



**INSTITUTE FOR
FREE SPEECH**

June 18, 2024

Mr. Jonathan Wayne
Executive Director
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04011

Re: Proposals in the U.S. Congress to Amend the First Amendment

Dear Mr. Wayne:

Thank you for requesting comments to be considered for your annual report on constitutional amendments regarding campaign finance laws, which is required under the law enacted by Question 2 in 2023. The Institute for Free Speech submits these comments expressing our deep concerns about measures to amend the First Amendment to the U.S. Constitution.

We should not tamper with the First Amendment. The First Amendment has stood the test of time, along with the rest of the Bill of Rights.

The leading constitutional amendment proposals under consideration by Congress are [H. J. RES. 13](#), a bill originating in the House of Representatives introduced by Mr. Schiff of California on January 9, 2023, and referred to the House Committee on the Judiciary; and [S. J. RES. 45](#), introduced by Sen. Shaheen of New Hampshire on September 14th, 2023, and referred to the Senate Committee on the Judiciary.

These constitutional amendments are over four times longer than the First Amendment they seek to amend. Further, each appears to grant unlimited powers to Congress and the states to regulate speech if lawmakers can assert any connection to “influence elections,” whatever that phrase means.

Opposition to these proposals can be fairly characterized as bipartisan. Former White House Counsel to President Barack Obama, Bob Bauer, noted that “[t]he case for a constitutional change must rest on the claim that the problem an amendment would address is so fundamental that, in the words of James Madison, it qualifies as one of the ‘great and extraordinary occasions’ for revising the founding document,” and challenged supporters to furnish evidence that would substantiate their claims.¹

¹ Bob Bauer, “‘Great and Extraordinary Occasions’ for Constitutional Reform—and The Question of Evidence,” More Soft Money Hard Law. Retrieved on June 2, 2014. Available at: <http://www.moresoftmoneyhardlaw.com/2014/05/great-extraordinary-occasions-constitutional-reform-question-evidence/> (May 19, 2014).

If adopted, either of these amendments would help entrench elected officials by insulating incumbent politicians from criticism and granting legislators unprecedented power to regulate the speech of those they serve.

Both leading measures have similar wording of this key phrase: “Congress and the States may regulate and impose reasonable viewpoint-neutral limitations on the raising and spending of money by candidates and others to influence elections.”

This raises a host of unanswered questions. Would spending by independent groups require lowering the amount a candidate could spend? What would be included in spending “to influence elections?” Given the broad grant of authority over political speech, much speech might be construed as having a purpose to influence elections.

For example, if a group ran communications urging the protection of abortion rights, a salient issue in current election campaigns, could such speech be limited? Such an amendment could make that alarming scenario a reality, even if the communications didn’t mention any candidate or party.

What about nonpartisan voter guides, candidate forums, and similar educational efforts? All these efforts might influence an election and be subject to direct government control with no recourse in court.

And consider that services at churches, mosques, and synagogues might discuss current events. Maybe there will be a discussion of the morality of war. It is possible, even likely, that the amendments would give lawmakers direct control over religious speech if such speech discusses current events and takes a position on issues.

The amendments are unclear about who regulates what

A previous version of these amendments gave states power over state election campaign speech and Congress power over federal election speech. However, the current proposals do not restrict states to regulating money in state election campaigns and Congress to regulating funds spent on federal election campaigns. The fact that such a restriction was stripped from the bill would, as a general matter of statutory interpretation, mean the original limitation is not there. Potentially, states could raise Tenth Amendment arguments to void any federal regulation of state spending on election campaigns, and the federal government could claim supremacy to void any state regulation of federal candidates. However, since this is a constitutional amendment, such arguments could be swept aside. At a minimum, this potential legal battle is a distinct possibility. And Congress might well claim that any election with a federal candidate on the ballot is subject to federal rules.

