
From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Wednesday, March 06, 2002 12:24 PM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO])
Cc: noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO])
Subject: : Re:

Begin Original ARMS Header ##### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 6-MAR-2002 13:24:17.00
SUBJECT:: Re:
TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO]) READ:UNKNOWN
End Original ARMS Header

That actually does not answer the question. Knowing what you know in terms of evidence, do you think the current limits (for all contributors) and bans (for corporations and unions) on contributions to candidates are unconstitutional? It is a yes or no as to both prongs of the question (money limits and bans).

Helgard C. Walker
03/06/2002 10:44:22 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

I did answer your question(s). Generally unconstitutional means subject to strict scrutiny; presumptively unconstitutional; might conceivably pass muster if evidence of real problem + narrow tailoring, et cetera, but hard row to hoe.

I don't know how it could be just background noise if it overwhelms -- seems to me it's then foreground noise. Anyway, I still think (in case I was not clear before) that it's both bad law and policy to regulate it directly. I agree it creates problems for candidates when they are hampered by contribution limits and outside groups are not; but the way to fix this (the old "leveling the playing field" issue) is to eliminate contribution limits, not to regulate the groups. So we are agreed, then, that it is the contribution limits that cause these many unintended consequences.

Brett M. Kavanaugh

03/06/2002 10:17:45 AM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: noel j. francisco/who/eop@eop

bcc:

Subject: Re:

You did not answer my question. And what does "generally unconstitutional" mean? Do you think the current limits (for all contributors) and bans (for corporations and unions) on contributions to candidates are unconstitutional?

also, please be fair to what I said and do not mischaracterize. I said "background noise that overwhelms the candidates/campaigns." The reason it "overwhelms" is that the candidates cannot respond because they cannot raise money from their supporters in same way that the interest groups can raise money from theirs. That means that not all "speakers"

are playing under the same rules. That seems a 1A problem. And I do not like a political campaign that is Sierra Club against Chamber of Commerce with the candidates reduced to bit roles because of contribution limits.

Helgard C. Walker

03/06/2002 10:01:33 AM

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc: noel j. francisco/who/eop@eop

bcc:

Subject: Re:

The fact that you would call voter speech "background noise" suggested that you do not value it very highly and therefore do not think it was that "good" of a thing. But I am glad that you have changed your mind.

Again, candidates are conspiring with interest groups to evade the contribution limits and evidence of coordination can be adduced, that is already banned under FECA. And I know you agree that it is unconstitutional, but I was disagreeing with your point that eliminating "background noise" is "laudable" policy -- I think it's scary policy.

As to your specific Qs, I think that Justice Thomas was right when he wrote in *Colorado Republicans I* that contributions deserve the same 1A protections as expenditures. So, yes, I think limits on those actions are generally unconstitutional. And as a policy matter, I support less rather than more direct regulation of speech, preferring public disclosure (coupled with the use of existing bribery and vote-buying laws) as a means of disinfecting the political process.

Brett M. Kavanaugh

03/06/2002 09:52:11 AM

Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP

cc: noel j. francisco/who/eop@eop

bcc:

Subject: Re:

I agree that "background noise" is a good thing, but my point is also tied up with the circumvention-of-limits issue. There is a lot of that has gone on. I think that is undeniable as a factual matter. But remember that I agree it is "blatantly unconstitutional," so relax.

Also, let me ask this, which may help me understand your general views: (i) As a policy matter, do you support ending the limits and bans on contributions to candidates? (ii) Do you think the current limits and bans on contributions to candidates are constitutional?

Helgard C. Walker
03/06/2002 09:36:52 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

Interesting. Two points: I vehemently disagree that when people who happen not to be candidates themselves speak out publicly on behalf of either an issue or a candidate that their speech is mere "background noise." That characterization is a gross demeaning of political speech and participation.

Why is the speech of voters/citizens less valuable in the political process than the speech of candidates (who are most often incumbents trying to protect themselves from public criticism when they regulate to mute all "background noise" but their own speech)? We'd have a pitiful democracy, if one at all, if people were not free to discuss among themselves and persuade each other on matters of public import. Besides, if voters wish to hear candidates debate without being distracted by other "voices," they can turn on the television and watch candidate debates. But preventing regular citizens from trying to talk with each other about political issues and the merits or demerits of candidates for election is no way to run the American political process.

Second, there is a line between individual contributions and parties, and it is this: when an individual gives, he's got his own 1A interest at stake. But when you talk about a party, you have two sets of 1A interests, as the Court has repeatedly recognized: the interest of the party as an institution, but also the associational interests of the people who have come together to form the party as a way of increasing their effectiveness in the process.

