

Mr. Jan Baran, Wiley Rein & Fielding

Professor Michael Malbin, State University of New York at Albany

Honorable Bradley Smith, Commissioner, Federal Election Commission

*Mr. Andrew Siff, Chief Counsel, United States Senate Committee on Rules & Administration
(moderator)*

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MR. SIFF: My name is Andrew Siff. I am the Editor of the Federalist Society's Free Speech and Election Law newsletter. When I am not busy attending or participating in fascinating Federalist Society events, I work as the Chief Counsel to the United States Senate Committee on Rules and Administration, which has jurisdiction over all matters related to federal elections. In that capacity, I have had the opportunity to do a lot of thinking about academic critiques and judicial rulings and legislative proposals implicating America's great political parties and the role they should play in our democracy.

I am very excited about the panelists we have here today, who have been in the forefront of many of the legal, academic, and political developments that have shaped the role that political parties currently play in our democracy.

Our panelists today are, Mr. Jan Baran, who is a partner at the law firm of Wiley Rein & Fielding and, by anyone's account, has one of the preeminent election law practices in America. Mr. Baran previously served from 1989 to '92 as General Counsel to the RNC. And over the years, he has been involved in several important cases that have really defined the legal environment in which political parties operate. He is currently lead counsel in the epic *Colorado Republican* litigation that is, I think, older than some of his children and which is currently heading to the Supreme Court for a second time.

We also have with us Michael Malbin, who is a professor at the State University of New York at Albany and is also the head of a very interesting new organization, the Campaign Finance Institute, which is affiliated with George Washington University and operates here in Washington, D.C. His organization is somewhat unique among campaign finance organizations because they at least tolerate the conservative and libertarian viewpoint on campaign finance, which is evidenced by the fact that the Federalist Society's own Boyden Gray is a trustee of the Campaign Finance Institute. I would urge all of you who have an interest in campaign finance to visit the institute's Web site, where they have what I have found to be probably the best compilation of spending data in the congressional races that were just held. It is really a fantastic site with a lot of great links.

Finally, we have with us someone whom most of you know, Commissioner Brad Smith of the Federal Election Commission, who until his recent confirmation to the Federal Election Commission was probably the most prolific election law scholar in America. He taught at Capital Law School in Columbus, Ohio. And before moving to academia, Brad practiced law at the Columbus office of the law firm of Vorys, Sater, Seymour & Pease.

Before we hear from our panelists today, I would just like to take a few moments to try to provide a bit of context for the remarks and thoughts that we are going to hear. Some time ago a

brilliant political scientist at Duke, Professor Mike Munger, persuaded me that before you start analyzing any judicial rulings or academic articles or legislative proposals affecting the role of political parties, you have to have in your mind some coherent model of our political process and the role that parties do and should play in the political process.

So let me just throw out there a couple of models through which you might view the remarks of our commentators today. One popular theory that I use generally when I am considering matters related to political parties was crafted and refined by political scientists such as E. E.

Shatschneider, John Uldrich, Paul Beck, Dean Burnham, James Q. Wilson, and Giovanni Sartori. They viewed parties as, quite simply, fundamental elements of our democracy, without which the system just could not function. Their theory assumed that power in any form of popular government would have to be held by some organized group capable of overcoming the collective action and collective choice problems inherent in popular government.

So having assumed that some organized group would control over government, then they posited: Well, what kind of organized group do we want? Do we want essentially a special interest, of which there are varying definitions, but most of you probably have some understanding of what they were talking about. Or do we want the organized group to nominate political parties?

They thought that political parties were by far the preferable alternative because while both special interests and political parties can overcome the collective action and collective choice problems inherent in popular government, political parties were to be preferred because, unlike narrow special interests, political parties seek to win elections. This meant that they could be held accountable in elections in a way that other interest groups could not be. And because political parties are, in the words of E. E. Shatschneider, “the special form of political organization adapted to the mobilization of majorities,” parties are forced to advance a broad, coherent platform.

And to persuade people of the merits of their vision of government, to offer a vision of government sufficiently broad, to develop a majority of our nation’s electorate, a party must reduce the influence that any single narrow special interest has on it. Simply put, the desire to organize a majority forces parties to enlarge the range of public policy debate beyond that of any single special interest and to refine and moderate that debate through the many varying constituencies that must be amassed to assemble majority support. So they felt that parties were quite necessary and salutary institutions.

