UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, et al.	)	
Plaintiffs,	)	
v.	)	Civ. No. 02-874 (CKK, KLH, RJL)
FEDERAL ELECTION COMMISSION, et al.	)	All consolidated cases.
Defendants.	)	

REBUTTAL DECLARATION OF SIDNEY M. MILKIS

1. I submit this declaration to respond to the expert reports submitted by political scientists on behalf of defendants in this case. In my view, those reports significantly understate the adverse impact of the BCRA on political parties and the harm to the American political system that is likely to result from its enforcement.

2. It is difficult to take seriously the unsupported suggestion by Professors Krasno and Sorauf that the BCRA, which will eliminate all non-federal funds (so-called "soft-money") raised by the national party committees (half a billion dollars during the 2000 election cycle alone) and severely restrict state party non-federal funds, "is likely to have little or no harmful impact on . . . political parties." Krasno/Sorauf Report at 2. The sudden and dramatic loss of funding on so large a scale will necessarily cause a pronounced reduction of party operations, including large-scale layoffs of the national parties' professional staff and a resulting loss of institutional expertise. It is my understanding that the RNC alone expects to lay off approximately 40 percent of its workforce as a direct consequence of the BCRA. See

Declaration of Jay Banning, ¶ 32. It is simply not credible to suggest that any organization can sustain so dramatic a reduction in resources while suffering "little or no harmful impact."

3. In my opinion, the Democratic and Republican parties have used non-federal funds to revitalize the national character of their organizations. American political parties have never been merely federal organizations; nor have they been merely loose coalitions of state and local organizations. Although their organizations have been decentralized, the two parties have orchestrated national campaigns; and their representatives in Congress have tended to moderate sectional or local interests in supporting national policies. In the past two decades, the Democrats and Republicans have used non-federal funds in a manner that is consistent with this traditional role – these funds have served to strengthen state and local parties, which had atrophied considerably by the end of the 1970s, and to enhance the collaboration among federal, state, and local organizations in recruiting and electing candidates as well as formulating a unified message.

4. The defendants' expert witnesses deny this, claiming that, especially since 1996, the parties have used non-federal funds to pay for expensive media advertising that has little to do with "party building" – in Professor Thomas Mann's words, as "vehicles for implementing their newly developed strategy of federal electioneering under the guise of issue advocacy" (Mann report at 22). It is my understanding, however, that nonfederal funds have been used to strengthen the most basic forms of associational activities – voter registration, get-out-the-vote activities, party communication with its members and subsidiary organizations, and promotion of the parties' ideological views. See Declaration of Jay Banning, at ¶ 28; Declaration of Thomas Josefiak, at ¶¶ 34, 36-39, 42, 48, 82-87, 91, 95. If non-federal funds have been used in ways that do not serve these essential associational services, the response, it seems,

should be to address those abuses. Instead, the BCRA takes a meat cleaver approach that restricts national parties in their ability to sustain critical associational activities.

5. Moreover, the BCRA will undercut the efforts of the national parties to strengthen their state and local organizations. Because many state political party committees rely heavily on what are effectively cash subsidies from the national party committees, in the form of transfers of non-federal funds, reduced operations are likely at the state and local level as well. Professors Krasno and Sorauf indicate in their report that state parties receive 46% of their funds from non-federal transfers by the national party committees. See Krasno/Sorauf Report at 10. Again, it is exceedingly unlikely that such significant flows of money could be eliminated without harming the recipients of those funds. State parties' ability to recover from this loss will be severely hampered by restrictions on fundraising, including fundraising assistance from national party committees and federal officeholders. Furthermore, as I indicate in my affirmative declaration for this case, the BCRA will severely restrict the ways in which parties may raise so-called "Levin Funds" – nonfederal funds that state and local parties may raise, in contributions up to $10, 000 per donor, so long as state law allows, for certain "federal election activity." For example, state parties are prohibited from engaging in joint-fundraising with other state parties in raising these funds (see Milkis affirmative declaration, at ¶44).