Brett M. Kavanaugh
03/06/2002 09:15:45 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: Noel J. Francisco/WHO/EOP@EOP
Subject:

Just so you know, I agree that the issue ad restrictions are blatantly unconstitutional -- although I think the policy goal of allowing the candidates to debate each other without background noise that overwhelms the

candidates/campaigns themselves is quite laudable (albeit unconstitutional). And beyond the background noise issue, it also seems clear to me that the issue ads are often done in coordination with candidates because the candidates do not have enough money because, in turn, of the limits on contributions to campaigns. So Mr. Big Donor is solicited to contribute to Sierra Club for them to run an ad attacking Governor Bush rather than to the Gore campaign for it to run an ad attacking Governor Bush. I can see why people think that is a circumvention of the limits on contributions to candidates. That does not mean the restriction on issue ads is any more constitutional, but we lose credibility if we pretend that that scenario is not happening a lot.

As to the soft money limits, I have constitutional concerns but I do not see how limits on contributions to candidates (and the longstanding ban on corporate and union contributions to candidates) can be meaningfully distinguished from contributions to political parties. That line between candidate and party does not make sense to me as a constitutional matter, nor (I am quite sure) does it remotely reflect the reality of political campaigns. Therefore, it seems to me that limits on contributions to candidates and limits on contributions to political parties are not readily distinguishable as a constitutional matter. And I have heard very few people say that the limits on contributions to candidates are unconstitutional, although I for one tend to think those limits have some constitutional problems.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Wednesday, March 06, 2002 9:00 AM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO])
Cc: noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO])
Subject: : Re:

Begin Original ARMS Header ##### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 6-MAR-2002 09:59:46.00
SUBJECT:: Re:
TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO]) READ:UNKNOWN
End Original ARMS Header

The problem re issue ads in a nutshell is that candidate X is handcuffed in his/her ability to respond to the Sierra Club etc. because of the limits on contributions to his/her campaign. That is grossly unfair to the candidates, and I think it is a serious 1A problem as well.
That is why I asked your views re the limits on contributions to candidates. (Is it possible that my 1A views are even purer than yours!!)

Helgard C. Walker
03/06/2002 09:36:52 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

Interesting. Two points: I vehemently disagree that when people who happen not to be candidates themselves speak out publicly on behalf of either an issue or a candidate that their speech is mere "background noise." That characterization is a gross demeaning of political speech and participation.

Why is the speech of voters/citizens less valuable in the political process than the speech of candidates (who are most often incumbents trying to protect themselves from public criticism when they regulate to mute all "background noise" but their own speech)? We'd have a pitiful democracy, if one at all, if people were not free to discuss among themselves and persuade each other on matters of public import. Besides, if voters wish to hear candidates debate without being distracted by other "voices," they can turn on the television and watch candidate debates.
But preventing regular citizens from trying to talk with each other about political issues and the merits or demerits of candidates for election is no way to run the American political process.

Second, there is a line between individual contributions and parties, and it is this: when an individual gives, he's got his own 1A interest at stake. But when you talk about a party, you have two sets of 1A interests, as the Court has repeatedly recognized: the interest of the party as an institution, but also the associational interests of the people who have come together to form the party as a way of increasing their effectiveness in the process.

Brett M. Kavanaugh
03/06/2002 09:15:45 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: Noel J. Francisco/WHO/EOP@EOP
Subject:

Just so you know, I agree that the issue ad restrictions are blatantly unconstitutional -- although I think the policy goal of allowing the candidates to debate each other without background noise that overwhelms the candidates/campaigns themselves is quite laudable (albeit unconstitutional). And beyond the background noise issue, it also seems clear to me that the issue ads are often done in coordination with candidates because the candidates do not have enough money because, in turn, of the limits on contributions to campaigns. So Mr. Big Donor is solicited to contribute to Sierra Club for them to run an ad attacking Governor Bush rather than to the Gore campaign for it to run an ad attacking Governor Bush. I can see why people think that is a circumvention of the limits on contributions to candidates. That does not mean the restriction on issue ads is any more constitutional, but we lose credibility if we pretend that that scenario is not happening a lot.

