregate interests of the community." No better definition of a special interest group has since been posited.

Madison's wisdom concerning factions is no less relevant today than it was in 1787. Madison observed that there are but two ways of "removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests." Madison observed that both of these routes are foolhardy, and that the "enlightened statesman" should try "to adjust these clashing interests, and render them all subservient to the public good." Since "[e]nlightened statesmen will not always be at the helm," the object of principled government must be to control the effects of factions. One important strength of our large and diverse Union, Madison argued, is its ability to moderate factions and prevent "improper or wicked project[s]" from pervading the Union.

Much can be learned from Madison's discussion of factions. Effective control of special interests would require suppression not just of soft money donations to political parties, but of other activities that are basic to our democracy—the ability of interest groups to engage in lobbying, the right of organizations to communicate with their members, and their right to engage in public debate about issues—all in derogation of the rights of petition, speech, and association protected by the First Amendment. A prohibition on soft money donations to political parties by itself would merely rechannel those dollars to other activities by special interests. Therefore, the Committee confronts two questions: First, would a soft money ban accomplish its essential purpose of reducing the influence of special interests in Washington? And second, would such a ban inflict serious and undesirable damage on political parties?

Clearly, such a ban would not reduce the influence of special interests. As shown, soft money donations to political parties is barely a blip on the screen in relation to other interest group activities funded with soft money. And it is reasonable to assume that money currently going to political parties in the form of soft money donations would merely be redirected to other activities that enhance interest group influence.

But a ban on soft money donations would damage the political parties in ways that are in turn detrimental to the country. As Madison warned, demands of special interest groups can tend to the extreme. An interest group's leaders often care only about currying favor with their limited number of constituents rather than promoting the long-term best interests of the public at large. If the group's effort fails, it can keep trying; if it succeeds, it will be utterly unaccountable to the public at large for the public damage wrought by its proposal. Banning donations of soft money to political parties, and thus channeling more resources to the promotion of these narrow interests, simply does not sound like the best of all ideas.

In contrast to the narrow special interest groups, political parties simply must pursue the public interest (as they best understand it), since their objective is to get a majority of votes on election day. No single special interest group can control

a political party, because no single special interest group comprises a majority of the electorate.

Further, political parties are accountable for the long-term effects of their proposals, since their success depends on voter approval at each election. For this reason, it would be suicidal for political parties to curry favor to the most extreme impulses of interest groups. While a political party may support proposals advanced by an interest group as part of its platform, it will do so only if it believes those proposals, as moderated, will meet with the approval of the general public. Political parties rarely if ever use soft money to advocate the narrow issues of concern to the donors.

Professors Nelson W. Polsby and Aaron Wildavsky of the University of California at Berkeley make this point in their classic book, Presidential Elections (9th ed. 1996), p.326, writing:

> "Winning requires a widespread appeal. Thus the decision to win leads to moderation, to appeals to diverse groups in the electorate, and to efforts to bring many varied interests together. This is why we prefer parties of intermediation to parties of advocacy. Parties of advocacy do not sustain themselves well in government. They fail to assist political leaders in mobilizing consent for the policies they adopt, and this widens the gap between campaign promises and the performance of government."

Similarly, Professor Paul S. Herrnson of the University of Maryland, an expert witness for the Federal Election Commission in federal court litigation, has written:

> "As institutions that aggregate and articulate political interests, political parties act as mediators, or middlemen, between the people and their government. They help to translate the wants and needs of the general public into public policy. In assisting their candidates with running their election campaigns, the national party organizations have begun developing, advertising, and mobilizing public support for party positions. In this way, they have been helping to set the political agenda and furnishing some policy directions for party members elected to office. Thus the strengthening of the party organizations, and especially national party organizations, may lead to the development of a more party-oriented electorate and a more cohesive set of governmental parties. This would enable the parties to become more effective at structuring political debate and in translating public opinion into public policy. For many political observers, the emergence of more responsible political parties is an essential first step toward solving many of our nation's problems and improving the quality of American democracy. Paul S. Herrnson, Party Campaigning in the 1980s, pp. 5–6 (1988).

The Senate recognized the importance of political parties when it passed the Federal Election Campaign Act Amendments of 1974, and expressed its desire to strengthen political parties. This Committee observed that "a vigorous party system is vital to American politics." S. Rep. No. 93–689, p.7, *reprinted in* 1974 U.S.C.C.A.N. 5587, 5593. The Committee predicted that, despite the reforms:

> "parties will play an increased role in building strong coalitions of voters and in keeping candidates responsible to the electorate through the party organization.
>
> "In addition, parties will continue to perform crucial functions in the election apart from fundraising, such as registration and voter turnout campaigns, providing speakers, organizing volunteer workers and publicizing issues. Indeed, the combination of substantial public financing with limits on private gifts to candidates will release large sums presently committed to individual campaigns and make them available for donation to the parties, themselves. As a result, our financially hard-pressed parties will have increased resources not only to conduct party-wide election efforts, but also to sustain important party operations in between elections."