Now, if you do not like that model of the political process there, let me throw out another rather more populist model. This view rejects the necessity of parties. It posits that individual citizens acting purely on altruistic motives are able to make decisions and translate them into coherent policies without passing them through mediating institutions, such as parties. This view of government relies on Richard Hashtadert in his 1955 book *The Age of Reform* referred to as “The man of good will,” who according to Hashtadert “was dissociated from all special interests and biases and had nothing but the commonweal at heart. He would act and think as a public spirited individual, unlike all the groups of vested interest that were ready to prey on him. Far from joining organizations to advance his own interests, he would dissociate himself from such combinations and address himself directly and high-mindedly to the problems of government.”

This notion of civic-minded individuals conceiving of and effectuating public policy based on shared notions of the public good was popular with some of our founding fathers, who hoped that our nation would not be divided amongst competing political parties. This idea also I think drove the progressives, who seemed to distrust most forms of organizations and to degrade or ignore the organizational problems of politics.

I think that, to some degree, your view of our panelists' remarks today will tend to be colored by which of these two models you tend to prefer. Of course, there are other models and variations on these models. But I think it is always interesting to analyze any ideas about regulating parties and the role they should play in the context of a fuller picture of our political process.

With that, let us now turn to our panelists. The way we are going to try to do this today is have each of the panelists speak and then open it up for questions. We will start with Mr. Baran and then Professor Malbin and Commissioner Smith.

MR. BARAN: Thank you very much, Andrew, and good afternoon, everybody. My assignment is to discuss the future of political parties in the context of campaign finance regulation, which I am delighted to do.

As Andrew mentioned, I have been involved in what he refers to as an epic piece of litigation. I refer to it as a Dickensian piece of litigation, which started in 1986: the Colorado Republican Campaign Committee case. It deals with the question of whether spending limits imposed by federal law on political parties violate the First Amendment with no redeeming benefit from that restriction.

This, of course, means that we will once again present political parties to the Supreme Court. As I am sure all of you know, the Supreme Court has been a little bit ambivalent about political parties. Sometimes they look at them suspiciously. And other times we get these opinions that rhapsodize about the First Amendment rights of speech and association of political parties. But there is an undercurrent there that you have to watch political parties. Yes, they have First Amendment rights, but they are not really in the same status as media organizations and other exponents of the First Amendment.

There is potential ambivalence. It is really a reflection of American society in general. I mean, the recent polling that is coming out of this election shows that political parties are held in relatively low esteem by the public, which is an irony because party identification is still the number one cue to voters as to how they are going to vote. Some 60-70 percent of Americans who go to the polls when they decide, particularly with candidates that they do not know much, if anything, about will say, "Well, was that Republican? Is it a Democrat? Is the person with the Green Party, Reform Party?" Party identification is still a cue.

This, of course, is a longstanding phenomenon, a lot of attention and contradiction. Will Rogers said he did not belong to any organized party. He was a Democrat. And then last fall we had the spectacle of John McCain running against the establishment of the Republican Party. So they are either organizational shambles or they are monolithic. You get your choice. Everyone has these conflicting views about what political parties are.

I do not know about the two models that Andrew presented to you in a philosophical or a

political science sense, but I think it is important to isolate what these things are. There should be some empirical foundation and understanding about what parties are before the courts start making decisions about the extent of their constitutional rights.

As you probably know, these are largely volunteer organizations that are spread out all over the country. They raise money purely and voluntarily through contributions. There is no forced giving. If it were, it would be illegal. They only meet once every four years through delegates. They parade around wearing funny hats and causing spectacles in major metropolitan areas. Then the rest of the time they are led by chairmen.

What is a party chairman? If you think about it, they are usually uncompensated jobs. There are some states that have actually paid state chairmen. Of course, the national party chairmen get a salary and usually a car and a driver. They can go to talk shows if, of course, the candidates allow them to do that.

And that is another irony here; that our politics have drifted away from party-centered politics to candidate-centered politics. And the party officials are kind of up in the air as to whether they are a good thing or a bad thing and whether they are even being appreciated by the candidates, who supposedly are carrying the party banner.

Now, in the last cycle, just to put this in financial terms, all of the political parties in the United States over the two-year period of '95-'96 (which is the way the FEC and the political scientists keep track of this information) raised collectively about \$850 million. That is out of a total amount spent according to Professor Herb Alexander of \$4.2 billion.

So in all the politics during that period of time, there was an annual cash flow of \$2.1 billion. I checked the Web. It happens to equal the reported gross annual revenues of just one well-known media organization, *The Washington Post*, in terms of annual revenues.

