INFORMAL REMARKS ON THE LIMITS OF FACIAL REVIEW IN COMPLEX CASES

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I want to try to take a posture on this panel in critiquing the district court's opinion that is a little bit removed from my actual participation in the case itself. I'm participating in this litigation as one of the counsel for the parties, so I think it is inappropriate for me to spend time critiquing the substance of the lower court opinion. I have an audience for that, and that will unfold over the next couple of months. But I do feel that it is appropriate for me to critique the process.

I think that what happened in the district court was an institutional train wreck of serious proportions. I know that half of the opinion was facts, and therefore, instead of 1700 pages, we only had something like 900 pages. But 900 pages is something quite extraordinary. I know that the judges were asked to do a difficult task. They did it conscientiously and, I think, maybe as well as anybody is going to do it under the circumstances. Moreover, since I did not participate in the trial court (I was ill and away from the process), I have standing to say this. I know the lawyers on both sides did a splendid job in attempting to present the issues to the court. I think, however, that the process is just deeply flawed. I think that the idea of facial review of complex statutes has simply gotten out of control. To believe that there is any body of individuals ranging from the Supreme Court down, because this starts in *Buckley*,[1] capable of exercising the kind of predictive judgment necessary to carry out facial review here, simply asks more than the Article III judiciary can provide. Indeed, it pushes the Article III judiciary into looking something very like the Councils of Revision that were rejected by the Founders, and makes the Article III judiciary resemble European Constitutional Courts that routinely review legislation before it goes into effect. The law that comes out of these complex facial processes is inevitably flawed. It's time to rethink the reflexive notion that just because it's a First Amendment case, the case is to be decided on the basis of predictions about how statutes are likely to be applied in years to come to hypo-

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[1] Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

thetical parties and hypothetical contexts.

If there's one thing that characterizes the opinions of all three of the district judges, it is guesswork on two crucial issues. The first crucial issue is: how likely is it that there will be a genuine appearance of corruption in connection with contributions of soft money in future elections to political parties? How likely is it that a genuine appearance of corruption is going to occur? Now, it's hard enough, as we talked about in the first panel, that we're not even sure what "corruption" means. But assume that we develop a definition of "corruption" that we all agree on. You ask judges to speculate about how likely it is that a hypothetical contribution in a hypothetical election by a hypothetical person to a hypothetical party, would generate in the perception of the public, an appearance of corruption. Should it surprise you that on a record of sand like that, what happens is that experts come in and say "well we think it would be," "we think it wouldn't be," "we think in the past it was perceived this way by undergraduates at Arizona State University," "we think it wasn't perceived this way"? Does it surprise you that on a record of sand, three conscientious judges came to three completely different results?

Judge Henderson said, I don't see why there would be any appearance of corruption in the future on this. Judge Kollar-Kotelly said, of course there is going to be an appearance of corruption in the future on this. And Judge Leon said, there will be an appearance of corruption in one place, but not somewhere else. And you know what? All three of them are right, and all three of them are wrong, because they're just guessing. And in the absence of some sort of requirement that you have an enforcement history, and that you move the judicial determinations to actual cases and controversies involving actual communications in the context of actual disputes between real world parties, what you're going to get is treatises, or 900 pages of law, because judges have to canvass abstract propositions, and what they are writing are not judicial opinions, but law review articles dressed up as judicial opinions.

Secondly, the judges had to speculate on how likely it would be that the primary definition of "electioneering communication" is going to include too much pure issue advocacy. Again, hypothetical statements in hypothetical future elections, in hypothetical settings. They're supposed to make a judgment about whether or not that is going to be a communication about issues or a communication about candidates. The best evidence they had before them were the two *Buying Time* studies.[2] The two *Buying Time* studies were subjected to

[2] CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (2001); JONATHAN S. KRASNO & DANIEL E. SELTZ, BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS (2000).

very serious criticism, and came through quite well. Both Judge Leon and Judge Kollar-Kotelly upheld the *Buying Time* studies as useful and helpful.[3] But let me say immediately, this is a study in which undergraduates at Arizona State and the University of Wisconsin looked at storyboards pulled from context, and made their best judgment about whether it was intended as an issue ad or not an issue ad. Useful in making general predictive determinations? Sure, but it doesn't substitute for a judge's ability to decide an actual case in an actual setting with an actual communication in a real world controversy.