A ban on political party receipt of soft money would reduce the resources available to parties, a shortfall that could not be filled by simply wishing into existence more hard money. Such a ban would accordingly weaken the ability of parties to participate in the public debate, while simultaneously enhancing the relative power of special interests to dominate that debate. Political parties already complain that interest group spending threatens to marginalize parties as interest groups increasingly control the agenda, crowd out political party comment, and confuse the electorate. A ban on political party soft money would exacerbate this situation. Voters would have a less clear idea of the party agenda, and parties would find it more difficult to translate election returns into a public mandate. Effective government would suffer.

And finally, a ban on political party soft money would also reduce the ability of parties to moderate the extreme positions of interest groups. As parties lose financial resources and ultimately influence, interest groups will have less incentive to work with parties. Interest groups would instead choose to spend and speak on their

own, or form their own alliances with candidates or with other interest groups, thus depriving parties of their salutary moderating role.

IV. DO SOFT MONEY DONATIONS TO POLITICAL PARTIES CREATE ACTUAL OR APPARENT CORRUPTION?

Most advocates of a ban on political party soft money assert that soft money donations buy "access" to officeholders, and thus create an "appearance of corruption." The rhetoric on these issues is often quite strident. Numerous campaign finance reform groups are now engaged in round-the-clock claims in the media and in their own publications concerning the corrupting influence of political party soft money. Such groups as the Center for Responsive Politics, Common Cause, the Brennan Center, and Campaign for America have, through their ceaseless, strident, and I believe irresponsible rhetoric, created unnecessary cynicism about honorable public officeholders.

I have had the privilege of representing many honorable public servants, including some of your colleagues. These are men and women of the highest integrity. As a lawyer and as a citizen, I take umbrage at the suggestion that any corporation, union, or interest group that wants something done on Capitol Hill need only make a large soft money donation to the RNC or the DNC to make it happen. The pro-reform rhetoric has gone well beyond acceptable hyperbole, and has begun to corrode confidence in government. Once the public is persuaded that Congress is dishonorable, new campaign laws will not restore public confidence.

As previously shown, soft money donations pale in comparison to lobbying expenditures, issue advocacy, and grassroots activity. The notion that these relatively minor soft money donations are necessary for major corporations, unions, and trade associations to get heard on Capitol Hill is, frankly, insupportable. Perhaps most revealing in the claim that soft money buys "access" to Congress is the implicit acknowledgment by the campaign reform groups that they have no evidence of soft money affecting voting behavior.

But even these vague suggestions of influence-buying do not withstand analysis. While large in absolute dollars, any individual soft money donation is minimal in relation to total political party fundraising. During the 1998 cycle, Philip Morris was the largest soft money donor to the national Republican Party committees, but its donations of $2,027,752 constituted only .62%—less than 1%—of the $327 million raised by the national Republican party committees during that cycle. Similarly, the $1,464,250 of soft money donated by the Communications Workers of America to the national Democratic Party committees constituted only .77% of the $189 million raised by the national Democratic party committees during that cycle. In short, it is not persuasive to suggest that an entity contributing less than 1% of a party's funding could have any significant effect on the party's policies. Rather, a more likely explanation for this largesse is that the donors support the policies already espoused by the party.

Some reform advocates have asked rhetorically why soft money donors would give money to parties if they expected nothing in return, suggesting that soft money donations must buy influence. Again, these reformers fail to understand that donations are a show of support for the party' positions rather than an effort to change those positions. The Trust for Philanthropy estimates charitable contributions during 1998 of $174.5 billion—well over 1,000 times the amount of soft money annually given to political parties. Unless the reformers truly believe that charitable givers expect to derive some tangible benefit from their gifts, their unsupported aspersions about political donations are not persuasive.

Moreover, soft money donations go into the political party soft money accounts, and cannot be earmarked for use in support of individual senators or congressmen. The most effective party fundraisers tend to be well known Senators and Congressmen, often chairmen or ranking members of high profile committees. These fundraisers are less likely to be involved in close races, and typically have little difficulty raising substantial hard money for their own campaigns. Moreover, it is well established that parties spend their resources only on close races where their candidates have a chance to win. Soft money simply does not normally flow to the members who raise it, and thus is unlikely to result in an exchange of dollars for political favors.