So, that figure gives you some idea of the role played by parties, in economic terms. But, of course, unlike the Post, political parties are not blessed with advertising revenues and family ownership that spans generations. They do not have basically unfettered First Amendment rights to editorialize about how unnecessary TV is, or about whether to count every ballot by hand in four highly Democratic counties in Florida because otherwise it would not be a fair, and accurate election. No. Political parties must be somewhat controlled.

So in that context, it is remarkable, to me anyhow, that people are still involved in parties. Why would you put up with it other than for a possible appointment? But, of course, Civil Service reform has pretty much taken care of that.

The age of when public employees would be assessed, to make donations to their parties, has now been declared illegal. And the party officials have to stand in the shadows of their standard bearers, who basically are campaigning, usually silently, about their party.

You have McCain Republicans and Perotistas and Reagan Democrats. There are all kinds of candidates trying to disguise the fact that they actually have something behind them that is bigger than they are and that will be around, whether they win or lose, after the next election.

In this confusion, I think that there is going to be a big challenge for the Supreme Court, which will affect, in my opinion, the future of political parties. And that is: How can parties operate in this atmosphere of campaign finance regimen, especially with the growing demand of even more restrictions and more regulation of everybody in politics with, of course, the exception of the news media and organized labor? But everybody else has to be controlled, particularly political parties, because of the public suspicion of their role.

Well, I am afraid that the initial signs are not terribly good. For anyone who has read the 1996 opinion from the Supreme Court in *Colorado*, they concluded: Well, political parties have a constitutional right to make an independent expenditure. This is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate, which is done without coordination with that candidate.

So you have got to look at the Supreme Court and say, "What in the world were you thinking of - a political party making independent expenditures and preserving this First Amendment right?" The whole nature of a political party is to work hand in glove with its candidates. In fact, the first nine years of the litigation that I spent with the Federal Election Commission was with the presumption that my client, the Colorado party, was coordinating everything with its candidates in Colorado.

And, yet, the conclusion from the Supreme Court was: We have got this First Amendment right for independent spending. It is impractical. But come back after the District Court and the Tenth Circuit once again review the constitutional issue of whether you can spend money even working with your candidates, who are so dependent and working in common cause with you.

Now, in the course of all of the intervening four years we had additional briefing and we had to have discovery for the third time with the FEC. Anyone who has had the pleasure of litigating with the Federal Election Commission can appreciate the need for further discovery, particularly on a case that has existed for ten years.

We had some interesting studies, brought out by the political scientists on both sides. They all came forward. And they all say one thing in common. Well, political parties are unique. Even the ones who want to regulate them to death, they say: Well, they are unique. We have got to uniquely regulate them. You have got to watch out for that.

It was the first time that anybody actually did a study of how political parties spend the money that they raise with their candidates. This was done by Professor Corrado from Colby College. He found that with respect to the spending of money that this federal law is seeking to restrict (which is limited to seven cents per voter in a state, which means that the political party cannot buy a stamp to send a letter to every voter under this federal law), that over 90 percent of the monies spent by the national party committees on behalf of the candidates is spent on political communications, advertising, radio, letters, and so forth. Most of the other ten percent is spent on issue research and polling. And all of that, he found, was used to help the candidates develop and target their campaign messages.

The other finding, none of which has been contested by the commission or any of the amici, is that, of all the participants in campaign finance in the United States, political parties are the only

source of money that goes primarily to non-incumbent candidates. All the other money, from individuals, from PACs, corporations, labor unions (in those states where money is available), the vast majority goes to incumbents.

So the result of the spending limit is that the Federal Election Commission's statute places a restriction on the amount of communications that could be financed by the party in working with their candidates. And that restricts the only source of primarily non-incumbent money in the process.

There have been several arguments advanced by the government in trying to sustain this limit, which has now been struck down as unconstitutional by both the federal District Court in Denver and the Tenth Circuit Court of Appeals. They say that this restriction is necessary to prevent corruption, which, of course, is the rationale necessary to justify a First Amendment restriction of this sort. This argument is in the face of some other interesting statistics, namely that from 1992 to 1996, the amount of soft money raised by political parties increased 247 percent.

Now, soft money, as you know from reading the news, is money that comes to political parties in unlimited amounts from corporations, individuals, and unions. It has to be spent in certain ways, which are mysterious, but basically can include certain types of communications. That money is increasing 247 percent from '92 to '96. In this election cycle, it increased again over 100 percent from 1996.

At the same time, hard money, which is what this limit limits, increased about 45 percent from '92 to '96. The Federal Election Commission statistics for the current cycle is that the money raised by parties in the form of hard money has remained relatively flat. I think one party is up a little, about two percent, and the other party is down a couple of percentage points.

