

Beyond Post-Watergate Reform: Putting an End to the Soft Money System

Donald J. Simon*

I. INTRODUCTION

On June 17, 1997, we marked the twenty-fifth anniversary of the Watergate break-in. Since that scandal served as the impetus for the last wave of campaign finance reform, it is an appropriate marker from which to judge where we stand after the 1996 election. The short answer is—not in a good place. We have traveled a long way in twenty-five years, but unfortunately, it has mostly been in a circle. The problems we have in the campaign finance system today are at least as serious, and arguably more so, than the problems revealed during Watergate.

The Watergate scandals of the 1970s revealed deep problems in the financing of federal elections. The Watergate investigation showed numerous instances of corporations buying government favors through the use of campaign contributions. As George A. Spater, former Chairman and Chief Executive Officer of American Airlines, explained during the investigation,

The law . . . is based on a system by which candidates for public office must seek funds from persons affected by the actions of such candidates when elected to office. The system provides no limits on the total amount that may be raised or spent and hence places a premium on pressure to raise greater and greater amounts.¹

The Senate Watergate Committee concluded that as a result of the “systematic solicitation” of corporate donors, twelve major corporations gave approximately \$749,000 to the Nixon campaign,² notwithstanding the fact that corporate contributions had been prohibited in federal elections since 1907.³ Some of the best known corporations in America—American Airlines, Goodyear Tire and Rubber, Braniff Airways, Gulf Oil, and Hertz—pled guilty to violating the ban on corporate contributions.⁴

Several corporate executives testified that they responded to solicitations as a way of getting access to Administration decision-makers and also out of fear of retaliation if they failed to contribute. Claude C. Wild, Jr., Vice-President for Government

* Executive Vice-President and General Counsel of Common Cause; J.D., Harvard Law School.

1. *Presidential Campaign Activities of 1972, Senate Resolution 60: Hearings Before the Senate Comm. on Presidential Campaign Activities*, 93d Cong. 5497 (1973) [hereinafter *Watergate Hearings*] (testimony of George A. Spater, former Chairman and Chief Executive Officer of American Airlines).

2. *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. REP. NO. 93-981, at 446 (1974).

3. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1994)).

4. *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. REP. NO. 93-981, at 446, 447, 462, 465, 469, 473 (1974).

Relations of Gulf Oil Corporation, told the Senate Committee, "I considered it considerable pressure when two Cabinet officers and an agent of one of the committees that was handling the election ask[ed] me . . . for funds—that is just a little bit different than somebody collecting for the Boy Scouts."⁵

The coincidence of large contributions followed by government decisions benefiting the contributors resulted in public cynicism about the integrity of the campaign finance process. The pledge by Associated Milk Producers, Inc. of \$2 million to the Nixon campaign was linked with the Nixon Administration's backing of an increase in federal milk price supports.⁶ So too, ITT's donation of \$400,000 to the Nixon campaign was linked in the public mind to the Justice Department's favorable ruling on an antitrust action against ITT.⁷

The Watergate investigation also found that wealthy individuals were buying ambassadorships with huge campaign contributions. More than \$1.7 million in contributions to the Nixon campaign came from individuals who were later appointed to be an ambassador. The Ambassador to Great Britain, Walter H. Annenberg, contributed \$254,000, the Ambassador to Switzerland, Shelby Davis, contributed \$100,000 and the Ambassador to France, Arthur K. Watson, contributed \$303,000.⁸

II. IMPLEMENTATION OF REFORM IN THE WAKE OF WATERGATE

A. Reform of the Presidential Campaign Finance System

Following Watergate, comprehensive reform of the presidential campaign finance system was put into place.⁹ The post-Watergate reform included a provision that provided partial public financing for presidential primary candidates¹⁰ who agree to abide by spending limits¹¹ in exchange for the receipt of federal funds to match small contributions raised from individuals.¹² Furthermore, major party candidates running in the general election would receive full public financing¹³ in exchange for their agreement not to raise or spend other money on their race.¹⁴ As a result of these reforms, in the 1996 election each major party candidate received approximately \$62 million in public funds.¹⁵

5. *Watergate Hearings*, *supra* note 1, at 5479 (testimony of Claude C. Wild, Jr., Vice-President for Government Relations of Gulf Oil Corp.).

