

December 10, 2007

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

**Re: Comments on Advisory Opinion Request 2007-32
(SpeechNow.org)**

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to AOR 2007-32, an advisory opinion request submitted by SpeechNow.org, seeking the Commission's guidance as to "whether it is required to register with the Commission as a political committee, whether it is subject to the contribution limits of 2 U.S.C. § 441a(a)(1)(C), and whether donors to SpeechNow.org must count their donations to SpeechNow.org against biennial aggregate limits described in 2 U.S.C. § 441a(a)(3)." AOR 2007-32 at 1-2.

Although this advisory opinion request raises serious issues, it is not a serious advisory opinion request. SpeechNow.org knows full well the answers to the questions it poses – for the Commission has recently and repeatedly made clear that 527 groups, just like the requester, which have a major purpose to influence federal elections, which spend money for express advocacy expenditures and which solicit contributions to pay for such expenditures, are required by FECA to register as political committees and to abide by the contribution limits that apply to such committees.

What SpeechNow.org really seeks is a declaration that the political committee requirement, and the appurtenant contribution limits, are unconstitutional. But that is a determination the Commission should not, indeed cannot, make – and certainly not in the context of issuing an advisory opinion. Advisory opinions are for the purpose of addressing questions "concerning the application of the [Federal Election Campaign] Act," 11 C.F.R. § 112.1(a), not for declaring key portions of the Act unconstitutional.

Instead, the Commission should tell SpeechNow.org what it surely already knows – that FECA applies to it; that its proposed activities will require it to register as a political committee; and that its status as a political committee will subject it (and its donors) to the applicable

contribution limits. Then the Commission should send the requester off to the courthouse where it can engage in the constitutional adjudication that it appears to want.

I. SpeechNow.org’s Proposed Activities Will Make It A “Political Committee” Under FECA and Commission Regulations.

The first question posed in the AOR is whether SpeechNow.org must register as a “political committee.”

The statute defines the term “political committee” to mean “any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5(a).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the term “political committee” to “only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” 424 U.S. at 79 (emphasis added). In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court again invoked the “major purpose” test and noted that if a group’s independent spending activities “become so extensive that the organization’s major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.” 479 U.S. at 262 (emphasis added). In that instance, the Court said the group would become subject to the “obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.” *Id.* (emphasis added). The Court in *McConnell v. FEC*, 540 U.S. 93 (2003) restated the “major purpose” test for political committee status as first iterated in *Buckley*. 540 U.S. at 170 n.64.

Thus, SpeechNow.org is a “political committee” if it meets both parts of a two-prong test for political committee status: (1) it has a “major purpose” to influence elections and (2) it receives \$1,000 in “contributions” or makes \$1,000 in “expenditures.”

A. SpeechNow.org admits that it meets the threshold “major purpose” test.

SpeechNow.org admits in its AOR that “[i]ts mission and major purpose is to advocate the election of candidates -- in the 2008, 2010, and future federal election cycles....” AOR 2007-32 at 2 (emphasis added); *see also id.* at 4, 6. This admission is the end of the “major purpose” inquiry.¹

¹ If more were needed, this “major purpose” conclusion is buttressed by the fact that SpeechNow.org has registered with the Internal Revenue Service (IRS) under section 527 of the Internal Revenue Code as a “political organization” that is operated “primarily” for the purpose of “accepting contributions or making expenditures” under 26 U.S.C. § 527. *See* AOR 2007-32 at 1, 2; *see also id.* at Exhibit D (IRS Form 8871, Political Organization Notice of Section 527 Status). The Supreme Court in *McConnell* recognized that section 527 groups are primarily engaged in influencing elections. It stated, “Section 527 ‘political organizations’ are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity.” 540 U.S. at 174 n.67. The Court noted that 527 groups “by definition engage in partisan political activity.” *Id.* at 177. Thus, by definition, any entity that registers with the IRS as a “political organization” under section 527 is “organized and operated primarily” for the

B. SpeechNow.org admits that it will meet the \$1,000 expenditure test.

An “expenditure” is defined as “any purchase, payment ... gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9); *see also* 11 C.F.R. § 100.111(a).

