UNITED STATES SENATE
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POLICY COMMITTEE

Larry E. Craig, Chairman
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***Supporters Already on Record for Non-Severability***

# Severability and Non-Severability in S. 27

Severability clauses are sometimes referred to as mere "boilerplate," but the severability clause in S. 27 has become the focal point of a vital debate. Sometime this week, there will be an attempt to strike the severability clause in McCain-Feingold and replace it with a non-severability clause. Dozens of supporters of McCain-Feingold already have voted for a campaign finance "reform" bill that contained a *non-severability clause*.

**Severability and Non-Severability.** Section 401 of the McCain-Feingold campaign bill, S. 27, contains a standard *severability clause* which provides that if any part of the act is held unconstitutional then the remainder of the act "shall not be affected." Congress has used similar language numerous times.

Less often, Congress inserts a *non-severability clause* to signal that all or some of the provisions of an act are inextricably bound together; therefore, if one part of that act is declared unconstitutional, Congress intends for all of the act, or some other part of the act, to fall also. A non-severability clause in the McCain-Feingold bill would bind together the entire bill or just some of its parts, *e.g.*, the ban on soft money might be tied to the restrictions on non-candidate expenditures (the Snowe-Jeffords language).

**Non-Severability for S. 27.** Senators who favor the *severability clause* of S. 27 and oppose a *non-severability clause* do so, presumably, on the belief that "half a loaf is better than none." They would be happy to have a ban on soft money whether or not that ban was coupled with any other provision of the bill. Other Senators do not take that view, however. For them, the ban on soft money is only one part of a comprehensive legislative package, and they may be unwilling to take the ban without the complementary parts of the package. For them, a non-severability clause helps ensure that the essential parts of the package they voted for are kept together.

**Non-severability may be appropriate in this case because (1) the two essential parts of S. 27 are of equal weight, and (2) they counterbalance one another. (3) Both are substantive not procedural, and (4) both affect fundamental constitutional rights. (5) Both provisions are at the core of the legislative bargain; the Snowe-Jeffords restrictions on non-candidates expenditures are essential to the success of the McCain-Feingold ban on soft money. Snowe-Jeffords clinches the deal for those who favor S. 27 as now pending on the Senate floor.**

**Finally, (6) both provisions involve matters where Congress (not the courts) has special expertise.**

***Buckley v. Valeo* and Severability.** The Federal Election Campaign Act of 1971 (FECA) contained a severability clause, 2 U.S.C. §454 (1994 ed.), but the Supreme Court neglected to cite that clause as it carved-up FECA in *Buckley v. Valeo*, 424 U.S. 1, 108-09 (1976) (per curiam).

When parts of a statute are severed, the choices made by Congress can be undone. Members of the 107th Congress who think that they are going to end up with the same legislative choices that they made in Congress (*e.g.*, combining the McCain-Feingold ban on soft money with the Snowe-Jeffords restriction on non-candidate expenditures) may find that a court has nullified one essential part of their hard-won legislative package while enforcing another.

The severing of the choices made by Congress in FECA by the slicing and dicing in *Buckley v. Valeo* has led to our current situation, which nearly everyone decries. Given the unhappiness with today's campaign finance laws, one would think that Congress would do whatever it could to avoid a repeat of that precedent — yet McCain-Feingold contains a severability clause that will have the courts, not Congress, picking and choosing among its various provisions. The courts will not make their choices willy-nilly, but once they strike down part of an act they must then substitute their judgment for Congress' in deciding if and how other parts of the act will continue to fit together. *Buckley* teaches that the Supreme Court ultimately will decide which parts of a campaign reform law stand and which fall, unless Congress demands that the essentials stand or fall together.

**Severability Clauses in the Courts.** A recent decision of the Federal Circuit well summarizes the Supreme Court's current rules for severability clauses:

> "The [Act] contains a broad severability clause. . . . On its face, this provision appears to make the remainder of the Harbor Tax severable from the tax on exports held unconstitutional in [a previous case]. . . . Statutory language, however, sometimes is not as simple and clear as it appears. That is the case here. Just as the absence of a severability clause does not make the invalid portion of the statute necessarily non-severable, *see Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion); *United States v. Jackson*, 390 U.S. 570, 585 n. 27 (1968), the apparently clear facial applicability of such a clause does not end the inquiry. Further analysis must be made under the principle that "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam); *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). . . .

> "In *Alaska Airlines*, the Court stated that '[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress. . . . The final test . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.' 480 U.S. at 685. The Court pointed out that it had held in previous cases that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute. *Id.* at 687 (citations omitted)." *Carnival Cruise Lines v. United States*, 200 F.3d 1361 (Fed. Circ. 2000), *cert. denied*, 120 S. Ct. 2741.

As can be seen, the Court will search for Congress' meaning, and it will let stand those provisions that can stand alone. Remember the precedent of *Buckley v. Valeo*, however. The statutory provisions that the Supreme Court might leave standing may have only a passing similarity to the package of provisions that passed the Congress.