6. I disagree with the claim of the defendants' expert witnesses that state parties have not benefited from the injection of nonfederal funds into their organizations. My research on party organizations indicates that state parties are far from the Potemkin villages they are depicted to be in the accounts of the defendants' expert witnesses. The constitutional division between the federal and state governments has allowed state parties to use nonfederal funds to exert independence in formulating platforms, recruiting candidates, and carrying out

their associational tasks. As Professor Ray La Raja has shown in his affirmative declaration for this case, state organizations are doing more than airing issue ads during the election campaign season: even in the 2000 election cycle, when media spending was high, combined spending on mobilizing voters, distributing grassroots materials, and paying the administrative expenses of the state party organization amounts to more than that spent on issue advertisements.

7. The sudden loss of funding on so large a scale will by itself be a heavy blow to the parties, but much more is at stake. The other crucial part of the story, which the defendants' political scientist experts either overlook or substantially understate, is the fact that the BCRA leaves special interest groups largely free to continue their recent, massive use of non-federal funds to define the terms of political debate. This shift in the balance of power between broadly based parties and single-issue interest groups, a shift that favors "pressure politics" over "party politics," would in my view be one of the most significant and harmful legacies of the BCRA.

8. The view expressed by Professors Krasno and Sorauf that "a fairly straightforward model of the post-BCRA world exists in the period prior to 1995" simply ignores the ways the political environment has changed since then. See Krasno/Sorauf Report at 85. As research by the Annenberg Center for Public Policy and by Professor Magleby have clearly shown, since at least the mid-1990s, special interest groups have spent very large and growing sums of non-federal funds on issue advocacy. An Annenberg study showed that during the 2000 cycle special interests outspent parties on issue advertising by a ratio of 2 to 1. Parties have been forced to respond to this onslaught of special interest money with defensive advertising, in order to avoid having their messages drowned out in the cacophony of special interest advocacy.

9. While BCRA imposes an absolute ban on the raising or spending of non-federal funds by national party committees, it does little to rein in interest groups. True, special interests will no longer be able to broadcast issue advertisements naming federal candidates within 30 days of a primary or 60 days of a general election (assuming that provision is not struck down). They will, however, remain entirely free to raise unlimited amounts of non-federal funds from wealthy individuals and corporations and to spend those funds on issue advertising naming candidates right up until the 31st day before a primary and the 61st day before a general election. Such advertising can serve to frame the terms of debate, all the more so because parties will be constrained in their ability effectively to respond. The DNC made effective use of just such a strategy to shape the political environment by airing issue advertisements in 1995, long before the 1996 primary or general elections.

10. During the election season itself, when the 30-day and 60-day limits are in effect, special interest groups will remain free to spend unlimited sums on a wide range of activities that the BCRA will not regulate. These include so-called "ground war" functions, such as direct mail, telephone banks, door-to-door canvassing, and distribution of literature. According to Democratic media consultant Raymond Strother, in his experience, interest groups are known to spend large sums on television, radio, direct mail, and so-called "push polls" in the weeks before elections. Strother notes that because such activities are not subject to disclosure requirements, "[w]e had no idea where the money came from." Declaration of Raymond D. Strother, at ¶ 15. Under the BCRA, interest groups will remain free to use 100% non-federal funds for these purposes, although they may focus more of their effort late in the campaign season on direct mail, push polls, and the like.