Just as SpeechNow.org admits that its “major purpose” is to influence Federal elections, so too it also admits that it intends to make “expenditures” as defined by Federal law: “SpeechNow.org will run such advertisements -- independent expenditures as defined at 2 U.S.C. §431(17) and 11 C.F.R. 100.16 -- in the districts of voters able to elect or defeat those officeholders.” AOR 2007-32 at 2. An “independent expenditure” obviously is an “expenditure” for purposes of the political committee test. *See* 2 U.S.C. § 431(17) (defining “independent expenditure” to be “an expenditure by a person expressly advocating the election or defeat” of a candidate); *see also* 11 C.F.R. § 100.16. SpeechNow.org admits that it will make expenditures in excess of \$1,000. AOR 2007-32 at 2.

This admission by SpeechNow.org that it intends to make express advocacy “expenditures” is the end of the “expenditure” inquiry.²

C. SpeechNow.org admits that it will meet the \$1,000 contribution test.

A “contribution” is defined as “any gift, subscription, loan ... or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8); *see also* 11 C.F.R. § 100.52(a). The Commission’s regulations provide that a “gift ... of money or anything of value made by any person in response to any communication is a contribution ... if the communication indicates that portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.” 11 C.F.R. § 100.57(a).

Just as SpeechNow.org admits that its major purpose is to influence Federal elections and further admits that it intends to make “expenditures” within the meaning of FECA, so too it also admits that it intends to solicit and receive “contributions.”

SpeechNow.org makes clear that its solicitations will indicate that the funds received will be used to support or oppose candidates: “Donors to SpeechNow.org will be advised that their donations ... will be used for political purposes such as supporting or opposing the election of candidates.” AOR 2007-32 at 3; *see also id.* at Exhibit A, Bylaws, Article VI, § 11. SpeechNow.org admits that it will receive contributions in excess of \$1,000. *Id.* at 4.

purpose of “influencing or attempting to influence the selection, nomination, election or appointment of” an individual to public office.

² We believe – and a district court recently found – that express advocacy is not required in order to determine whether a “major purpose” group has made an “expenditure,” for purposes of applying the political committee standard. *See Shays v. FEC*, 511 F. Supp. 2d 19, 26-27 (D.D.C. 2007) (*Shays II*). Nonetheless, the fact that SpeechNow.org admits that its spending will include express advocacy makes this issue moot here.

Given the definition of “contribution” in section 100.52(a), this admission is the end of the “contributions” inquiry.

The bottom line is this:

SpeechNow.org admits that it has a “major purpose” to influence federal elections.

SpeechNow.org admits that it will make \$1,000 or more in “expenditures.”

SpeechNow.org admits that it will receive \$1,000 or more in “contributions.”

The Commission has no choice but to advise SpeechNow.org that it meets the test for “political committee” status under 2 U.S.C. § 431(4) and 11 C.F.R. § 100.5(a), and accordingly that it must register as such.

II. As a Federal Political Committee, SpeechNow.org Will Be Subject to the Contribution Limits of 2 U.S.C. § 441a(a)(1)(C).

The second question posed in the AOR is whether donations to SpeechNow.org are subject to the limits on contributions set forth at 2 U.S.C. § 441a(a)(1)(C). *See* AOR 2007-32 at 5.

For the reasons set forth above, SpeechNow.org is a political committee. FECA provides that “no person shall make contributions ... to any other political committee [*i.e.*, a committee other than a candidate or political party committee] ... in any calendar year which, in the aggregate, exceed \$5,000....” 2 U.S.C. § 441a(a)(1)(C); *see also* 11 C.F.R. § 110.1(d). Although this statutory limit is, on its face, clearly applicable to all non-candidate/non-party political committees, Commission regulations reiterate that the contribution limits “apply to contributions made to political committees making independent expenditures.” 11 C.F.R. § 110.1(n).