6. *The Final Report of the Senate Select Comm. on Presidential Campaign Activities*, S. REP. NO. 93-981, at 579, 612-21 (1974).

7. *Id.* at 127.

8. *Id.* at 493.

9. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455 and scattered sections of 18 & 47 U.S.C.); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at scattered sections of 2, 18, 26 & 47 U.S.C.); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at scattered sections of 2, 18 & 26 U.S.C.); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (codified as amended at scattered sections of 2, 5, 18, 22, 26 & 42 U.S.C.).

10. 26 U.S.C. §§ 9031-9042 (1994).

11. 26 U.S.C. § 9035(a) (1994); *see also* 2 U.S.C. § 441a(b) (1994).

12. 26 U.S.C. §§ 9033(b)(3), 9034(b) (1994).

13. 26 U.S.C. §§ 9001-9013 (1994).

14. 26 U.S.C. § 9903(b),(c) (1994).

15. Federal Election Comm'n, *Public Funding of Presidential Elections* (Aug. 1996) <<http://www.fec.gov/pres96/presgen1.htm>>.

This system of funding presidential elections was upheld by the Supreme Court in *Buckley v. Valeo*.¹⁶ The Court found that the goals of the public financing system coincided with a permissible effort by Congress to legislate in the interest of the general welfare in order "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund-raising."¹⁷ Furthermore, the Court found public financing to be consistent with the First Amendment. The Court observed, "[Public financing] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, [public financing] furthers, not abridges, pertinent First Amendment values."¹⁸

Initially, the presidential campaign finance system achieved its goals. The bipartisan Commission on National Elections, headed by Melvin Laird, former Secretary of Defense, and Robert Strauss, former Chair of the Democratic National Committee (DNC), recognized the value and success of the presidential campaign finance system. The Commission concluded that, "Public financing of presidential elections has clearly proven its worth in opening up the process, reducing undue influence of individuals and groups, and virtually ending corruption in presidential election finance. This major reform of the 1970s should be continued."¹⁹ So too, former Senator Paul Laxalt, who chaired the 1976, 1980 and 1984 Reagan presidential campaigns, said that the presidential financing system "worked . . . like a breath of fresh air."²⁰

Campaign finance reform at the presidential level worked initially to limit spending. The 1972 Nixon campaign spent \$60 million, the equivalent of over \$200 million in current dollars.²¹ By contrast, Bill Clinton spent \$89 million and George Bush spent \$93 million in the 1992 campaign, well below the rate of spending prior to reform.²² The system also initially worked to increase competition. Since the reform efforts were enacted, challengers have won three of the five elections in which an incumbent has been contested—a much higher election rate than in congressional campaigns.²³ Recently, however, the presidential campaign finance system has become radically undermined by the growth and development of "soft money," which is dis-

16. *Buckley v. Valeo*, 424 U.S. 1 (1976).

17. *Id.* at 91.

18. *Id.* at 93-94.

19. Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1143 (1994) (quoting COMMISSION ON NAT'L ELECTIONS, ELECTING THE PRESIDENT: A PROGRAM FOR REFORM (1986)).

20. Wertheimer & Manes, *supra* note 19, at 1143 (quoting David S. Broder, *How to Fix Congress—Advice from the Alumni*, WASH. POST, Jan. 6, 1991, at C1 (quoting Senator Paul Laxalt)).

21. *Campaign Finance Investigation, 1997: Hearings Before the Senate Governmental Affairs Comm.*, 105th Cong. (1997) (statement of Ann McBride, President of Common Cause and Donald Simon, Executive Vice-President and General Counsel of Common Cause), available in 1997 WL 592075.