So why are parties raising more and more soft money? Could it possibly be that a party chairman or anybody looking at this bizarre campaign funding scheme and knowing the spending limits says, "Why do I want to raise more hard money when I cannot spend it? There is a federal law that says I cannot spend more than a certain amount in coordination with my candidate."

The ultimate argument that the commission presents that will be of some interest to the court, I believe, is this notion that you have to have the spending limit in order to preserve the integrity of contribution limits to political parties. Hard money is subject to contribution limits. No individual can give more than \$5,000 a year to a party or in the case of a national party \$20,000.

Soft money, on the other hand, is unlimited. However, the restrictions that are in place still are not in my opinion justified because the evil that has been identified with respect to the funding of parties is really controlled by contribution limits and not by spending limits. That is going to be the debate ultimately that the court will have to grapple with. They are going to be importuned to basically uphold spending limits because they are seen as a necessary reform just like other possible reforms, reducing soft money or prohibiting it.

What I fear is the Court may react to political parties in very simplistic ways, seeing parties as the caricatures they are sometimes depicted as in the national press, as opposed to, really, the only vehicle we have in our campaign funding system, as imperfect as this vehicle may be, which is interested in one and only one thing. That is, to gain enough public support and enough

candidates operating under the organization's banner in order to obtain a majority in order to govern. You cannot achieve that goal by simply catering to single interests. A party has to broaden its appeal or it is never going to have success in terms of obtaining an opportunity to govern in this country.

It is my hope that the Court, when it gets to this case, will see that the parties serve that important role; that the particular spending limit that will be before them is not only ineffective, it is counterproductive in that it is driving parties into more and more soft money fund-raising; and that they will basically strike this down, as have the earlier two courts, and give parties the opportunity to serve an important function in our democratic process.

If they do that, then I think there is a continuing role for the parties in terms of mediating for the political process and their supporters and candidates. If they do not do that, then I think that will place the campaign finance regime back into a direction of more restrictions, which will reduce not only the political parties' roles but will simply enhance the relative roles of other participants in the political process, such as unions and the media.

Thank you very much.

PROFESSOR MALBIN: Andrew mentioned in the opening remarks that I am both a professor at SUNY, Albany and Executive Director of the Campaign Finance Institute.

The Institute is an independent, nonpartisan think tank affiliated with George Washington University with a diverse board of trustees. Andrew mentioned Boyden Gray. Jan quoted another one of our trustees, Tony Corrado. It is a group with a wide range of political perspectives.

At the end of my talk, I am going to say something that does pertain to the Institute, but I want to make clear that except for that one moment, the positions I am going to be expressing today are ones that I have expressed in print in my own name in the past. They are not conclusions of the task force or of the Campaign Finance Institute, which generally does its work through task forces or other forms of collective deliberation. I want that to be clear.

Now, having said that, as a matter of policy, not as a matter of constitutional law, -- and I am not a lawyer; so take that into account -- I have personally argued for a long time in favor of the positions that Jan Baran has taken in many of his arguments in the Colorado case. That is to say I have argued in favor of unlimited party contributions to candidates. This appeared most recently in print in the co-authored 1998 book *The Day After Reform*. I have supported this position for two reasons. One relates to competition, the other to accountability.

With respect to competition: in my previous writing, I ran some of the numbers for congressional elections back through 1986 as well as 14 different state legislative elections during the 1990s. Those results showed beyond question, as Jan said, that political party money is disproportionately much more than any other source of campaign funds, including public funds, better at getting contributions to non-incumbents in close races. This is indisputable.

Second, on the subject of accountability: voters potentially are better able to hold parties and candidates accountable than they are able to hold interest groups accountable. We know this from a study by David Magelby on issue ads. We know that voters believe: that candidates

should be held accountable for what the parties say; and, that the voters consistently misidentify candidate advocacy ads from interest groups, the so-called issue ads from interest groups, as if they were ads from political party committees.

Therefore, if interest group activity cannot be limited in amount under the Constitution, as it cannot be, it is important, or one could argue that it is important in the name of accountability, to be sure that parties and candidates have the wherewithal to make themselves heard above the din.

However, having made this point, I also want to make the following one. If party activity is to be justified in the name of accountability, then a great deal of work has to be done to make sure that party activities, in fact, are transparent, and accountable to voters. I will come back to this later.

So having said so far why I agree with this important part of Jan's position, as a matter of policy, I want to make two important qualifications.