As to the soft money limits, I have constitutional concerns but I do not see how limits on contributions to candidates (and the longstanding ban on corporate and union contributions to candidates) can be meaningfully distinguished from contributions to political parties. That line between candidate and party does not make sense to me as a constitutional matter, nor (I am quite sure) does it remotely reflect the reality of political campaigns. Therefore, it seems to me that limits on contributions to candidates and limits on contributions to political parties are not readily distinguishable as a constitutional matter. And I have heard very few people say that the limits on contributions to candidates are unconstitutional, although I for one tend to think those limits have some constitutional problems.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Monday, November 18, 2002 4:04 PM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re:

Begin Original ARMS Header ##### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:18-NOV-2002 17:03:59.00
SUBJECT:: Re:
TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

that's not good.

Helgard C. Walker
11/18/2002 04:58:32 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:Re:

Yes

.

----- Original Message -----

From:Brett M. Kavanaugh/WHO/EOP
To:Helgard C. Walker/WHO/EOP@EOP
Cc:
Date: 11/18/2002 03:53:21 PM
Subject: Re:

only 4 votes for the groups challenging the ban, you mean?

Helgard C. Walker
11/18/2002 03:12:37 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
bcc:
Subject: Re:

I think there are only 4 votes at best for that result.

Brett M. Kavanaugh
11/18/2002 12:01:40 PM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc:
Subject:

WASHINGTON)) The Supreme Court agreed Monday to take a new look at federal limits on campaign contributions to candidates.

The court will decide whether certain advocacy groups can contribute to candidates' campaigns. Currently, only individuals, political action committees, political parties and other campaign committees can give to candidates.

This case is unrelated to the McCain-Feingold campaign finance law, which bans unlimited corporate, labor and individual contributions to the political parties. Opponents have challenged that law in the lower courts.

The Supreme Court has been more willing to uphold limits on contributions, which justices have said could give the appearance of corruption. In June 2001, a very divided court ruled 5-4 that political parties could not spend unlimited amounts of money if they coordinated their efforts with a candidate. And in January 2000, the court voted 6-3 to back Missouri's contribution limits to state campaigns.

On the other hand, the court has struck down spending restrictions on First Amendment grounds, likening money to free speech. Such reasoning led the court in 1976 to uphold post-Watergate limits on campaign contributions but throw out restrictions on how much candidates could spend on their campaigns.

At issue in this case is whether North Carolina Right to Life and other nonprofit advocacy corporations) groups that raise money not through business ventures but through donations from supporters) can make campaign contributions. Such groups have neither business interests nor shareholders.

From: Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP [WHO])
Sent: Wednesday, March 06, 2002 5:05 PM
To: Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO])
Cc: brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO]); noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO])
Subject: : Re:

Begin Original ARMS Header ##### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 6-MAR-2002 18:04:40.00
SUBJECT:: Re:
TO:Helgard C. Walker (CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO]) READ:UNKNOWN CC:noel j. francisco (CN=noel j. francisco/OU=who/O=eop@eop [WHO]) READ:UNKNOWN
End Original ARMS Header

Or do you mean "uncle"?

Helgard C. Walker
03/06/2002 05:37:17 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

Truce.

Brett M. Kavanaugh
03/06/2002 05:24:31 PM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

the problem is that the foreground noise is sometimes in the foreground only because of the restraints on the candidates themselves.

it should not be viewed as "scary" to acknowledge that fact or to try to correct that bizarre situation. and I never said that "eliminating background noise is laudable policy," contrary to your e-mail's wild mischaracterization.

Helgard C. Walker
03/06/2002 10:44:22 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

I did answer your question(s). Generally unconstitutional means subject to strict scrutiny; presumptively unconstitutional; might conceivably pass muster if evidence of real problem + narrow tailoring, et cetera, but hard row to hoe.

I don't know how it could be just background noise if it overwhelms -- seems to me it's then foreground noise. Anyway, I still think (in case I was not clear before) that it's both bad law and policy to regulate it directly. I agree it creates problems for candidates when they are hampered by contribution limits and outside groups are not; but the way to fix this (the old "leveling the playing field" issue) is to eliminate contribution limits, not to regulate the groups. So we are agreed, then, that it is the contribution limits that cause these many unintended consequences.

Brett M. Kavanaugh
03/06/2002 10:17:45 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: noel j. francisco/who/eop@eop
bcc:
Subject: Re:

You did not answer my question. And what does "generally unconstitutional" mean? Do you think the current limits (for all

contributors) and bans (for corporations and unions) on contributions to candidates are unconstitutional?

also, please be fair to what I said and do not mischaracterize. I said "background noise that overwhelms the candidates/campaigns." The reason it "overwhelms" is that the candidates cannot respond because they cannot raise money from their supporters in same way that the interest groups can raise money from theirs. That means that not all "speakers"

are playing under the same rules. That seems a 1A problem. And I do not like a political campaign that is Sierra Club against Chamber of Commerce with the candidates reduced to bit roles because of contribution limits.