11. Under FECA and the BCRA, special interest membership organizations and corporations are free to use unlimited non-federal funds to pay for so-called "restricted class" campaign-related communications to their members, stockholders, executive or administrative employees, and the families of each of these groups. Unions and trade associations, and to a lesser extent corporations, already have made broad use of this exception. According to the FEC, during the 2000 election cycle, unions, interest groups, and corporations spent millions on restricted class communications. For example, the national AFL-CIO reported spending $4,220,500, in addition to amounts spent separately by AFL-CIO locals. The National Education Association reported spending $2,921,070. The National Rifle Association reported spending $1,795,198. Altogether, there were $17,757,818 in reported restricted class communications -- all paid for with 100% non-federal funds -- during the 2000 election cycle. See Declaration of Robert W. Biersack, at Table 13. It is my understanding that the actual amounts spent are likely to be higher, because not all such expenditures are required to be reported to the FEC. The use by interest groups of non-federal funds to pay for such communications, which may expressly advocate the election or defeat of specific federal candidates, will no doubt increase under the BCRA. We can expect that non-federal funds that cannot be spent on issue advertising during election seasons will be used for other forms of political communication, such as "restricted class" communications. Finally, special interest groups remain free to use non-federal funds to conduct broadcast advertising that does not refer to federal candidates but which may nonetheless be tailored to advance the agenda and reinforce the message of particular candidates.

12. As Professors Krasno and Sorauf state, "[m]oney is by nature easily transferable, completely mobile. . . . Its fluidity quickly validates the old adage that in any

transactional nexus activity flows from the more regulated portions to the less regulated ones." Krasno/Sorauf Report at 90. After BCRA, the latitude enjoyed by special interest groups to raise and spend non-federal funds is, for that very reason, likely to attract non-federal funds currently directed to party committees. The emphasis that BCRA puts on federal funds ("hard money") also benefits interest group organizations like PACs and business groups, which can act as "bundlers" of individual contributions by gathering like-minded people from around the country to give the maximum amount permitted to many campaigns.

13. I am aware of no evidence suggesting that special interest groups will unilaterally disarm in the wake of the BCRA. To the contrary, these groups are likely to press their advantage once parties' ability to raise and spend non-federal funds is tightly restricted. Indeed, there is evidence that they already are making plans to do so. This past summer, the Business and Industry PAC (BIPAC), an organization supported by business and trade associations, held a strategy session of business and trade association executives. According to Gary Casey, BIPAC president and CEO, there was enthusiastic agreement at this meeting that PACs have become "the coin of the realm." Mr. Casey's view was that BCRA has restored the conditions prior to the enactment of the 1979 Amendments to FECA, which marked the beginning of efforts by Congress and the FEC to reinvigorate parties as a bulwark against growing interest group influence. "Now we are back," he predicted, "to where PACs are not only important, but good." (Thomas B. Edsall and Juliet Eilperin, *Washington Post*, August 18, 2002.)

14. As I point out in my affirmative declaration prepared for this case, the new era of interest group domination is likely to be worse. Political activists formerly associated with the Democratic and Republican parties are reported to be creating new groups to fill the gap created by BCRA, employing provisions of the tax code that allow the creation of tax-exempt

organizations that they claim are not covered by the new law. These groups include Progress for America, which champions policies of the Bush Administration, and the Progressive Donor Network, to help women's rights, environmental, and civil rights groups. As Mike Lux of the Progressive Donor Network testified in his deposition in this case, "[a] lot of givers instead of giving money to political parties, since that will be prohibited, they will be looking for other organizations that may be effective politically to give money to." See Deposition of Mike Lux, at 51:4-8. These new organizations, according to officials involved in forming them, can raise and spend "soft" money as long as they do not coordinate their efforts with the political parties or candidates. (Thomas Edsell, *Washington Post*, August 25, 2002).

15. Not only will these groups confound the desire of BCRA supporters to restrict "soft money," they also will raise and disseminate such funds with far less disclosure than have political parties. As Professors Krasno and Sorauf point out, when nonfederal funds were channeled through parties, laws required full disclosure of both contributors and expenditures. (Krasno/Sorauf report at 85). But the new vehicles for this money are likely to be more secretive, with little or no obligation to reveal their activities. Ironically, Krasno and Sorauf suggest that without the enactment of BCRA, party organizations might have metastasized into interest groups, which would be "under their control or trusted allies, ...to avoid any disclosure of receipts and expenditures." In fact, the enactment of BCRA has *encouraged*, not proscribed, a proliferation of party surrogates. What's more, it is my opinion that these spin-off organizations will operate independently in the post-BCRA regulatory regime. They will do so, in part, out of consideration for the new law, which restricts collaboration with formal party committees. But legal concerns will combine with ideological considerations. For example, the Progressive Donor Network, representing liberal interests, will be unlikely to find organizational fellowship with the

centrist, New Democratic Network, another organization formed to gain access to the nonfederal funds that, prior to BCRA, would have gone to political parties. BCRA thus threatens to badly fragment parties.