First, the shorter point. The policy argument does not settle the question of Congress' constitutional authority. Let us assume you accept the argument that the primary constitutional defense for contribution limits is that they deter corruption or the appearance of corruption. Assume you also accept the argument that, at least from the moment that candidates become the official designees of their parties, the candidates and parties are so thoroughly intertwined that it is absurd to think of one as corrupting the other because they are fundamentally engaged in the same operation.

That corruption argument, which I will get back to in a moment, does not quite settle the case in, say, a publicly funded election. In that situation one could easily make the argument that party spending limits would be a necessary adjunct to a voluntary agreement by a candidate to accept the spending limit in return for public funds.

That is, if the parties and candidate are so thoroughly intertwined as this argument makes them out to be, then one could say that unless you limit party spending, you do not have a voluntary agreement to limit candidate spending. Again, I want to separate the wisdom of spending limits, which I have questioned, from the constitutional argument.

My second point gets away from the precise issue of the Colorado case and gets a little more into Jan's argument about intertwining. In my view, both the policy and the constitutional arguments about direct party support for the candidates and allowing direct party support *for* the candidates, first of all, have almost nothing to do with the arguments about soft money. I want to stress that point because soft money does play so much a part of the current debate, and because those two issues are usually mixed up in the super-heated discourse of legislative argument.

The argument about the *Colorado* case, as Jan said, has to do with money going out from the parties to the candidates or being spent on behalf of the candidates. That practice is defended by saying that the two, the parties and the candidates, are intertwined. And I agree that they are.

Soft money is about unlimited contributions *into* the parties. If it is true that candidates and parties are thoroughly intertwined, it follows that contributions into the parties may be subjected to contribution limits on the basis of the same reasoning that lets you limit contributions to candidates. Party money is essentially money raised by party leaders, who are themselves either

candidates or office holders, or the agents of candidates or office holders.

The Supreme Court's reasoning in favor of contribution limits in the *Missouri v. Shrink PAC* case, it seems to me, would easily let Congress reach out to limit all contributions into, stressing "into," the national party committees or any other money raised by a federal candidate, office holder, or agent of a federal candidate or office holder for any committee. Again, the reason behind this is that the nexus that one is interested in has to do with the relationship between the office holder and the giver. It does not have to do with what the party is spending.

Now, as with everything else I have said so far, the constitutional question does not settle the policy question. To untangle the policy questions, we have to be more rigorous in thinking about political parties than we have been so far. In this respect, I heartily endorse the opening remarks that Andrew Siff made, specifically the idea that you have to have some kind of a model in mind of what you think parties ought to do, or what they ought to stand for, or what they are.

For far too long among my fellow political scientists, as well as others, the notion of the political party — the idea, the concept, the word, has been treated as a large or undifferentiated mass or blob, as if it all covers one phenomenon. That mistake crosses into both sides of the political debate. For example, the Federal Election Campaign Act provisions, being challenged in the Colorado case, treated parties as if they were large PACs, or political action committees. That conceptual model is all wrong. The essence of interest groups, including PACs, is that they are organizations outside the government that are trying to influence what happens inside.

Parties are not specialized interest groups. They are not super interest groups. They are not big interest groups or conglomerations. They are different. They are different at their core. Parties had their origins in the Eighteenth Century as legislative caucuses. They were the means by which like-minded officials and candidates could work together and present themselves under a common label. That part of this picture remains true today, especially for legislative campaign committees. The key actors in party committees at all levels remain intermingled. Office holders, candidates, and the agents of the officer holders or candidates, intertwine at state and local committee levels with citizens who vote in primaries, and with volunteers who do the work.

On the level of policy, there has been an important change in the role of the party committees over the past 20 years and, in particular, in the legislative committees. Until the 1980s, the congressional caucus committees and the state legislative caucuses essentially existed to serve the interests of the sitting incumbents. Since then they have shifted their focus. Instead of the members' individual interest in reelection, the committees shifted to serving the members' collective interests in maximizing the size of the party contingent. To help the parties do this, the leaders have devoted increasing amounts of their time to raising money, large money, for the party committees. Is that good or bad? The record seems to me to be mixed. And the way you view the mixture has to do with the differentiated roles that we see for the parties.

I have already said that parties disproportionately help challengers and open seat candidates in close contests. Let us stipulate that this is good for the system.