Finally, the reformers' claim that soft money has caused confidence in the political system to decline is not supportable. Exhibit 15 shows voter turnout in presidential election years since 1960. The decline in turnout that began after 1960 has continued unabated by the sweeping campaign finance reforms in 1974. Exhibit 16 shows the rapidly declining participation in the taxpayer check-off that supports public funding of presidential campaigns. Taxpayers are overwhelmingly telling us that they want campaigns funded by private money, not public money. Further, there

simply is no public outcry for campaign finance reform, which always ranks low, if it even registers, in polls of issues important to voters. I am aware of no evidence that campaign finance reforms are likely to enhance voter participation in elections or public confidence in government.

In short, the rhetoric surrounding soft money is not borne out by the facts.

V. CONSTITUTIONAL ISSUES.

A prohibition or limitation on political party receipt and expenditure of soft money raises three separate constitutional concerns. The first concern is the infringement of free speech in violation of the First Amendment. The Committee is well aware of the Supreme Court's ruling in *Buckley v. Valeo,* 424 U.S. 1 (1976), that restrictions on political giving and spending interfere with political debate. Such restrictions can survive under the First Amendment only if justified by a compelling government interest in preventing corruption or the appearance of corruption, and if narrowly drawn to achieve that interest. Since soft money cannot, under current law, be used by political parties to expressly advocate the election or defeat of federal candidates, it is used instead for issue discussion, which the Supreme Court and numerous lower courts have held may not be regulated. Efforts to inhibit the ability of political parties to engage in such issue discussion by restricting the resources available to them infringe on the political parties right to free speech.

In addition, campaign reform advocates recognize that merely restricting soft money donations to political parties would be wholly ineffective in reducing or eliminating the perceived ills. They know the soft money donors would simply redirect their money to other activities, such as issue advocacy. Thus, reform legislation necessarily imposes restrictions such as "quiet periods" in the weeks preceding the election in which even independent groups may not exercise their First Amendment rights. These ancillary restrictions on speech are a blatant affront to the First Amendment. I know of no authority who believes these restrictions would survive under current constitutional doctrine.

The United States Supreme Court's recent decision in *Nixon v. Shrink Missouri Government PAC,* 120 S. Ct. 897 (2000), is fully consistent with this analysis. *Nixon* upheld the ability of states to impose reasonable limits on contributions to state and local candidates. Although it did not expand the constitutional protections of *Buckley,* it also did not limit those protections. In short, the First Amendment problems with efforts to ban soft money continue.

The seriousness of these First Amendment issues is well demonstrated by recent efforts to modify the First Amendment itself to allow tighter campaign finance regulation. Thankfully, the efforts have been unsuccessful.

Another constitutional defect in a soft money ban is its insult to the Tenth Amendment and the federalist system. The political parties located in Washington, D.C., are national parties, not federal parties. In addition to supporting federal candidates, the national parties support candidates in state and local elections, in compliance with state and local law. Imposition of federal contribution limits on national parties would improperly arrogate authority over state campaign financing decisions to the federal government.

Again, recognizing that a prohibition of soft money donations to national party committees alone would be wholly ineffective, legislative proposals to ban party receipt of soft money often seek to impose soft money restrictions on state parties as well—even though state party activity not involving federal elections is thoroughly regulated by state campaign finance laws. Never before has the federal government taken the position that it can regulate such a basic element of state governance as how candidates for state office are allowed to campaign.