22. *Id.*

23. Presidents Carter, Reagan and Clinton defeated incumbents in 1976, 1980 and 1992, incumbent Presidents Reagan and Clinton withstood challenges in 1984 and 1996 and no incumbent ran in 1988, resulting in a 40% re-election rate in races by incumbents. Recent re-election rates in Congress:

	1986	1988	1990	1992	1994	1996
House	98%	98%	96%	88%	90%	94%
Senate	75%	85%	96%	83%	92%	90%

Andrew Mollison, *Money & Politics: Focus on Campaign Finance Reform*, ATLANTA J.-CONST., Jan. 23, 1997, available in 1997 WL 3950532.

cussed below. As a result, many of the goals of the public financing system have been jeopardized.

B. Reform of the Congressional Campaign Finance System

Although Congress chose to enact public financing for presidential campaigns in the 1974 post-Watergate reform act, it failed to take a similarly bold step for its own campaigns, opting instead for a system of privately financed, but regulated, campaigns. Congress enacted a scheme for congressional campaigns that limited contributions to candidates and expenditures by candidates. The system limited the amount an individual could spend on his or her own campaign, as well as independent spending by an individual or group unconnected to a candidate.²⁴

In *Buckley*, the Supreme Court threw out as unconstitutional all limits on spending, including the limit on overall campaign spending, the limit on the spending of personal wealth and the limit on independent expenditures. The Court left in place, however, all limits on contributions, including an overall limit on an individual's aggregate annual contributions to campaigns, as well as the limit on contributions by individuals and political action committees (PACs) to candidates, to other PACs, and to political parties.²⁵

The aftermath of *Buckley* left a hobbled regulatory scheme never intended by its drafters in Congress. The original system of contribution limits in the context of expenditure limits was a comprehensive effort to control the flow of money both into and out of congressional campaigns. The invalidation of spending limits resulted in the unrestrained ability of campaign costs to rise, while money into campaigns continued to be subject to limits. This resulted in a dynamic unintended by Congress and dislocations that cannot fairly be blamed on those in Congress who crafted the law.

C. The Constitutional Framework for Reform

Buckley v. Valeo set forth the basic constitutional principles governing regulation of campaign finances. Of significance is the gross distinction established by *Buckley* which provides that limits on contributions, in whatever form, are by and large permissible; while limits on expenditures, in whatever form, are by and large not permissible. In order to understand this distinction, one must leave to one side the question of whether the distinction between contributions and expenditures makes any sense as a matter of policy, political science or constitutional principle. The *Buckley* distinction has been much criticized—and there is much to criticize. But this is the framework established by *Buckley* and consistently followed by the Court in the cases that followed.²⁶

24. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455 and scattered sections of 18 & 47 U.S.C.); Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at scattered sections of 2, 18, 26 & 47 U.S.C.); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended at scattered sections of 2, 18 & 26 U.S.C.); Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (codified as amended at scattered sections of 2, 5, 18, 22, 26 & 42 U.S.C.).

25. *Buckley*, 424 U.S. at 96.

26. See *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 116 S. Ct. 2309 (1996); *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

The Court in *Buckley* found that regulating money in politics raises First Amendment concerns. But to say that money as speech is protected by the First Amendment is the beginning of the constitutional analysis, not the end. There is a need to ask two subsidiary questions. First, how great is the expressive content of the particular use of money? In other words, how much and what kind of speech is involved. And also, how great are governmental purposes served by regulating or restricting that particular use of money as speech?

The basic First Amendment analysis is a balancing test. The test involves determining the strength of the First Amendment interest in the form of speech at issue, and balancing that against the strength of the governmental interest served by the proposed restriction on the speech.²⁷ A government restraint on speech that serves an important or compelling public purpose will be upheld, particularly where there is a less direct First Amendment interest at issue.²⁸ On the other hand, a restraint on pure speech will not survive scrutiny where there is no compelling governmental interest in the restraint.²⁹

In applying this test, the Court in *Buckley* drew a clear distinction between regulating contributions and expenditures. A contribution is defined as a situation in which one person gives money to another, and that second person spends the money on speech. An expenditure, on the other hand, is when a person directly spends money on speech by, for instance, buying a newspaper or television advertisement.