The unclear media exemption

Both measures also provide that “[n]othing in this article shall be construed to grant Congress the power to abridge the freedom of the press.” Presumably, this is intended to serve as a “media exemption” – a provision often included in campaign finance statutes to preserve the rights of *The New York Times* editorial board and Fox News’s Sean Hannity to endorse and campaign for candidates. However, the scope of such an exemption is unclear. The right to a free press does not extend a specific speech right to media corporations that

other Americans do not have. The free press clause is merely a natural corollary of the free speech clause; it protects the right to publish and distribute the written word, audio, or video. The Supreme Court has “consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”² And even if “the press” did confer a separate sanction for specific speech, the Supreme Court in 2010 noted that “[w]ith the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”³

This uncertainty over who qualifies for the media exemption may not faze the regulators, who tend to favor established players at the expense of newcomers. The Federal Election Commission, for example, has traditionally applied the media exemption by asking, “[f]irst . . . whether the entity engaging in the activity is a press or media entity.”⁴ In other words, to qualify as a media entity, a speaker must first be a media entity. The amendments’ special exemption for the press would further entrench this model of circular reasoning and preferential treatment for certain speakers over others; it protects the right to publish for all.

A Historical Perspective on Campaign Finance Laws

Before the 1970s, there were no limits on individual contributions to federal candidates, except for limited restrictions on government employees and contractors. The Commission should remember that voters elected FDR, Truman, Eisenhower, Kennedy, and Johnson as president without such limits. Was landmark legislation such as the Voting Rights Act, Medicare, and the Civil Rights Act the product of a corrupt system, given that individual contributions were unlimited to any candidate? Of course not.

Consider the role of this system that allowed unlimited contributions to candidates and its impact on the 1968 Democratic primary and the debate on the Vietnam War. In late November 1967, Minnesota Senator Eugene McCarthy decided to challenge President Lyndon Johnson for the Democratic nomination. At first, people thought McCarthy’s campaign would be quixotic. However, with no contribution limits, Senator McCarthy assembled a well-funded campaign from a few wealthy donors who shared his opposition to the Vietnam War. McCarthy concentrated on the New Hampshire primary, and his campaign’s number one issue was ending the war.

His wealthy backers gave the equivalent of about \$14 million in today’s dollars to fund the campaign, an enormous amount at the time. As a result of his showing in New Hampshire, McCarthy forced President Johnson out of the race, a feat not duplicated since the enactment of contribution limits.

² *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (internal citations and quotations omitted).

³ *Id.*

⁴ Federal Election Commission Adv. Op. 2010-08 (*Citizens United*) at 4.

Today, about a dozen states, including many of the nation's least corrupt⁵ and best-managed⁶ states, have no limits on individual contributions to candidates or parties.

Conclusion

These vague and poorly drafted amendments to amend our Constitution would shred the protections of the First Amendment, stifle political dissent, and grant lawmakers effectively unlimited power to control political speech.

The First Amendment is not – and never has been – conditioned upon a level playing field. There has never been a time in American history where everyone spoke equally and was heard equally, and there never will be. Few will ever be as famous as Oprah Winfrey, run a newspaper, or anchor a television news program. The purpose of the First Amendment is to protect us from being censored or punished for our views by the government so that we may always speak without limit to other citizens. These amendments would threaten that vital right.

Respectfully submitted,



David Keating
President

⁵ Adriana Cordis and Jeff Milyo, "Working Paper No. 13-09: Do State Campaign Finance Reforms Reduce Public Corruption?" Mercatus Center at George Mason University. Retrieved on June 2, 2014. Available at: mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (April 2013); Matt Nese and Luke Wachob, "Do Lower Contribution Limits Decrease Public Corruption?," Center for Competitive Politics' Issue Analysis No. 5. Retrieved on June 2, 2014. Available at: https://www.ifs.org/wp-content/uploads/2013/08/2013-08-01_Issue-Analysis-5_Do-Lower-Contribution-Limits-Decrease-Public-Corruption1.pdf (August 2013).

⁶ Matt Nese and Luke Wachob, "Do Lower Contribution Limits Produce 'Good' Government?," Center for Competitive Politics' Issue Analysis No. 6. Retrieved on June 2, 2014. Available at: https://www.ifs.org/wp-content/uploads/2013/10/2013-10-08_Issue-Analysis-6_Do-Lower-Contribution-Limits-Produce-Good-Government1.pdf (October 2013); Matt Nese, "Do Limits on Corporate and Union Giving to Candidates Lead to 'Good' Government?," Center for Competitive Politics' Issue Analysis 7. Retrieved on June 2, 2014. Available at: https://www.ifs.org/wp-content/uploads/2013/11/2013-11-20_Issue-Analysis-7_Do-Limits-On-Corporate-And-Union-Giving-To-Candidates-Lead-To-Good-Government.pdf (November 2013).