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GIVING, SPENDING AND “SOFT MONEY”

*Anthony Corrado**

Our country's current campaign finance system is simply not working. The controversy surrounding the elections of 1996 has raised immediate issues regarding how much money was spent, how it was raised, its sources and, finally, who raised it. But to a greater extent, the recent elections also lead us to question the degree to which the raising of campaign monies may influence our national policies, both domestic and foreign. It will now take numerous investigations before these problems may accurately be identified and resolved.

I find it interesting that the controversy currently swirling around party fundraising is concerned with the activities and developments within political parties that have resulted, in part, because of the Federal Election Campaigns Act¹ and legal distinctions in campaign finance law that have emerged. Today, I hope to explain how the current situation evolved and to identify several areas we should reform. Therefore, as will become apparent, my speech is less about campaign finance law and more a testament to the human ingenuity exemplified over the past twenty years.

The problems witnessed today are not new. Suddenly, however, there are daily reports in the papers regarding “soft money,” and reporters and congressional investigators are scrambling to find information on the subject. I often want to ask where they have been for the last twenty years. Often, White House press conferences remind me of Captain Renault's feigned outrage when it is demanded that he close down the bar in the movie “Casablanca,”² and he simply pronounces “I am shocked, shocked that there is gambling going on here.”

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¹ 2 U.S.C. §§ 431-455 (1997).

² CASABLANCA (Metro-Goldwyn-Mayer 1942).

I am "shocked" to hear that the Vice President of the United States is involved in fundraising activities in a presidential election year.³ I am "shocked" that the Democratic National Committee is raising large contributions, in part, by offering some access to political leaders. This is not new; these tactics have been a part of national party fundraising efforts for quite some time. In fact, they have emerged as a direct result of the provisions of the 1974 Federal Election Campaigns Act.⁴

In 1976, the first year of publicly funded presidential elections, it quickly became apparent that the candidates, now faced with limited resources, wanted to maximize the amount of money they could use on television advertising. As a result, both Carter and Ford were miserly when it came to some of the traditional paraphernalia and activities of a presidential campaign, particularly volunteer activities and the production of buttons, bumper stickers, campaign signs and other symbolic materials.⁵ As a result, party organizations appealed to Congress, arguing that many of their traditional volunteer activities could no longer be funded without violating the stipulations on spending limits that accompanied the new law.⁶

Congress responded and, in 1979, amended the Federal Election Campaigns Act to exempt very specific, narrowly defined activities from the definitions of expenditure and contribution.⁷ Thus, parties

³ The question of whether or not Vice President Al Gore engaged in illegal fundraising activities during the 1996 presidential election is being investigated by the Justice Department. *Clinton Backs Gore in Fundraising Probe*, THE FINANCIAL POST, Sept. 5, 1997, at 2.

⁴ 1974 Federal Election Campaigns Act Amendments, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (1997)).

⁵ The 1976 presidential election pitted Republican incumbent Gerald Ford against Democrat Jimmy Carter. Despite the changes in the way campaign monies were spent, including more television advertisements, only 54% of the electorate voted in the election. 2 MARY BETH NORTON ET AL., *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES* 1029 (4th ed. 1994).

⁶ See CONGRESSIONAL QUARTERLY, *CONGRESSIONAL CAMPAIGN FINANCES: HISTORY, FACTS AND CONTROVERSY* 50 (1992).

⁷ Federal Election Campaigns Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1354 (codified as amended at 2 U.S.C. §§ 431(8)(B) & (9)(B) (1997) (listing exemptions from definitions of expenditure and contribution)).

could spend unlimited amounts on grass roots activities to try to promote voter participation through voter registration and “get out the vote” activities. Despite advances in technology, Congress sanctioned spending for the production of traditional campaign materials such as bumper stickers, buttons and slate cards even though these materials may still directly influence a presidential election.⁸ Parties were allowed to pursue such activities under the rubric of “party building” even though these activities may also aid party candidates running for “lower” offices.⁹

While Congress was amending the Federal Election Campaigns Act, political parties were arguing in another venue—not the hallowed halls of Congress, but before the Federal Election Commission.¹⁰ The parties argued that, although the law seemed to assume that the national party organizations are essentially organized to finance federal political activity and candidates, the party organizations are also very much involved in non-federal political activity, such as the support of state legislative candidates. Therefore the law should in some way reflect this non-federal structure of the party system. A series of rulings resulted in which the FEC advised party organizations that they could participate in financial activity related to non-federal elections provided they maintain separate bank accounts between federally limited and non-federal monies.¹¹ Thus was born the notion of hard and soft money.