On the other hand, leaders have more than doubled the amount of soft money they have raised for the party committees between 1998 and 2000 from 86 million to 179 million. Much of that

was raised by prominent office holders in large chunks. It is hard for me to understand why that would not raise the same kinds of issues — as you would raise when you think about contribution limits to candidates. Admittedly, there are substantial numbers of people who think that all contribution limits are bad ideas, including Brad Smith. But it seems to me that the same kinds of arguments would apply to both. If you think there is an issue related to corruption or appearance of corruption — and I do -- then they apply.

On the accountability side of the ledger, it is clear to me as a person who has tried and failed, with some skill — although not an expert accountant's or an auditor's skill—to make sense of the hundreds and hundreds of pages that the party committees file every month with the FEC, that the way the soft money is disclosed does not always support the idea of accountability.

Parties in principle are more accountable than interest groups, but in practice, much of the money is transferred two or three times between state and local committees before it is used. You have to trace it through who knows how many different steps. Sometimes it is even given to nonparty committees that then turn around and use it for issue ads bought by front organizations that have meaningless and uninformative names.

Clearly if one justification for party spending is that it is more accountable than interest group spending, then all of these measures associated with accountability have to be addressed and tightened.

I have gone on at length, but I have only begun to scratch the surface of the issues that we ought to consider when we think about the future role of the parties. And I readily acknowledge that most of the statements I have made, and positions I have taken, are ones with which people will argue with. There is a lot to be worked through if you want to get away from the easy cliches that have dominated the discussion.

Where to go from here? Last Monday, the Campaign Finance Institute held a post-election forum at the National Press Club with representatives of the Congressional and Senatorial Campaign Committees. At that forum, we announced that we are forming or creating a working group on political parties to explore some of these issues in depth.

The members of this group will begin with our board of trustees and the academic advisory board but will spread outward from there. As a working group, it is different from our task force on issue ad disclosure that will produce recommendations during the early part of the next year. This working group is more fluid because there is a lot to be talked through and a lot of cliches to be gotten rid of.

I am pleased this week to be starting, not ending but starting, a much needed conversation.

MR. SMITH: Well, thank you very much.

Before I start, I need to poke at Andrew a little bit here, chide him a bit for his introduction. First, during his introduction, he suggested that I may be the nation's most prolific scholar in the field of campaign finance, which, very honestly, is embarrassing to me just because I am sitting here on the panel with Michael Malbin. I do not mind being called prolific at all. That is fine. You could have gone on at great length. But to call me the most prolific when I am sitting here on the

panel with Professor Malbin, who has been in this game longer than I have, and whose work is unsurpassed in quality, is unduly flattering. It is really an honor for me to be up here on the panel with him.

I also wanted to chide Andrew just because a couple of months ago he asked me -- this was back in September--if I would be willing to do this panel. I said to him: Yes. I said: I have got a great topic for you.

He had no interest in it.

I said: No, this would be really good. We should do a panel, because this has not been discussed enough, "on the cost-benefit analysis of hand recounts in presidential elections."

He said: "No, no. Nobody would have an interest in that. That is boring." So here we are today to talk about political parties.

Professor Malbin talked a bit about some of the history of political parties, and I will jump in at this point, around the turn of the last century, back around 1900. At this time, the progressive movement began a conscious effort to reduce the power of political parties in the United States. This effort has gone on, it would be for almost exactly a century.

A number of things that were done then and since have weakened the power of political parties. Some of the most notable have already been discussed, at least in passing. The loss of patronage to political parties has been a tremendous loss for the power of parties. Primary systems have cost party hierarchy power, throwing things open more to a broader public. Another change that was very important in the latter part of the last century was the Federal Election Campaign Act, which essentially, as Professor Malbin noted, treated parties as big interest groups or big PACs and created for us a very candidate-centered mode of raising funds thus giving candidates greater independence from political parties.

Now, again, the idea was that these things would be good, that they would break up party machines and they would create a better voter and more legislation in the public interest. And to some extent there may be some truth in that if you look at old Nineteenth Century parties that really did seem to have an iron grip on certain areas and were able to get away with a great deal of corruption.

It is possible that our politics today is much less corrupt than it was 100 years ago. And some of that probably is due to some of the changes that were made in parties. On the other hand, this has had a number of effects for our ability to govern and for voting that have not been so good.

Andrew in his opening remarks talked a little bit about the ideal of the model voter, the man of good will, the sort of disinterested person. As we have seen in the last presidential election, that is just not a very accurate model of people. There just are not many people like that out there.

To me the epitome was one of the focus groups after one of the presidential debates. By this time, the campaign has been going on for a year. We have been spending hundreds of millions of dollars. And we have this focus group. We have had a couple of debates, but the people in the focus group were chosen because they claimed to need more specifics. And so they watched the

debate. Then they put the focus group out there. And the moderator says to one on the panel: “Well, does this debate help you make up your mind?”