16. Consequently, the BCRA's substantial restriction of party financial resources and disruption of the ties that bind the national, state, and local party committees together as a cohesive political network will materially weaken the parties both in absolute terms and -- more ominously -- relative to special interest groups. Those special interest groups rarely share the parties' need to build consensus among a broad constituency. Rather, they are most often focused on a narrow set of issues, or even a single issue, and are far more likely to represent one or the other extreme end of the political spectrum than they are to represent the broad center. As Morton Keller and I explain in our affirmative declarations in this case, the consequences of reorienting our politics away from the parties and toward the pressure politics of the special interests could be serious indeed. When parties have been weak – during the 1850s, the 1920s, and the 1970s, for example -- sectional and interest group politics have dominated the national and state capitals.

17. Professors Krasno and Sorauf thus ignore the important lessons of American political history when they claim that parties possess "natural" advantages over interest groups. (Krasno/Sorauf at 39) Parties always have had an indispensable but fragile place in the political life of the nation. American political culture, dominated by individualism, privacy, and rights, has bestowed important standing on interest groups. The power of interest groups, always significant, has become all the more so since the early part of the twentieth century. With the growth of big government amid the development of a complex commercial society, interest groups have become imposing rivals to political parties, capable of pressuring

government to enact policies that benefit small constituencies at the expense of the general public. As the legislative history of the 1979 Amendments to FECA show, these changes in the campaign finance laws were made in the hope of correcting the advantage that the organic statute gave to interest group politics. As I noted in my affirmative declaration for this case, public officials, such as Morley Winograd, president of the Association of State Democratic Chairpersons, urged that steps be taken to strengthen the "politics of party, the politics of coalition and accommodation, which is our nation's best defense against the divisiveness of special interest politics" (paragraph 37). These amendments authorized state and local party committees to use funds more freely in carrying out their critical associational activities; during the 1980s and 1990s, both Democrats and Republicans made use of nonfederal funds to pump new life into their state and local organizations. BCRA risks reverting to the situation that prevailed during the 1970s, when advocacy groups dominated the councils of American government.

18. The defendants' expert witnesses deny that parties have made good use of nonfederal funds; in fact, they insist that "soft money," has corrupted or "appeared" to corrupt the political process. With regard to whether BCRA is necessary to address corruption or "the appearance of corruption," Professor Mann writes that "[m]ost importantly, soft money has led the parties to become the avenue by which elected officials and large private donors frequently come together. . . . As inducements for large contributions, policymakers grant access and provide opportunities for face-to-face discussions in intimate settings with the party's most prominent public officials." Mann Report at 29. Donors and officeholders were getting together long before "soft money" became the focus of reformers' efforts. The parties have long conducted "federal funds" (sometimes called "hard money") fundraising dinner galas and

fundraising programs at which donors and candidates have an opportunity to meet. The RNC's "Eagles" fundraising program, for example, has long featured dinners and gatherings of the sort to which Professor Mann presumably objects, beginning in the late 1970s. These events, to which federal funds donors are invited, are, of course, perfectly permissible under both FECA and the BCRA and will likely continue after BCRA takes effect.