The Court held that the First Amendment interests in contributing money to someone else is weaker than in directly spending the money on speech. The Court wrote,

[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.³⁰

Thus, a contribution of \$100 involves as much speech as a contribution of \$10,000. The speech element lies in the symbolic act of making the contribution, not in the size of the contribution. Contributions are indirect or symbolic speech, or speech by proxy. As a result, this form of speech involves a lessened First Amendment protection. The Court explained,

A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues . . . [T]he transformation of contributions into political debate involves speech by someone other than the contributor.³¹

27. *Buckley*, 424 U.S. at 44-45.

28. *Id.*

29. *Id.*

30. *Id.* at 20-21.

31. *Id.* at 21.

On the other hand, the Court held that expenditures—direct spending of money on speech by individuals, candidates or political associations—involve pure speech and are entitled to a higher level of First Amendment protection. Thus,

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. . . .

[A]lthough the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.³²

Contributions and expenditures are both protected by the First Amendment but to different degrees. In order to limit them, the government has to demonstrate "a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment."³³ *Buckley* held that this showing was met in the case of limiting contributions, but was not met in the case of expenditures.

The Court found that there was a "constitutionally sufficient justification" for the contribution limits in the primary purpose of the Act: "[T]he prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."³⁴ Furthermore, the Court stated, "[T]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . [T]he problem is not an illusory one."³⁵

The Court in *Buckley* found a governmental interest not just in preventing this kind of corruption, but also in deterring the appearance of corruption.

Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. . . . Congress could legitimately conclude that the avoidance of the appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent."³⁶

It had been argued that bribery laws and disclosure requirements adequately and more

32. *Id.* at 19, 23.

33. *Id.* at 25 (citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

34. *Buckley*, 424 U.S. at 25-26.

35. *Id.* at 26-27. In a subsequent case, *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court defined "corruption" in the following manner: Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors.

Id. at 497.

36. *Buckley*, 424 U.S. at 27 (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 565 (1973)).

narrowly serve the purpose of deterring corruption. But the Court in *Buckley* rejected this argument. Instead, the Court wrote,

But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve . . . many salutary purposes . . . Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.³⁷

The Court, however, did not find that limits on expenditures serve any interest in deterring corruption or the appearance of corruption. Coordinated expenditures by an individual or group are treated as contributions and thus can be limited. Further, independent expenditures by an individual or group do not pose a threat of corruption.

Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.³⁸

So too, the Court found no anti-corruption purpose served by limiting a candidate's right to spend his own money, or in limiting overall campaign spending.

In short, the Court found that contributions are only symbolic speech or speech by proxy and are entitled to a lesser form of First Amendment protection. Furthermore, weighed in light of governmental interests, contribution limits adequately and constitutionally serve a compelling interest in deterring corruption or the appearance of corruption.³⁹ On the other hand, the Court found that expenditures by an individual, a group or a candidate are a pure form of speech and are entitled to a higher level of First Amendment protection.⁴⁰ Therefore, limits on expenditures do not serve a compelling governmental interest.

There are those who seek to have the Court reconsider *Buckley*, although there is little evidence that it will. From a reformist point of view, *Buckley* makes it difficult to craft campaign finance reform legislation. In light of this dilemma, some argue that a constitutional amendment should be enacted to break the Court's direct linkage of political money and speech, in the hope of opening up the system to greater regulation of political money.

But *Buckley* does leave room to substantially address the problems in the political process. Although working within the *Buckley* framework makes the effort more complicated, addressing the problems is still possible. The Court recognized the corrupting influence that money can have in politics and, as importantly, the fact that public confidence in government can be undermined by the appearance of corruption which can result from the public's perception of the influence of large aggregations of

37. *Buckley*, 424 U.S. at 27-28.