And the focus group member said: Well, “yes and no.” That was actually her response. And she seemed very proud of it; that at that very late stage of the campaign, she was still “independent” and not willing to commit.

In fact, what we find is that these late committers, these “men of good will,” you might say, actually tend to be less informed than other people in society. Indeed, they tend to be among our least informed voters. I do not want to say they are among our less in-formed citizens. It may be non-voters are even more poorly informed. But for the most part I think they are not the people we view as the model voter.

In fact, people who have a stronger attachment to political parties tend to be the true model voter. The reason that they have a strong attachment to political parties is precisely because they think about issues more often and they have a coherent political view. They put their issues into a matrix that fits together and that makes sense for them. For these voter issues are not just floating around out there, outside of some ideological framework, allowing them to be plucked off by the candidate who promises them the most immediate benefits. In this sense, the party-affiliated voter is probably our best voter.

That does not necessarily mean, I suppose, that parties are always going to be good things, but it does suggest that the best voters may tend to gradually form themselves into parties. They will join together with people possessing a similarly coherent world view. It may begin in a legislative caucus. It may begin on the outside in a movement to elect particular people. But something like that I think will take place.

The Federal Election Campaign Act, falling on the heels of primaries, and the demise of patronage, was a real blow to political parties, because it took away much of their function and put the individual candidates in the saddle. Yet about that same time, the Supreme Court began deciding a number of cases which in other ways strengthened the power of political parties or at least of the party hierarchies. In cases such as *Eu v. San Francisco County Democratic Central Committee* and *Tashjian v. Connecticut*, and most recently this year, in *California Democratic Party v. Jones*, the Supreme Court has strengthened the right of political parties to govern themselves to decide their own membership, to limit who would vote in primaries for parties, and to set up their own internal governing structure.

So, while some of the Court’s decisions, in patronage and so on, have cut against parties in other ways, the Court has done some things that have strengthened the structure of parties. At the same time, our parties do seem to be becoming, if anything, more polarized in terms of having a coherent world view.

Now, that may be good or bad. It may be bad at some level if the parties become too polarized. But we are seeing now that when these various groups that do their ratings of political parties—groups such as the American Conservative Union, Americans for Democratic Action, and People for the American Way for the first time ever, really—we are seeing among senators that every Democrat is to the left of every Republican. I do not think it is quite that stark yet for the House,

although it is moving in that direction.

The party label, in terms of interpreting what a member of Congress or the Senate might do on any issue, may be more meaningful now than it has ever been. If you tell me a congressman's position on even one major issue, I can probably tell you what party the person is in. If you give me two or three or four issues, I can almost certainly do it. The old mavericks, the Hiram Johnsons and Bob La Follettes if we go way back, or more recently the Jacob Javitzes and Lowell Weickers and the Sam Ervins are pretty much disappearing, and we have more and more a conservative party and a liberal party.

What does all of this mean for the future of political parties? These two trends — stronger party autonomy and ideological cohesiveness - I see strengthening political parties, despite all the beating and buffeting that they have taken in the last century.

The third thing that is working right now to strengthen parties is the soft money system, which is countering the party destructive features of the Federal Election Campaign Act. Under FECA we created a system in which parties were very weak — they could not contribute much more to a candidate than could any old PAC. The parties were initially weakened. But we have not raised at the federal level contribution limits since they were first passed in 1974. And, as has been pointed out, that has led to something of a drying up of hard money funds, the \$1,000 contributions that can be used in federal races. It is not a complete drying up of funds because the economy grows and more people have more money. So each year there is a few more people who can give \$1,000 or maybe some people who are not yet feeling they are maxed out at \$500 can go ahead and up their donations to \$750 or \$1,000. But for the most part because that cap is there, the ability of hard money to grow is not there as it is with soft money.

The need to campaign continues to grow. Population continues to grow. Inflation continues to go up. And inflation in areas where campaigns spend a lot of money on things like postage and paper and broadcast advertising time, tends to have gone up more rapidly than general levels of inflation.

Plus, we keep expanding the electorate. We have not really expanded the electorate a lot by law recently. We were for a while there when we added the right to vote early in the century to women, later in the century to 18-year-olds. By statute through the Voting Rights Act, we began to enable large numbers of minorities to enroll and vote when they had not previously. We have not had many statutes like that lately that have specifically expanded the electorate, but the potential electorate, at least, continues to expand just through added efforts that are made these days to get minorities registered and voting and also through things like the Motor Voter Act, which make it easier to register and to vote, whether you are a minority or not. And so these types of things have continued to expand the electorate. And, of course, it takes money to reach these people.