Existing statutes and regulations could not be more clear – all Federal political committees, including those engaging only in independent spending, are subject to the contribution limits established by 2 U.S.C. § 441a(a)(1).

The Commission has no choice but to advise SpeechNow.org that because its proposed activities will make it a political committee under Federal law, it will be subject to the contribution limit established by 2 U.S.C. § 441a(a)(1)(C) on the money it raises.

III. Donors to the SpeechNow.org Will Be Subject to the Biennial Aggregate Contribution Limits of 2 U.S.C. § 441a(a)(3).

The third and final question posed by the AOR is whether the individual biennial aggregated contribution limit described at 2 U.S.C. § 441a(a)(3) applies to the donations made by individuals to SpeechNow.org.

For the reasons set forth above, SpeechNow.org is a political committee. Section 441a(a)(3) provides that, during the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, “no individual may make contributions aggregating more than ... \$37,500, in the case of contributions to candidates” and “\$57,500 in the case of any other contributions, of which not more than \$37,500 may be attributable to contributions to political committees which are not political committees of national political parties.” 2 U.S.C. § 441a(a)(3) (These amounts have been indexed for inflation, *see id.* at § 441a(c)). Although this statutory limit is, on its face, clearly applicable to contributors to all political committees, Commission regulations reiterate that the “biannual limitation on contributions ... applies to contributions made to persons, including political committees, making independent expenditures....” 11 C.F.R. § 110.5(d).

The Commission has no choice but to advise SpeechNow.org that because its proposed activities will make it a political committee under Federal law, the individual biennial aggregated contribution limit described at 2 U.S.C. § 441a(a)(3) applies to donations made by individuals to SpeechNow.org.

IV. Recent Commission Enforcement Actions Regarding the “Political Committee” Status of Multiple So-Called “527 Organizations” Make Clear That SpeechNow.org’s Proposed Activities Will Make It a “Political Committee” Under Federal Law.

Within the past year, the Commission has concluded that all of the following 527 organizations violated the law because they were “political committees” that failed to register as such and to comply with the applicable contribution limits and source prohibitions:

- Swift Boat Veterans and POWs for Truth (“SwiftVets”);³
- League of Conservation Voters;⁴
- MoveOn.org Voter Fund 527 organization;⁵
- Progress For America Voter Fund;⁶
- Environment2004, Inc.;⁷

³ See FEC Conciliation Agreement With Swift Boat Veterans and POWs for Truth (MURs 5511 and 5525) (Dec. 2006), available at <http://eqs.nictusa.com/eqsdocs/000058ED.pdf>.

⁴ See FEC Conciliation Agreement With League of Conservation Voters 527 (MUR 5753) (Dec. 2006) (available at <http://eqs.nictusa.com/eqsdocs/00005905.pdf>).

⁵ See FEC Conciliation Agreement With MoveOn.org Voter Fund, ¶ 15 (MUR 5754) (Dec. 2006), available at <http://eqs.nictusa.com/eqsdocs/000058F4.pdf>.

⁶ See FEC Conciliation Agreement With Progress For America Voter Fund (MUR 5487) (Feb. 2007), available at <http://eqs.nictusa.com/eqsdocs/00005AA7.pdf>.

⁷ See FEC Conciliation Agreement With Environment2004, Inc. and Environment2004 Action Fund (MUR 5752) (Mar. 2007), available at <http://eqs.nictusa.com/eqsdocs/00005F42.pdf>.

- National Association of Realtors (NAR) 527 organization;⁸
- Empower Illinois Media Fund,⁹ and
- The Media Fund.¹⁰

Based on the findings in those cases, the Commission collected, in aggregate, more than two million dollars of civil penalties.

By comparison to the 527 organizations involved in those enforcement actions, SpeechNow.org presents the easy case for finding political committee status. Indeed, given the legal analysis set forth by the Commission in those recent enforcement actions, and given the findings and conclusions repeatedly made by the Commission in those cases, it would be impossible for the Commission to conclude that SpeechNow.org is not a political committee.