38. *Id.* at 47.

39. *Id.* at 67.

40. *Id.* at 75-76.

money. And the Court found there to be a compelling governmental purpose in legislation designed to deter this type of corruption or appearance of corruption.⁴¹

The bottom line is that although campaign finance regulation is difficult and complicated, it is constitutional. Furthermore, the principles established in *Buckley*, although far from perfect, do leave Congress with the necessary room to act.

III. PROBLEMS IN THE 1996 CAMPAIGN

The 1996 election revealed an interlocking set of systemic problems with campaign financing. Some problems in the 1996 campaign were new, while others represented the logical extension of trends apparent in prior election cycles. As a whole, 1996 saw the functional collapse of a system of effectively regulating money in politics. The election was the most expensive ever with corresponding receipts of soft money doubling to over \$260 million.⁴² There was a flood of union and corporate money directly injected into federal campaigns in the guise of so-called "issue advocacy" that was plainly electioneering. There was a pervasive culture of lawlessness that resulted in widespread cheating on the election laws. There was a growing sense that both political parties were in the business of selling access and influence to large soft money donors and that, in particular, the White House engaged in a systematic sale of access to the President in exchange for contributions in the amounts of \$50,000 or \$100,000 contributions.⁴³ In sum, there was a perception of a never-ending money chase by politicians.

There can be little dispute that this trend is having an adverse effect on our democracy, which is manifested in the general public cynicism toward politics—a widespread disaffection and alienation from government and a public flight from the political process. Accordingly, in 1996, only forty-eight percent of registered voters came to the polls, the lowest voter turnout in five decades.⁴⁴

Recent public opinion polls support this conclusion. A recent New York Times/CBS News poll showed that seventy-five percent of those surveyed estimated that "many public officials" made or changed policy positions as a result of political donations.⁴⁵ Another poll by the Mellman Group found that, when asked whether those who make large contributions get special favors from politicians, thirty-four percent said it was "one of the things that worries them the most," and another thirty-

41. *Id.* at 67.

42. Federal Election Comm'n, *FEC Reports Major Increase in Party Activity for 1995-96* (Mar. 19, 1997) <<http://www.fec.gov/press/ptyye1.htm>>. According to a recent Common Cause study, the national political party committees raised \$434 million in soft money in the first six months of 1997. Common Cause, *Editorial Memorandum: Senate Expected to Consider Soft Money Ban in September* (last modified Sept. 1997) <<http://www.commoncause.org/publications/editmemo.htm>> [hereinafter *Editorial Memorandum*].

43. See, e.g., David Jackson, *White House's Offer: Access for Cash Documents Released Friday Show a Strategy of Targeting Ethnic Groups for Aggressive Fundraising, with the Reward Being Entry to Officials, up to the President*, CHI. TRIB., Jan. 25, 1997, available in 1997 WL 3514259. Former-Clinton aide, George Stephanopoulos stated, "The whole system is horrible. The problem is that you can't help having your perspective shaped by the people you talk to. And access comes from money." Common Cause, *Channeling Influence—The Broadcasting Lobby and the \$70 Billion Free Ride: The Soft Money Scam* (last modified Apr. 2, 1997) <http://www.commoncause.org/publications/040297_rpt4a.htm>.

44. Fred Kindecke, 'A Done Deal': Clinton's Wide Lead Kept Voter Turnout Low, ST. LOUIS POST, Nov. 7, 1996, at 17A.

45. Francis X. Clines, *Most Doubt Resolve to Reform Campaigns*, PATRIOT LEDGER, Apr. 8, 1997, at 1.

four percent said it was "one of the things that worries them a lot."⁴⁶ The Mellman poll found that seventy-nine percent of the public believes that the campaign finance system needs to be changed or replaced, while an astonishing ninety percent of those surveyed in the New York Times/CBS News poll see a need for "fundamental change" or a "total overhaul" of campaign finance regulation.⁴⁷

Soft money in particular stands out as the cause for the breakdown of the regulatory system in 1996. The soft money system is a unifying theme that ties together many of the stories about improprieties or the appearance of improprieties during the 1996 campaign. It is the single aspect of the current system that most dramatically needs reform.