Party soft money has tended to fill the gap, strengthening parties in the process. The other thing is, of course, that we are, in fact, spending gradually more of our Gross National Product on political activity. We do not spend as much as a lot of countries do as a percentage of Gross National Product. You know, the Philippines, Venezuela, and poor countries like that of ten spend more than do a number of richer countries. But we are spending more of our Gross

National Product on electoral activity.

To some people that is a terrible thing, but I think it is a natural thing. I think as the society becomes richer, it will tend to have more money to spend on non-essentials, which to some extent is what political lobbying is.

I think it is also natural when the government continues to grow and grow and grow and grow. When you have a government that claims ever more power and spends ever more money, people will want to spend more money to influence that government. And so spending will go up faster even than inflation and population growth account for. Because we have limited the hard money spending, it has to be made up somewhere. And it is being made up in the form of soft money.

The parties are able to raise the soft money and spend it in ways that, without directly advocating the election or defeat of their candidates, support those candidates for office. So what we have seen in the last 25 years is the parties have gradually become transformed from a place where you got your volunteer help and an organization to a place where you get cash, particularly if you are a challenger, because nobody else will give you the cash. They are also a place to find expertise. You get expertise to cope with campaign finance regulation and some of the other regulations that are out there now.

The parties themselves also have a stronger structure because of the Supreme Court decisions, which have tended to limit the ability of states to regulate the internal structures of parties. Yet, though the parties have this stronger formal structure now and a lot of cash flowing through them, they are almost bereft of members, in terms of the number of people who claim to strongly identify with parties, but more than that, people who will really go out and work at party headquarters and volunteer and do things on campaigns.

Indeed, I have argued that, to some extent, some of this may be intentional, that parties do not necessarily want volunteers because volunteers tend to screw up and run afoul of campaign finance regulations. So you do not want a bunch of volunteers out there. They will just get you in trouble. And if you have volunteers, you want them only to the extent that they are directly controlled by headquarters. You do not want people going off and freelancing within the context of the party.

Finally, there has been much discussion about whether or not we can ban soft money to political parties. I have argued in other fora that no, we cannot as a constitutional matter. But let us say I am wrong and that we can. Because there is an argument for the position.

So let us say we were to ban soft money to political parties. There is a lot of popular support for that, not because people want to ban money to political parties but because they “know” that soft money is really bad.

They do not know what it is, but they know that soft money is a very, very bad thing and they know that they are supposed to be opposed to it. They hear that all the time. They read it all the time in the newspapers. So they support a ban. And Senator McCain said there will be blood on the floor of the Senate if there is no action on his legislation. We do not want blood on the floor of the Senate. We really do not. And I hope if it is that important to him, I hope he can pass it without putting blood on the floor. [S.27, the “McCain Feingold” bill, passed the Senate on April

2, 2001.] So perhaps we will get a ban on soft money. What would be the effects? Well, as has been pointed out, interest groups can still go ahead and spend money on issue ads and organizing activities and communications to members to their hearts' content.

I do not think anybody realistically is sitting around saying any more that we could tell the Sierra Club or the AFL-CIO or any of these groups, the right to life groups, the Christian Coalition, the National Rifle Association — you can pick either side of the aisle — that they can not talk about candidates and issues. Particularly under the current constitutional framework, which very clearly gives them that right, that activity is going to continue. So, even if you could limit party soft money spending, you would simply have these interest groups become even more important

We handled some big cases at the FEC not long ago pertaining to some of the 1996 elections. By the way, I supported our vote finding that there were no violations of the act on at least these particular matters, so I do not mean to be critical. But I did note the argument that was made. The complaint was that the Democratic party had coordinated various activities with the labor unions. And so that made them union expenditures, contributions in kind, and so on.

And to the extent there was anything to that complaint, what I thought was interesting was that it was not like the party had gone to the labor union and said, "Look, here is what we are doing and here is what we need you to do independently." No. It was more that the labor unions went to the party and said, "Look, here is what we in big labor are doing, and here is what we need you guys in the party to do" and got the party in line.

So we already have interest groups threatening to dominate the parties. And what I am simply suggesting is if we cut out what is now one of the main things that keeps national parties going, which is the soft money flow, we are going to have even more power and influence trend to single issue groups, and lose the mediating influence of parties.