**The Power of a Non-Severability Clause.** A *severability clause* will not protect the bargained-for package of legislative choices. However, a *non-severability clause* may securely protect Congress' choices. Although there does not seem to be any Federal court decision on the effect of a Federal *non-severability clause*, the Supreme Court did say in dicta that a *non-severability clause should be given conclusive application*:

> ". . . Invalidation of a portion of a statute does not necessarily render the whole invalid unless it is evident that the legislature would not have enacted the legislation without the invalid portion. [Citing *Buckley*, 424 U.S. at 108; *Jackson*, 390 U.S. at 585; *Champlin Refining*, 286 U.S. at 234.] *Here, we need not speculate as to the intent of the Alaska Legislature; the legislation expressly provides that invalidation of any portion of the statute renders the whole invalid* [quoting the Alaska law]. However, it is of course for the Alaska courts to pass on the severability clause of the statute." *Zobel v. Williams*, 457 U.S. 55, 64-5 (1982) (emphasis added) (dicta). See also, Comment, "Inseverability Clauses in Statutes," 64 *University of Chicago L. Rev*. 903, 923 (1997) ("[A]n inseverability clause evidences a legislative compromise and a deliberate attempt by the statutes' drafters to inseverably link statutory provisions[, and by] deferring to the plain meaning of inseverability clauses, courts will encourage the legislative process by preserving an effective tool for enforcing legislative deals.").

**Supporters of S. 27 Have Supported *Non-Severability* in the Past.** Many of today's supporters of McCain-Feingold voted on at least two occasions in the past for a *campaign finance bill* that contained a *non-severability clause*.

**102d Congress.** In 1992, when both House of Congress were controlled by Democrats, the

Congress placed a campaign "reform" bill on President Bush's desk. He sent it back, vetoed. *That bill contained a* non-severability clause *that was supported by every supporter of today's McCain-Feingold who had a vote in 1992!*

The bill was S. 3, the Congressional Campaign Spending Limit and Election Reform Act, which the Senate adopted on April 30, 1992 (by a vote of 58 to 42). President Bush vetoed it on May 9, 1992, and the Senate then unsuccessfully tried to override the veto on May 13, 1992 (vote of 57 to 42, but a two-thirds majority was required). *Twenty-five Senators who are still members of the Senate voted for S. 3 on those two votes, and that bill contained a non-severability clause to protect the policy agreements and political compromises that Congress had packaged together!*

**Those 25 Senators are Republicans Jeffords and McCain; and Democrats Akaka, Baucus, Biden, Bingaman, Breaux, Byrd, Conrad, Daschle, Dodd, Graham, Harkin, Inouye, Kennedy, Kerry, Kohl, Leahy, Levin, Lieberman, Mikulski, Reid, Rockefeller, Sarbanes, and Wellstone.**

Section 903 of S. 3 actually looked something like a *severability clause*, but it contained two important caveats that *required non-severability* for those legislative choices and compromises that Congress considered fundamental. That clause, which 25 current Senators voted for, reads as follows:

> "Except as provided in sections 101(c) and 121(b), if any provision of this Act (including any amendment made by this Act), or the application of any such provision to any person or circumstance, is held invalid, the validity of any other provision of this Act, or the application of such provision to other persons and circumstances, shall not be affected thereby." S. 3, §903, 102d Cong., 2d Sess. (enrolled bill as passed by both Houses).

Section 903 provided for *severability*, therefore, *except* when it came to the important parts which were protected by §101(c) and §121(b). Section 101(c) said that the entire act "shall be treated as *invalid*" if "any part" of new FECA §§501, 502, or 503 were "held to be invalid." Those sections provided reduced media rates, reduced mailing rates, funds to pay for broadcast expenses, and funds to respond to independent expenditures for candidates for election to the United States Senate who agreed to limit their spending on their elections. Similarly, §121(b) of S. 3 said that the entire act "shall be treated as *invalid*" if "any part" of new FECA title VI were "held to be invalid." Title VI provided tax-funded benefits to candidates for the House of Representatives who agreed to limit their spending.

**103d Congress.** A year later, during the 103d Congress when the Democrats still controlled the Senate, the Senate again passed (on June 17, 1993) a campaign "reform" bill that contained another non-severability clause.

In addition to the Senators listed above, the following current Senators also voted for non-severability in the 103d Congress: **Democrats Boxer, Feingold, Feinstein, and Murray**. (Senator Campbell, then a Democratic but now a Republican, also voted "aye.") **Therefore, nearly 30 key supporters of today's McCain-Feingold bill have backed *non-severability*!**

Written by Lincoln Oliphant, 224-2946

## Appendix.
## Examples of Non-Severability Clauses in Federal Law

**Taxation of Telecommunications, 2000.**

In the Mobile Telecommunications Sourcing Act, enacted in the summer of 2000, Congress included the following provision: "If a court of competent jurisdiction enters a final judgment on the merits that (1) is based on Federal law; (2) is no longer subject to appeal; and (3) substantially limits or impairs the essential elements of sections 116 through 126 of this title, *then sections 116 through 126 of this title are invalid and have no legal effect as of the date of entry of such judgment*." Pub. L. 106-252, §2(a), July 28, 2000, 114 Stat. 632 (emphasis added).

