

April 30, 2014

Statement of Justice John Paul Stevens (Ret.)

Senator King, Chairman Schumer, Ranking Member Roberts, and distinguished Members of this Committee, thank you for the opportunity to appear before you today to discuss the important issue of campaign finance.

When I last appeared before this body in December 1975 my confirmation hearing stretched over three days. Today I shall spend only a few minutes making five brief points:

First, campaign finance is not a partisan issue. For years the Court's campaign finance jurisprudence has been incorrectly predicated on the assumption that avoiding corruption or the appearance of corruption is the only justification for regulating campaign speech and the financing of political campaigns. That is quite wrong. We can safely assume that all of our

candidates for public office are law abiding citizens and that our laws against bribery provide an adequate protection against misconduct in office. It is fundamentally wrong to assume that preventing corruption is the only justification for laws limiting the First Amendment rights of candidates and their supporters. Elections are contests between rival candidates for public office. Like rules that govern athletic contests or adversary litigation, those rules should create a level playing field. The interest in creating a level playing field justifies regulation of campaign speech that does not apply to speech about general issues that is not designed to affect the outcome of elections. The rules should give rival candidates - irrespective of their party and incumbency status - an equal opportunity to persuade citizens to vote for them. Just as procedures in contested litigation regulate speech in order to give adversary parties a fair and equal opportunity to persuade the decision-maker to rule in their favor, rules regulating

political campaigns should have the same objective. In elections, the decision-makers are voters, not judges or jurors, but that does not change the imperative for equality of opportunity.

Second, all elected officials would lead happier lives and be better able to perform their public responsibilities if they did not have to spend so much time raising money.

Third, rules limiting campaign contributions and expenditures should recognize the distinction between money provided by their constituents and money provided by non-voters, such as corporations and people living in other jurisdictions. An important recent opinion written by Judge Brett Kavanaugh of the D.C. Circuit and summarily affirmed by the Supreme Court, *Bluman v. Federal Election Commission*,¹ upheld the constitutionality of the federal statute that prohibits foreign citizens from spending money to support or

¹ 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct 1087 (Jan. 9, 2012).

oppose candidates for federal office. While the federal interest in preventing foreigners from taking part in elections in this country justified the financial regulation, it placed no limit on Canadians' freedom to speak about issues of general interest. During World War II, the reasoning behind the statute would have prohibited Japanese agents from spending money opposing the re-election of FDR but would not have limited their ability to broadcast propaganda to our troops. Similar reasoning would justify the State of Michigan placing restrictions on campaign expenditures made by residents of Wisconsin or Indiana without curtailing their speech about general issues. Voters' fundamental right to participate in electing their own political leaders is far more compelling than the right of non-voters such as corporations and non-residents to support or oppose candidates for public office. The *Bluman* case illustrates that the interest in protecting campaign speech by non-voters is less

worthy of protection than the interest in protecting speech about general issues.

Fourth, while money is used to finance speech, money is not speech. Speech is only one of the activities that are financed by campaign contributions and expenditures. Those financial activities should not receive the same constitutional protection as speech itself. After all, campaign funds were used to finance the Watergate burglaries - actions that clearly were not protected by the First Amendment.

Fifth, the central error in the Court's campaign finance jurisprudence is the holding in the 1976 case of *Buckley v. Valeo*² that denies Congress the power to impose limitations on campaign expenditures. My friend Justice Byron White was the only member of the Court to dissent from that holding. As an athlete and as a participant in Jack Kennedy's campaign for the presidency, he was familiar with the importance of

² 442 U.S. 1 (1976).

rules requiring a level playing field. I did not arrive at the Court in time to participate in the decision of the Buckley case, but I have always thought that Byron got it right. After the decision was announced, Judge Skelly Wright, who was one of the federal judiciary's most ardent supporters of a broad interpretation of the First Amendment, characterized its ruling on campaign expenditures as "tragically misguided."³ Because that erroneous holding has been consistently followed ever since 1976, we need an amendment to the Constitution to correct that fundamental error. I favor the adoption of this simple amendment:

Neither the First Amendment nor any provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for

³ J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Col. L. Rev. 609, 609 (1982).

public office, or their supporters, may spend in election campaigns.

I think it wise to include the word "reasonable" to insure that legislatures do not prescribe limits that are so low that incumbents have an unfair advantage or that interfere with the freedom of the press. I have confidence that my former colleagues would not use that word to justify a continuation of the practice of treating any limitation as unreasonable.

Unlimited campaign expenditures impair the process of democratic self-government. They create a risk that successful candidates will pay more attention to the interests of non-voters who provided them with money than to the interests of the voters who elected them. That risk is unacceptable.

Thank you.