SpeechNow.org readily admits that its intent is to make express advocacy “expenditures” and to receive funds that will qualify as “contributions” under the Commission’s regulations. And SpeechNow.org readily admits that its “major purpose” is to influence federal elections.

In contrast to these findings, served up here to the Commission as admissions, the several 527 groups involved in these recent enforcement actions all vigorously contested the comparable findings made in their cases.

In the face of the admissions made by SpeechNow.org, an opinion by the Commission advising the requester that it is not required to register as a political committee (and abide by contribution limits) would directly conflict with the multiple enforcement actions where the Commission, based on contested facts, made the opposite determination. The activities proposed by SpeechNow.org make it indistinguishable from these organizations for the purposes of political committee status. Just as all of these 527 organizations were found to be “political committees” under FECA, so too will SpeechNow.org be a “political committee” when it receives contributions or makes expenditures in excess of \$1,000 in a calendar year. The Commission has no basis to conclude otherwise.

V. The Commission Has No Authority to Adjudicate the Constitutionality of FECA’s “Political Committee” Restrictions and Requirements.

As noted in the introduction to these comments, there is no mystery about what this AOR is really seeking: SpeechNow.org wants the Commission to declare that the definition of “political committee,” and the contribution limits imposed on political committees, are unconstitutional as applied to an independent spending group.

⁸ See FEC Conciliation Agreement With National Association of Realtors (MURs 5577 and 5620) (June 2007), available at <http://eqs.sdrdc.com/eqsdocs/00005DB9.pdf>.

⁹ See FEC Conciliation Agreement With Empower Illinois Media Fund, ¶ 19 (MUR 5568) (July 2007), available at <http://eqs.sdrdc.com/eqsdocs/00006143.pdf>.

¹⁰ See FEC Conciliation Agreement With Media Fund (MUR 5440) (Nov. 2007), available at <http://eqs.nictusa.com/eqsdocs/000066D5.pdf>.

The Commission, however, has no authority to declare these FECA provisions unconstitutional. It is well-settled law that “adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies.” *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)); *see also Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). As the D.C Circuit said in *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), an “agency may be influenced by constitutional considerations in the way it interprets ... statutes [but] it does not have jurisdiction to declare statutes unconstitutional.” *Id.* at 47.

The Commission has no choice in this matter but to answer the AOR in a manner consistent with the plain meaning of FECA. The Commission cannot collaborate in the invalidation of key elements of FECA by suddenly deciding the law is unconstitutional. Indeed, the Commission’s obligation – one it has discharged with vigor in recent years in both the *McConnell* and *WRTL* cases – is to defend the constitutionality of the campaign finance laws enacted by Congress. When SpeechNow.org files the inevitable lawsuit for which this AOR is the obvious predicate, the Commission must meet SpeechNow.org in court and defend the law once again.¹¹

VI. Conclusion.

For all of the foregoing reasons, existing Federal campaign finance statutes and regulations require the Commission to advise SpeechNow.org that its proposed activities will require it to register with the Commission as a political committee, and thus require it, and its donors, to abide by the contributions limits that apply to non-candidate/non-party political committees.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

¹¹ Even though the Commission has no authority to reach the constitutional arguments made by SpeechNow.org, those arguments in any event lack merit. In the 2004 rulemaking proceeding on “Political Committee Status,” we submitted to the Commission a memorandum from Professor Daniel Ortiz of the University of Virginia School of Law, which set forth arguments as to why a 527 group that engages only in independent expenditures can, consistent with applicable constitutional principles, be required to register as a political committee and to abide by the contribution limits that apply to such committees. The Ortiz memorandum is part of the 2004 rulemaking record. *See* http://www.fec.gov/pdf/nprm/political_comm_status/comm2/27.pdf. We attach a copy of the Ortiz memorandum for the convenience of the Commission.

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center

Copy to: Commission Secretary



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.

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.