Since 1907, it has been illegal for corporations to spend money in connection with federal elections.⁴⁸ Since 1943, it has been illegal for labor unions to spend money in connection with federal elections.⁴⁹ Since 1974, it has been illegal for an individual to contribute more than \$1000 to a federal candidate,⁵⁰ and since 1976 it has been illegal for an individual to contribute more than \$20,000 per year to a political party, for the purpose of influencing a federal election.⁵¹

Soft money is money which violates these rules. It is the corporate donations, the union contributions and the large \$100,000 or even \$250,000 contributions given by wealthy individuals to the political parties. The myth of soft money is that it is contributed and spent for what is euphemistically called "party building" purposes that are unrelated to influencing federal elections. This premise is little more than a widely acknowledged legal fiction. Soft money is raised by federal candidates and its spending, although done by the parties, is controlled by or coordinated with federal candidates. It is spent by the parties as an adjunct to federal campaigns and for the purpose of influencing federal elections. That is the reality.

In 1978, the Federal Election Commission created the soft money loophole when it reversed a previous administrative ruling and allowed the parties to pay for certain activities, such as voter registration or get-out-the-vote drives, with a mixture of hard money—raised subject to federal rules—and soft money—raised outside the federal rules.⁵² The Commission's theory was that such party building activities affect both federal and nonfederal elections, and can be paid for with a mix of federal and nonfederal money that is apportioned or allocated to reflect the relative federal and nonfederal impact of the activities.⁵³

46. Fred Wertheimer, *Politician, Heal Thyself; Our Leaders Preach Values but Still Follow the Money*, WASH. POST, Dec. 24, 1995, at C1.

47. Clines, *supra* note 45.

48. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1994)); see *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659 (1990) ("[T]he compelling governmental interest in preventing corruption support the restriction on the influence of political war chests funneled through the corporate form.")

49. War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163, 167 (1943) (current version at 2 U.S.C. § 441b (1994)).

50. Federal Election Campaign Act Amendment of 1974, tit. I, § 101(a), 88 Stat. 1263, 1263 (current version at 2 U.S.C. § 441a(a)(1)(A) (1994)).

51. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, tit. I, sec. 112(2), § 320(a)(1), 90 Stat. 475, 486 (current version at 2 U.S.C. § 441a(a)(1)(B) (1994)).

52. FEC Advisory Op. 1978-10, 1 Fed. Election Camp. Fin. Guide (CCH) ¶ 5340 (Aug. 29, 1978).

53. *Id.*

In practice however, the Commission's theory is wrong. The soft money system has become an adjunct financing mechanism for federal campaigns, and has turned both political parties into conduits which launder illegal money into federal campaigns. Nowhere is this reality better demonstrated than by the ever increasing amounts of soft money raised and spent by the congressional campaign committees of both parties—the Democratic Senatorial Campaign Committee (DSCC), the Democratic Congressional Campaign Committee (DCCC), the National Republican Senatorial Committee (NRSC) and the National Republican Congressional Committee (NRCC).

In the 1996 cycle, the DSCC and the DCCC raised \$26.5 million in soft money.⁵⁴ The NRSC and the NRCC raised \$47.9 million in soft money.⁵⁵ The soft money given to the congressional campaign committees in 1996 was three times the amount they received in the previous election cycle in 1994.⁵⁶ The purpose of these congressional campaign committees is to elect federal candidates to Congress. Their mandate is to affect federal elections, not state or local elections. The fact that these committees raise and spend soft money is a perfect illustration that soft money is spent to influence federal elections.

