



September 8, 2014

United States Senate
Washington, DC 20510

**Re: ACLU Urges NO Vote on S.J. Res. 19, a Constitutional
Amendment Permitting Censorship of Issue Advocacy**

Dear Senator:

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We write in strong opposition to S.J. Res. 19,¹ a proposed constitutional amendment, slated for a floor consideration this week, which would empower Congress and the states to censor directly nonpartisan issue advocacy, such as pre-election communications by non-partisan advocacy organizations like the ACLU on important current public policy issues such as surveillance by the National Security Agency or the recent conflicts between protestors and police in Ferguson, Missouri.

We share the commitment of the sponsors of this resolution to the integrity of the electoral process, and support numerous reforms to preserve our competitive political system. Nevertheless, we fear this proposed constitutional amendment, if adopted, would harm precisely those it is meant to help, including, most tragically, individuals and groups who lack sufficient resources to navigate the complexities it will create in federal and state election law.

This amendment would permit Congress and the states to restrict the “spending of money” on speech that could “influence elections.” Long historical experience has shown that vague terms such as “influence” will inevitably be used to censor speech that merely praises or criticizes sitting politicians’ policy positions.² It may, accordingly, be used by those in the political majority to advantage their supporters and silence their critics.

¹ 113th Cong. (2014).

² See, e.g., *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (“WRTL”) (finding unconstitutional extension of political speech restrictions to advertisements exhorting voters to urge senators to oppose judicial filibusters); *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), vacated as moot sub nom., *Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975) (finding unconstitutional as applied regulation of ACLU ad critical of President Richard Nixon for opposition to school desegregation); *United States v. Nat’l Comm. for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (finding same for regulation of ads urging impeachment of President Nixon).

Section 1 of the amendment provides that “[t]o advance democratic self-government and political equality, and to protect the integrity of government and the electoral process, 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 grants Congress and the states express authority to enforce Section 1 through “appropriate” legislation, and permits lawmakers to “distinguish between natural persons and corporations or other artificial entities created by law, including by prohibiting such entities from spending money to influence elections.” Importantly, this section would extend to nonpartisan, non-profit advocacy groups at all points on the political spectrum, including, for instance, the ACLU, the Sierra Club, the National Rifle Association or the National Right to Life Committee.

And, Section 3 states that “[n]othing in this article shall be construed to grant Congress or the States the power to abridge the freedom of the press.” Under various rules of legal interpretation, including *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) and the last-in-time rule (later amendments or laws inconsistent with earlier control), this provision may lead courts interpreting laws enacted under Section 2 to exempt them from constitutional scrutiny under provisions other than the Press Clause.

Additionally, were it to pass, the amendment would represent the first time Congress has ever acted to limit specifically articulated rights in the Constitution. Even the 18th Amendment, which authorized Prohibition, did not limit a right specifically provided for in the Constitution (there’s no express right to drink).

We listed additional unintended consequences threatened by the amendment in our letter of June 3, 2014, on an earlier version of the amendment,³ including the strong likelihood that S.J. Res. 19 would result in absurd restrictions. These could conceivably include a restraint on the publication of *Hard Choices*, Secretary Hillary Clinton’s recent memoir, which many cite as an effort to build support in advance of an anticipated 2016 presidential candidacy.⁴

Those unintended consequences are even more severe with the version of the amendment slated for consideration this week. The broad authority granted Congress and the States to enact laws restricting the “spending of money” that “influence[s] elections” could conceivably cover any letter, email, web post, blog or even oral communication (if made in a paid capacity) that has the potential to sway a voter based purely on a question of public policy.

To illustrate, and as noted above, ACLU communications on NSA reform or Ferguson—paid for as they are through the organization’s general treasury funds—could qualify as the “spending of money” that could “influence elections.”

³ Letter from Laura Murphy et al. to the Honorable Patrick Leahy and the Honorable Charles Grassley (June 3, 2014), *available at* <http://bit.ly/1qs7EyG>.

⁴ See, e.g., Ed Pilkington, *Hard Choices: Hillary Clinton Lays Foundations for 2016 Presidential Run*, *The Guardian*, June 10, 2014, <http://bit.ly/1pjexp2>.

NSA reform, one of the ACLU's organizational priorities, has already featured prominently in numerous primary and general elections during this cycle. Similarly, the ACLU has been extremely active on the protests in Ferguson over the shooting of an unarmed African-American man, including highlighting cross-cutting issues such as police militarization and racial profiling. These are likely to play in numerous upcoming campaigns. One could certainly argue that this organization's activities have the potential to "influence elections" by convincing citizens to both take a position on these issues, which might prompt them to vote for or oppose candidates based on their position on such issues, even if the organization takes no action to urge support or opposition for any candidate, which by policy we do not do.

Indeed, *this very letter*—written as it is by a paid employee of the ACLU on company time—could conceivably be cited as an attempt to "influence elections" given the possibility it will be mentioned by supporters or opponents of the measure during their campaigns. Were it to so qualify, Congress would have free rein under the proposed amendment—unrestricted by the constitutional protections of free speech or association—to punish the ACLU for commenting on this important matter of public policy.

We continue to support numerous constitutional reforms to improve the political system, including a comprehensive system of public financing that provides candidates a floor by which they can launch a meaningful challenge to moneyed interests. We cannot, however, support this amendment, which we fear would result in lasting, severe and unpredictable harm to free speech for generations to come.

Please contact Legislative Counsel/Policy Advisor Gabe Rottman with any questions at 202-675-2325 or grottman@aclu.org.

Sincerely,



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