If we eschewed facial review, and said, let's let this work the way everything else works when judicial review occurs—bring us real cases or controversies—within three years, you would have the following things. First, you would have cases generating narrow constructions of the statutes that would create safe harbors for a lot of the problems that the parties raise with some of the statutes. They would be held by the courts not to be within the statute. Second, you would have a series of constitutional safe harbors created by "as applied" decisions saying that the statute couldn't be applied to the following type of communication. So you would have a narrow statute with constitutional safe harbors. Third, you would have the courts requiring the FEC to have advisory mechanisms that would be consistent with *Freedman v. Maryland*,[4] and that would provide a procedural mechanism in advance for anybody to find out whether or not their speech fell in one category or another, and that if you invoke such a procedural mechanism, it would be an absolute defense to a criminal prosecution until the decision finally came down.

So, if we went the ordinary case-by-case way, we can have the best of both worlds. We can have regulation of what everybody admits is an important problem that needs regulation. We could have protection of the areas of unconstitutional application of the statutes. We shouldn't have to choose between the two.

A legitimate exception exists in some First Amendment cases to the as-applied rule, the usual rule, in an American court. When a court reviews a case "as applied" to the litigants, the litigants raise their own rights in the context of a determination that is made as applied to the facts of that particular case. The exception to that for some First Amendment cases is clearly legitimate in certain contexts, but remember what those contexts are. Facial review of First

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[3] *See, e.g.*, McConnell v. FEC, 251 F. Supp. 2d 176, 634 (D.D.C.) (three-judge court) (Kollar-Kotelly, J.), *prob. juris. noted*, 123 S. Ct. 2268 (2003) (mem.) ("Importantly, much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert."); *id.* at 796 (Leon, J.) ("Unlike Judge Henderson, I believe that the *Buying Time* studies are entitled to some evidentiary weight." (footnote omitted)).

[4] 380 U.S. 51 (1965).

Amendment cases comes out of the civil rights movement in the South and the labor movement. The early cases involve state statutes that could not be narrowed by the Supreme Court. The statutes were being unfairly used by sheriffs and local law enforcement officials to crush labor pickets and to crush civil rights marches. The statute was being used to prevent vulnerable speakers who had no access to the courts and couldn't protect themselves against this process. That's what generated *Thornill v. Alabama*,[5] *Dombrowski v. Pfister*,[6] *Coates v. City of Cincinnati*,[7] and *Gooding v. Wilson*,[8] the line of cases that said that under certain circumstances, you challenge the statute not by what the parties do, but by how the statute might be used in the future. That narrow exception has mutated into a routine form of First Amendment litigation in which statutes are tested not by how they're being used, but by the ingenuity of counsel and how they might be used in the future in hypothetical settings. It's law school run amok.

I support facial review in appropriate settings. I support facial review in settings where there is a reasonable fear of viewpoint-based discrimination in the application of a broad statute. You need a fear that legitimate protected activity will be suppressed, and will be suppressed without the opportunity of the usual as-applied access to the courts. It mocks facial review to say that the National Rifle Association lacks ability to defend its own free speech rights in as-applied settings—that the nation's strongest speakers cannot protect themselves through the vigorous application of as-applied review.

We have allowed facial review to morph into a situation that turns the First Amendment into a tool of deregulation. It is no longer being used to decide whether a speech is protected or not. Vast amounts of unprotected activity get swept up through the facial review process, and you have a Scylla and Charybdis situation, where you have vagueness on one hand, overbreadth on the other, and the impossibility of a legislature to get between those two obstacles with-

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[5] 310 U.S. 88, 96 (1940) ("The section in question must be judged on its face.").

[6] 380 U.S. 479, 486 (1965) ("[W]e have consistently allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.").

[7] 402 U.S. 611, 616 (1971) (Black, J., concurring) ("[L]aws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face."); *id.* at 619-20 (White, J., dissenting) ("Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others.").

[8] 405 U.S. 518, 521 (1972) ("[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite specificity.'" (quoting *Dombrowski*, 380 U.S. at 486)).

out judicial help. And so my plea is, let's stop this. There is no way you are going to get a good three-judge decision. There is no way you are going to get a good Supreme Court opinion. It is only going to go from bad to worse, as long as we keep unnecessarily resorting to facial review in complex cases. It is time to rethink the process.