Thus, the entire soft money system is an edifice built on the foundation of a fallacy. This system has served to radically erode the campaign finance rules both adopted and reaffirmed in light of the lessons of Watergate. Furthermore, the explosive growth of soft money has caused our elections to be tainted again by the same kinds of money, the same kinds of scandals and the same kinds of corruption that led to national outrage more than twenty-five years ago. The growth of soft money has been dramatic: from \$9 million in the 1980 presidential election, to \$12 million in 1984, to \$45 million in 1988, to \$75 million in 1992 and now, to \$260 million in 1996.⁵⁷ The result of this growth is that soft money, which exists outside the federal regulatory system, now threatens to overwhelm the hard money that exists within the system, particularly in the presidential campaigns.

The presidential public financing system is intended, in part, to free candidates from the rigors and pressures of fund-raising by providing public funds. Instead, current law perpetuates a system in which candidates accept the public money but spend enormous amounts of time raising soft money. The presidential system is intended to limit spending in campaigns. Instead, the candidates each spent \$62 million in public funds in 1996,⁵⁸ and then controlled the parties' spending of tens of millions of dollars of additional soft money. Most importantly, however, the soft money system is reintroducing precisely the same dangers of corruption from large contributions that the campaign finance laws are intended to alleviate.

54. Federal Election Comm'n, *1995-96 Non-Federal Accounts of [Democratic] National Party Committees*, (visited Feb. 1, 1998) <<http://www.fec.gov/finance/demsoft.htm>>.

55. Federal Election Comm'n, *1995-96 Non-Federal Accounts of [Republican] National Party Committees*, (visited Feb. 1, 1998) <<http://www.fec.gov/finance/repsoft.htm>>.

56. Federal Election Comm'n, *National Party Non-Federal Activity Through the Complete Two Year Election Cycle* (visited Feb. 1, 1998) <<http://www.fec.gov/finance/softsum.htm>>.

57. Karen Gullo, *Once-Illegal 'Soft Money' Taints Political Climate 'Soft' Contributions Again Raising Queries on Curbing Big-Money*, ROCKY MOUNTAIN NEWS, Oct. 12, 1997, at 14A; *Editorial Memorandum*, *supra* note 42.

58. Federal Election Comm'n, *Public Funding of Presidential Elections* (Aug. 1996) <<http://www.fec.gov/pres96/presgen1.htm>>.

Soft money lies at the heart of most of the problems associated with the 1996 campaign. Soft money corrupts for a simple and obvious reason. Soft money donations are given in such huge amounts—\$50,000, \$100,000 or more—that the donors typically expect to receive something in return for investments of this magnitude. And those who solicit and receive these contributions, our elected officials and political parties, typically offer these donors something in return for their money. Usually what is bought and sold with soft money is access to elected officials and government decision makers. Increasingly, this bartering of access is done openly and brazenly. And it is done by both political parties.⁵⁹

The fundamental harm caused by this soft money system lies in the way it is undermining the core values that have long been the strength of our democracy—that government serves all citizens without prejudice or favoritism, that all persons are equal in the eyes of the law and the lawmakers and that ours is a government of the people. These cherished ideals are now being abandoned by our political parties and our elected officials in service of the increasingly frantic quest for huge soft money donations from the wealthy and the powerful.

That is the lesson of Roger Tamraz. He did not make a \$300,000 soft money donation to the DNC out of ideology, or belief, or political conviction. He did it, as he candidly admitted to the Thompson Committee, simply to buy an audience with the President of the United States. And if the price for that access had been twice as high, he would have gladly paid that too.⁶⁰

That is also the lesson of Pauline Kanchanalak, an Asian business consultant, who brought five clients to a small, private meeting with the President last year.⁶¹ Her clients were the heads of a Thai conglomerate, which is considered the biggest foreign investor in China. The subject of discussion at the meeting was United States policy toward China. On the day of the meeting, Kanchanalak made an \$85,000 soft money donation to the DNC and a member of her family contributed an additional \$50,000.⁶²