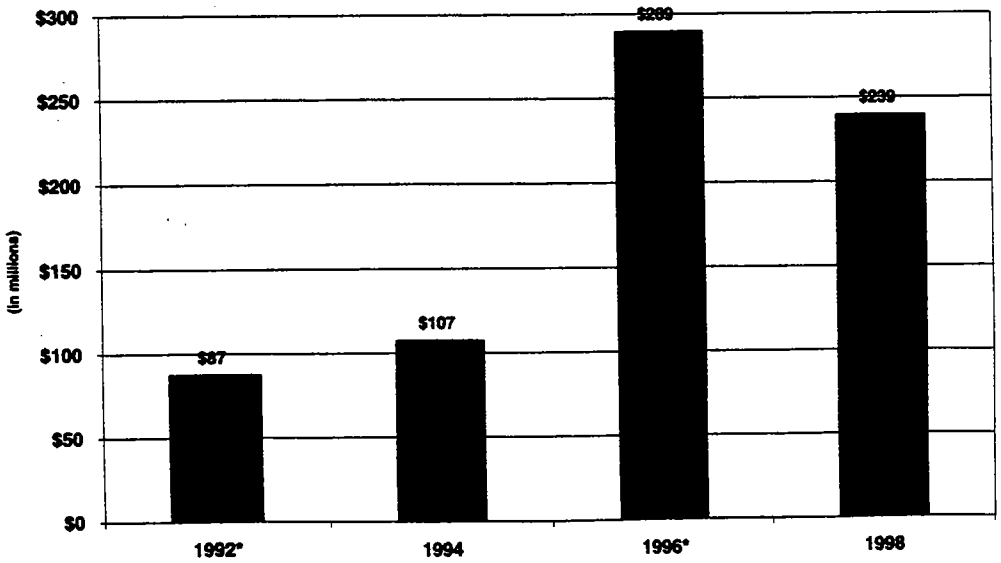
A third constitutional infirmity in the soft money prohibition results from the proposed unequal treatment of political party speech in relation to speech of other entities. Whereas a corporation or labor union can use unregulated funds to engage in issue advocacy, the reform proposals would extensively regulate and burden political party issue advocacy. This unequal treatment is offensive to the due process clause of the Fifth Amendment.

Once the facts are carefully analyzed, and the rhetoric stripped away, the case for banning political party soft money is weak indeed. Even if such a ban passed judicial review, an unlikely prospect, it would be wholly ineffective at reducing the influence of so-called special interests, and might well have the opposite effect of enhancing the influence of special interests in the national debate at the expense of political parties. Political parties would be further weakened and marginalized, and effective government would suffer.

The CHAIRMAN. Thank you, Mr. Burchfield.

BURCHFIELD EXHIBIT 1.

Total Non-Federal Funds Raised by the Six National Political Party Organizations: 1992-1998 Election Cycles



*Denotes presidential election year.

Source: Federal Election Commission.

APPENDIX 12.

EXEMPLARY FIRST AMENDMENT CASES

Brownsburg Area Patrons Affecting Change v. Baldwin, 137 F.3d 503, 505-07 (7th Cir. 1998).

Clifton v. Federal Election Commission, 114 F.3d 1309, 1312 (1st Cir. 1997).

Elections Board of State of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721, 731 (Wis. 1999).

Faucher v. Federal Election Commission, 928 F.2d 468, 470 (1st Cir. 1991).

Federal Election Commission v. American Federation of State, County and Municipal Employees, 471 F. Supp. 315, 316 (D.D.C. 1979).

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 249 (1986).

Federal Election Commission v. Central Long Island Tax Reform Immediately Commission, 616 F.2d 45, 52-53 (2d Cir. 1980).

Federal Election Commission v. Christian Action Network, Inc., 110 F.3d 1049, 1050-51 (4th Cir. 1997).

Federal Election Commission v. Christian Coalition, 52 F. Supp. 2d 45, 53-54 (D.D.C. 1999).

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 839 F. Supp. 1448 (D. Colo. 1993), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir. 1995), *vacated on other grounds*, 518 U.S. 604 (1996).

Federal Election Commission v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987).

Federal Election Commission v. GOPAC, Inc., 917 F. Supp. 851, 861 (D.D.C. 1996).

Federal Election Commission v. National Organization for Women, 713 F. Supp. 428, 433 (D.D.C. 1989).

Federal Election Commission v. Survival Education Fund, Inc., 65 F.3d 285, 290 (2d Cir. 1995).

Iowa Right to Life Committee v. Williams, 187 F.3d 963, 970-971 (8th Cir. 1999).

Kansas For Life, Inc. v. Gaede, 38 F. Supp. 2d 928, 935-36 (D. Kan. 1999).

Maine Right to Life Committee, Inc. v. Federal Election Commission, 98 F.3d 1, 1 (1st Cir. 1996).

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 712-13 (4th Cir. 1999).

Osterberg v. Peca, 43 Tex. S. Ct. J. 380 (Tex. 2000).

Planned Parenthood Affiliates of Michigan, Inc. v. Miller, 21 F. Supp. 2d 740, 743 (E.D. Mich. 1998).

Right to Life of Duchess County, Inc. v. Federal Election Commission, 6 F. Supp. 2d 248, 253 (S.D.N.Y. 1998).

Right to Life of Michigan, Inc. v. Miller, 23 F. Supp.2d 766, 767-68 (W.D. Mich. 1998).

Virginia Society for Human Life v. Federal Election Commission, 83 F. Supp. 2d 668, 676 (E.D. Va. 2000).

West Virginians for Life, Inc. v. Smith, 960 F. Supp. 1036, 1038-39 (S.D.W. Va. 1996).