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September 3, 2014

RE: S. J. Res. 19, to gut First Amendment protection for speech about public policy issues and political figures

Dear Senator:

On September 8 or soon thereafter, the Senate will vote on S. J. Res. 19, an amendment to the U.S. Constitution that would, among other things, empower Congress, and each of the 50 state legislatures, to prohibit the National Right to Life Committee (NRLC) or any of its affiliates from expending funds on any activity deemed to “influence elections.”

NRLC is strongly opposed to this sweeping attack on the protections that we currently enjoy under the Bill of Rights. The dispositive Senate roll call on S. J. Res. 19 will be included in NRLC’s scorecard of key roll call votes of the 113th Congress, with a vote in favor of the amendment accurately described as a vote to empower incumbent federal and state lawmakers to restrict and criminalize speech that is critical of their actions on crucial public policy issues, including abortion.

S. J. Res. 19 contains two separate empowerment clauses. Section 1 provides that “Congress and the states may regulate and set reasonable limits on the raising and spending of money by candidates and others *to influence elections.*” Section 2 empowers “Congress and the States” to enforce Section 1 – but also contains a separate clause providing that Congress and the States “may distinguish between natural persons and corporations or other artificial entities created by law, *including by prohibiting such entities from spending money to influence elections.*” [italics added for emphasis]

One can hardly conceive of language more sweeping than the phrase “to influence elections.” On its face, it could encompass not only communications regarding the actions of individuals who hold or seek elective office – which would be bad enough – but also communications regarding politically charged public policy issues (i.e., issue advocacy). Even nonpartisan activity intended to increase participation in the electoral process could be restricted. We regard the adjective “reasonable” as mere eyewash that provides no effective constraint on the power described in Section 1 -- but in any event, the “reasonable” standard *does not apply* to “corporations or other artificial entities created by law,” because the second clause of Section 2 explicitly authorizes laws “*prohibiting* such entities from spending money to influence elections.” [italics added for emphasis] These points illustrate the radical scope of this proposal:

- The restrictive powers conferred by S. J. Res. 19 would apply across the board, to every mode of communication – print (including books), electronic, broadcast, movies, internet, etc.
- The amendment confers plenary power both on Congress and on each state to control any spending on any activity deemed to influence any election – as opposed to granting power to Congress over federal elections and to each state over its respective state-office elections. Thus, for example, State X could pass and enforce a law prohibiting nonprofit advocacy groups from

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distributing *federal or state* legislative scorecards within that state, even if the nonprofit was complying with all applicable federal laws.

- If S. J. Res. 19 was part of the Constitution, there would be nothing to prevent Congress or a state legislature from crafting restrictions that effectively define one side of a public policy debate as the election-influencing side, and restricting communications to the public that advocate that particular viewpoint. (The same end might also be accomplished by imposing restrictions on the types of legal entities that advance one side of a public policy debate but not the other side – for example, banning election-influencing activity by trade associations and nonprofit corporations but not unions, or vice versa.) The Judiciary Committee report insists that any restrictions enacted under authority of S. J. Res. 19 would have to be “viewpoint neutral” because viewpoint neutrality is “a cardinal First Amendment principle” – but it is hardly tenable to propose to amend the Constitution to overturn decades of U.S. Supreme Court rulings enforcing First Amendment protections with respect to election-influencing speech, and then try to hide behind “a cardinal First Amendment principle” to deny the implications of such radical surgery on the Bill of Rights.

- Freedom of the press is not merely a “cardinal principle” derived from the First Amendment, but an explicit clause of the First Amendment – yet, the drafters of S. J. Res. 19 found it necessary to include Section 3, which provides that “nothing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.” This implicitly recognizes that “the press” consists largely of “corporations or other artificial entities created by law” that often spend money in ways that influence elections, so Section 3 is necessary to prevent giving legislators power to directly restrict “the press.” The inclusion of this rule also underscores that S. J. Res. 19 does indeed empower legislators to override all of the other provisions of the First Amendment – those dealing with free speech, the right to assemble, the right to petition, and the right to free exercise of religion – if they base the abridgements on the perceived need to curb activity they deem may “influence elections.” Moreover, the severing of freedom of speech from “the freedom of the press” should especially alarm any groups that advocate for causes that are out of favor with the “mainstream news media” or with Hollywood. Who will determine whether a given communicator is afforded the privileged status of “the press,” the only collective entity still allowed to engage in unrestricted communications that may “influence elections”?

S.J. Res. 19 proposes a constitutional framework for institutionalized corruption, under which a political patrician class – including the officially designated “press” -- could entrench itself in power, suppressing the collective voices of those who might otherwise marshal the resources to challenge the oligarchy. NRLC urges you to reject this radical assault on the Bill of Rights.

Sincerely,



Carol Tobias
President



David N. O'Steen, Ph.D.
Executive Director



Douglas Johnson
Legislative Director