19. The BCRA does not purport to end such interaction between donors and officeholders. Nor does it prevent interest groups from hosting fundraisers much like those the parties conduct, featuring opportunities for wealthy donors and corporate executives to meet with federal officeholders. That interest groups use federal officeholders to raise funds, just as political parties do, is clear. See, e.g., Declaration of Joe Solmonese (EMILY's List), at ¶ 16; Declaration of Jane Gallagher (NARAL), at ¶ 20; Declaration of Debra Callahan (League of Conservation Voters), at ¶ 7; Declaration of Simon Rosenberg (New Democrat Network), at ¶ 12; Declaration of Deborah Sease (Sierra Club), at ¶ 15. If contacts between donors and officeholders somehow create the "appearance of corruption," why is it that the BCRA leaves special interests free to be the "avenue by which elected officials and large private donors frequently come together"?

20. In my opinion as a political scientist who has long studied the role of political parties and interest groups in America, parties are far less likely than special interest groups to facilitate corruption. The worst episode of corruption in recent American history, Watergate, featured, as Professor Mann notes, attaché cases stuffed with thousands of dollars, illegal corporate contributions, and conduits to hide the original source of contributions (Mann report at 4). But Watergate did not implicate the Republican party, which the Nixon administration largely ignored; rather, it arose from the indiscretions of the Committee to Relect

President Richard Nixon (CREEP). CREEP marked an advance in the candidate-centered campaign, which had been evolving since the Progressive era; it was set up to operate with almost complete independence from the Republican party. A principal lesson of Watergate, often missed by campaign finance reformers, is that candidates and public officials who are not held accountable to collective, public organizations like parties are more likely to engage in peculation and to abuse power.

21. The Republican and Democratic parties are large, complex associations representing very diverse coalitions of voters, adherents, and interests. Professors Krasno and Sorauf note that political parties are "big tent" organizations, dedicated to building coalitions that can win elections and govern (Krasno/Sorauf Report at 24). But they fail to acknowledge that this inclusive character of parties gives them the resources, as Henry Jones Ford noted more than a century ago in his classic account of *The Rise and Growth of American Politics*, "to interpose a party obligation between legislative marauders and their prey." Just as important, parties are *collective organizations* with long-standing commitments to principles and platforms. American political parties have rarely been doctrinaire, to be sure; but they are not, as the defendants' expert witnesses caricature them, merely power-seeking organizations without public purposes. Indeed, writing at a time when the Republicans and Democrats relied on the "spoils system" and were far less subject to disclosure than today's parties, Ford noted that the need to win elections and govern, in the name of platforms and principles, made parties *sui generis* public institutions: "Partisanship tends to establish a connection based on an avowed public obligation, while corruption consults private and individual interests which secret themselves from view and avoid accountability" (Ford at 322-323).Weakening the parties by a massive reduction in their

resources therefore undermines the one major American political institution that is publicly accountable and thus less prone to corruption.

22. Defendants' political science experts suggest that the appearance of corruption that they associate with large donations to parties derives from either (1) candidates' solicitation of non-federal funds for parties in a manner that effectively earmarks the funds for that candidate's use (e.g., through joint fundraising committees), or (2) candidates coordination with the party of the use of non-federal funds to benefit the candidate (e.g., the alleged coordination between the Clinton-Gore campaign and the DNC during the 1996 election cycle). (Mann Report at 19-20, 29-30). In both cases, their complaint lies with what they perceive to be lax enforcement by the Federal Election Commission of the existing rules against earmarking of funds and coordination between candidates and parties.

23. It is my understanding that under existing law, a candidate may not solicit a donation of non-federal funds that is earmarked for use in his or her campaign. If Congress believed it necessary to further clarify this point or to take protective measures to prevent such earmarking, it could have done so without banning national party non-federal funds altogether. Concerns about the extent of coordination between candidates and parties with regard to issue advertising could likewise be addressed short of an absolute ban on national party non-federal funds. The draconian approach adopted by Congress -- an outright ban on national party non-federal funds -- was hardly necessary to address these earmarking and coordination concerns.

I declare under penalty of perjury that the foregoing is true and correct.

Sidney M. Milkis

Executed on October 7, 2002