The Thompson Committee has uncovered numerous other examples of the sale of access to the White House. The Lincoln Bedroom was regularly rented out to large soft money donors.⁶³ The program of “White House coffees” was clearly intended to serve as a prerequisite to induce or reward soft money donations. DNC fund-raiser Johnny Chung described the result graphically. He said, “I see the White House is like a subway: You have to put in coins to open the gates.”⁶⁴

59. See, e.g., Common Cause, *Democratic and Republican Congressional Campaign Committees Raised a Record \$63 Million in Soft Money During the '96 Elections, According to Common Cause Analysis of Largest Givers to the Committees* (last modified Mar. 18, 1997) <http://www.commoncause.org/publications.031797_sdy.htm>.

60. Phil Sudo, *Show Me the (Soft) Money! (Campaign Contributions as a Corrupting Influence)*, SCHOLASTIC UPDATE, Dec. 8, 1997, at 16.

61. David Willman et al., *An Investigative Report: What Clinton Knew; How a Push for New Fund-Raising Led to Foreign Access, Bad Money and Questionable Ties*, L.A. TIMES, Dec. 21, 1997, at A1.

62. *Id.* Kanchanalak donated a total of \$253,500 to the DNC from 1994 to 1996. All of it was returned when questions arose about the source of the money. *Id.*

63. *Defiant Clinton Shows No Remorse over His Fund-Raising Methods*, CHI. TRIB., May 2, 1997, at 12.

64. William C. Rempel & Alan C. Miller, *First Lady's Aide Solicited Check to DNC, Donor Says Fund-Raising: Administration Denies Account by Torrance Businessman Johnny Chung, Who Gave \$50,000 Contribution to Hillary Clinton's Chief of Staff*, L.A. TIMES, July 27, 1997, at A1.

IV. CONCLUSION

The first and most urgent reform of the campaign finance system is for Congress to ban soft money. Ending the soft money system requires more than changing the labels put on money. It requires more than accepting what is now considered soft money, corporate and union funds, or large individual donations and calling those same funds "hard money."

Nor is it acceptable to impose so-called "limits" on soft money, which would simply continue to allow soft money to flow into federal campaigns under a new name. The line walling off corporate money from political campaigns that has been part of federal law and policy for ninety years⁶⁵ should not be breached, nor should the line barring union treasury money from federal campaigns that has been in the law for fifty years.⁶⁶ Instead, a real ban on soft money must have three components:

- (1) The national political parties and their congressional campaign committees should be prohibited from soliciting or receiving any money that does not comply with federal law;
- (2) Federal candidates and officeholders should be prohibited from raising, soliciting or directing any money that does not comply with federal law; and
- (3) State parties should be required to spend only money permitted under federal law on any federal election activities.⁶⁷

The last point is of critical importance to an effective soft money ban. The soft money system cannot be banned at the national level and left to thrive at the state level. Doing so would simply leave the same abuses in place, just shifted down one level. There is ample evidence from the 1996 campaign that soft money donors active at the federal level gave very substantial money to state parties as well.

If Congress does not end the soft money system, the practices seen in the 1996 election will become the new norm of campaign behavior. If Congress does not ban soft money, it will legitimize the practices of the 1996 campaign, and those practices will be the new baseline for how campaigns operate in the future. Taking action to end the soft money system will be an enormous step to restoring public respect and honor for the Congress and for our democracy.

65. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (1907) (current version at 2 U.S.C. § 441b (1994)).

66. War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163, 167 (1943) (current version at 2 U.S.C. § 441b (1994)).

67. This suggestion for a real ban on soft money was presented by the author and Ann McBride to Congress on September 24, 1997. *Campaign Finance Investigation, 1997: Hearings Before the Senate Governmental Affairs Comm.*, 105th Cong. (1997) (statement of Ann McBride, President of Common Cause and Donald Simon, Executive Vice-President and General Counsel of Common Cause), available in 1997 WL 592075.