Helgard C. Walker
03/06/2002 10:01:33 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel.j.francisco/who/eop@eop
bcc:
Subject: Re:

The fact that you would call voter speech "background noise" suggested that you do not value it very highly and therefore do not think it was that "good" of a thing. But I am glad that you have changed your mind. Again, candidates are conspiring with interest groups to evade the contribution limits and evidence of coordination can be adduced, that is already banned under FECA. And I know you agree that it is unconstitutional, but I was disagreeing with your point that eliminating "background noise" is "laudable" policy -- I think it's scary policy.

As to your specific Qs, I think that Justice Thomas was right when he wrote in Colorado Republicans I that contributions deserve the same 1A protections as expenditures. So, yes, I think limits on those actions are generally unconstitutional. And as a policy matter, I support less rather than more direct regulation of speech, preferring public disclosure (coupled with the use of existing bribery and vote-buying laws) as a means of disinfecting the political process.

Brett M. Kavanaugh
03/06/2002 09:52:11 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: noel.j.francisco/who/eop@eop
bcc:
Subject: Re:

I agree that "background noise" is a good thing, but my point is also tied up with the circumvention-of-limits issue. There is a lot of that has gone on. I think that is undeniable as a factual matter. But remember that I agree it is "blatantly unconstitutional," so relax.

Also, let me ask this, which may help me understand your general views: (i) As a policy matter, do you support ending the limits and bans on contributions to candidates? (ii) Do you think the current limits and bans on contributions to candidates are constitutional?

Helgard C. Walker
03/06/2002 09:36:52 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc: noel.j.francisco/who/eop@eop
bcc:
Subject: Re:

Interesting. Two points: I vehemently disagree that when people who happen not to be candidates themselves speak out publicly on behalf of either an issue or a candidate that their speech is mere "background noise." That characterization is a gross demeaning of political speech and participation.

Why is the speech of voters/citizens less valuable in the political process than the speech of candidates (who are most often incumbents trying to protect themselves from public criticism when they regulate to mute all "background noise" but their own speech)? We'd have a pitiful democracy, if one at all, if people were not free to discuss among themselves and persuade each other on matters of public import. Besides, if voters wish to hear candidates debate without being distracted by other "voices," they can turn on the television and watch candidate debates. But preventing regular citizens from trying to talk with each other about political issues and the merits or demerits of candidates for election is no way to run the American political process.

Second, there is a line between individual contributions and parties, and it is this: when an individual gives, he's got his own 1A interest at stake. But when you talk about a party, you have two sets of 1A interests, as the Court has repeatedly recognized: the interest of the party as an institution, but also the associational interests of the people who have come together to form the party as a way of increasing their effectiveness in the process.

Brett M. Kavanaugh
03/06/2002 09:15:45 AM
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP
cc: Noel J. Francisco/WHO/EOP@EOP
Subject:

Just so you know, I agree that the issue ad restrictions are blatantly unconstitutional -- although I think the policy goal of allowing the candidates to debate each other without background noise that overwhelms the candidates/campaigns themselves is quite laudable (albeit unconstitutional). And beyond the background noise issue, it also seems clear to me that the issue ads are often done in coordination with candidates because the candidates do not have enough money because, in turn, of the limits on contributions to campaigns. So Mr. Big Donor is solicited to contribute to Sierra Club for them to run an ad attacking Governor Bush rather than to the Gore campaign for it to run an ad attacking Governor Bush. I can see why people think that is a circumvention of the limits on contributions to candidates. That does not mean the restriction on issue ads is any more constitutional, but we lose credibility if we pretend that that scenario is not happening a lot.

As to the soft money limits, I have constitutional concerns but I do not see how limits on contributions to candidates (and the longstanding ban on corporate and union contributions to candidates) can be meaningfully distinguished from contributions to political parties. That line between candidate and party does not make sense to me as a constitutional matter, nor (I am quite sure) does it remotely reflect the reality of political campaigns. Therefore, it seems to me that limits on contributions to candidates and limits on contributions to political parties are not readily distinguishable as a constitutional matter. And I have heard very few people say that the limits on contributions to candidates are unconstitutional, although I for one tend to think those limits have some constitutional problems.