**National Vaccine Program, 1986.**

In establishing the National Vaccine Program, Congress specified that "if any provision [of] part A or B of " the National Vaccine Injury Compensation Program [encompassing more than a dozen separate sections of the United States Code] "or the application of such provision to any person or circumstance is held invalid by reason of a violation of the Constitution, *both such parts shall be considered invalid*." 42 U.S.C.A. §300aa-1 note, Pub. L. 99-660, Title III, §322(a), Nov. 14, 1986, 100 Stat. 3783 (emphasis added). The provision was later narrowed so that it applied to fewer sections, see 42 U.S.C. §300aa-1 note.

**Budget Enforcement, 1985.**

In the Balanced Budget and Emergency Deficit Control Act of 1985, Congress provided that if the President fails to issue a deficit reduction order that contains certain requirements because the President asserts a "claim or defense that the constitutional powers of the President prevent such [requirements], and such claim or defense is finally determined by the Supreme Court of the United States to be valid, then the entire order issued pursuant to section 252(b) for such fiscal year shall be null and void." 2 U.S.C.A. §922(d)(2) , Pub. L. 99-177, Title II, §274, Dec. 12, 1985, 99 Stat. 1098.

**Rights of Government Employees, 1991.**

In the Government Employees Rights Act of 1991, Congress provided, "Notwithstanding section 401 of this Act, if *any* provision of section 1209 *or* 1219(a)(3) of this title is invalidated, *both* sections 1209 and 1219(a)(3) of this title shall have no force and effect." 2 U.S.C.A. §1221 note, enacted by Pub. L. 102-166, Title III, §322, Nov. 21, 1991, 105 Stat. 1098, *repealed by* the Congressional Accountability Act, Pub. L. 104-1, Title V, §504(a)(2), Jan. 23, 1995, 109 Stat. 41 (emphasis added). A similar severability provision relating to family and medical leave for Senate and House employees also was enacted and then repealed by the Congressional Accountability Act. 2 U.S.C.A. §§60m, 60n note, Pub. L. 103-3, Title V, §501-§502, Feb. 5, 1993, 107 Stat. 27, *repealed*

*by* Pub. L. 104-1, Title V, §504(b), Jan 23, 199, 109 Stat. 41.

**Indian Tribes, 1980, 1982, 1983, 1993.**

In the Maine Indian Claims Settlement Act of 1980, Congress included the following language which combines a non-severability clause with a severability clause: "In the event that any provision of section 1723 of this title is held invalid, it is the intent of Congress *that the entire subchapter be invalidated*. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect." 25 U.S.C.A. § 1734, Pub. L. 96-420, § 15, Oct. 10, 1980, 94 Stat. 1797.

In the Florida Indian Land Claims Settlement Act of 1982, Congress included the following provision: "In the event the Settlement Agreement between the Miccosukee Tribe and the State of Florida is ever invalidated, the transfers, waivers, releases, relinquishments, and other commitments made by the Miccosukee Tribe in paragraph 3 of the Settlement Agreement shall no longer be of any force or effect, section 1744 of this title shall be inapplicable . . . as if never enacted, and [certain transfers and claims] shall be void ab initio." 25 U.S.C.A. §1749, Pub. L. 97-399, § 10, Dec. 31, 1982, 96 Stat. 2016 (subsection designations omitted).

In the Mashantucket Pequot Indian Claim Settlement Act, Congress included the following language which is, as regarding severability, the same as in the case of the Maine Indians cited above: "In the event that any provision of section 4 of this Title [25 U.S.C.A. §1753] is held invalid, *it is the intent of Congress that the entire subchapter be invalidated*. In the event that any other section or provision of this subchapter is held invalid, it is the intent of Congress that the remaining sections of this subchapter shall continue in full force and effect." 25 U.S.C.A. § 1760, Pub. L. 98-134, § 11, Oct. 18, 1983, 97 Stat. 856 (emphasis added).

In the Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Congress used the following language: "If any provision of section 941b (a), 941c, or 941d of this title is rendered invalid by the final action of a court, then all of this subchapter is invalid. Should any other section of this subchapter be rendered invalid by the final action of a court, the remaining sections of this subchapter shall remain in full force and effect." 25 U.S.C.A. §941m(a), Pub. L. 103-116, §15, Oct. 27, 1993, 107 Stat. 1136.

**Interstate Compact, 1980.**

In an Act to grant the consent of Congress to the Tahoe Regional Planning Compact, Congress provided, "A State party to this compact may withdraw therefrom by enacting a statute repealing the compact. Notice of withdrawal shall be communicated officially and in writing to the Governor of the other State and to the agency administrators. This provision is not severable, and if it is held to be unconstitutional or invalid, no other provision of this compact shall be binding upon the State of Nevada or the State of California." Pub. L. 96-551, §1(c), Dec. 19, 1980, 94 Stat. 3233.