⁸ See *Hearings on Campaign Finance Revision: Soft Money Before the Comm. on Rules and Administration*, 104th Cong., 2d Sess., May 14, 1997 (testimony of Bradley A. Smith, The Cato Institute), available in 1997 WL 10571386.

⁹ See *Hearings on Campaign Finance Reform Before the Senate Governmental Affairs Comm.*, 105th Cong., 1st Sess., Sept. 24, 1997 (testimony of Edward H. Crane, the Cato Institute), available in 1997 WL 14151315.

¹⁰ “The Federal Election Commission (FEC) is an independent agency established by the Federal Election Campaigns Act of 1971” which has exclusive jurisdiction in the administration and civil enforcement of laws regulating the acquisition and expenditure of campaign funds. It is composed of six Commissioners appointed by the President, the Secretary of the Senate and the Clerk of the House of Representatives. 2 U.S.C. § 437(c)(a)(1).

¹¹ See, e.g., FEDERAL ELECTION COMMISSION ANNUAL REPORT 1979 69-70 (summarizing Advisory Opinion 1979-12 which allowed a Federal candidate and a state candidate to hold a joint fundraising dinner so long as all contributions

Largely, hard money, limited by federal law such that it may be used only in federal elections, is difficult to raise because of limits placed both on individual donations and the sources of those donations.¹² Soft money is relatively easy to raise because, for the most part, state laws are significantly less stringent than federal law.¹³ Many states permit corporate funding and labor union treasury funds thus allowing parties access to sources that had long been banned from contributing in federal elections.¹⁴ As a result of the development of rules allowing party building activities and non-federal political activities, the parties were suddenly freed from the guidelines of the Federal Election Campaigns Act, so long as they were sure to abide by the technical requirements of the law.

Subsequently, in the early 1980s, national party organizations rapidly adapted to these new rules of the game. One of the ways

were deposited to a clearing account which would turn over 50% of the proceeds to the Federal candidate); FEDERAL ELECTION COMMISSION ANNUAL REPORT 1977 61-62 (summarizing Advisory Opinion 1977-20 which allowed the National Association of Realtors political action committee to receive funds for both Federal and non-Federal elections so long as contributions were deposited into escrow accounts which would allocate contributions 60% - 40% between the state and the PAC); *Id.* at 63-64 (summarizing Advisory Opinion 1977-38 which allowed a candidate running for the United States Senate to simultaneously keep two bank accounts, the first to support his Federal campaign and the second to aid in retiring his campaign from his prior state election); FEDERAL ELECTION COMMISSION ANNUAL REPORT 1976 98 (summarizing AOR 1976-72 [an Advisory Opinion based on proposed regulations] which determined that party overhead costs may be allocated such that the Federal campaign absorbs one-third of the costs while the state campaign absorbs two-thirds).

¹² Editorial, *Dodging for Dollars*, WASH. TIMES, July 15, 1996, at A18.

¹³ *See id.* (defining soft money as "unregulated funds (money not subject to FEC limits) that parties can raise from corporations, labor unions and individuals to pay for 'party building' and 'get out the vote activities' that do not directly advocate the election of a federal candidate").

¹⁴ Previously, corporations and labor unions were prohibited from funding campaigns. *See, e.g.*, FEDERAL ELECTION COMMISSION ANNUAL REPORT 1976 98 (summarizing AOR 1976-72 which stated that "corporations and union treasury funds may not be used to fund any portion of registration or get-out-the-vote" drives). The prohibition on corporate contributions in federal elections dates back to the Tillman Act of 1907, 34 Stat. 864, while the prohibition on labor union treasury funds can be found in the Taft-Hartley Act of 1947, 61 Stat. 136.

parties could increase the amount of their resources, especially in presidential years, was by encouraging the same individuals who raised money for the presidential nominee in the primary season to shift over to the party staff and raise soft money to finance "get out the vote" and voter registration activities during the general election period.

As a result, parties quickly "scrambled" to get involved in the process of raising soft money to be used for party building. They did this in two ways. First, rather than relying solely upon activities exempted under the 1979 law, parties began using soft money to fund any activity they could justify as party building. For example, the national party committees began to use soft money to pay a percentage of their staff salaries, arguing that their staffs spend part of their time on non-federal activity; therefore, part of the money they receive should be from non-federal funds. Additionally, the national party committees argued that overhead and mailing expenses should be divided between hard and soft money so that the cost of Federal Express packages are split \$9.00 hard money and \$3.00 soft money, or something to that effect.¹⁵

So began the rising demand for soft money. National parties now resemble a centralized banking operation, raising large amounts of money, depositing it into national party coffers and then distributing those funds to state political parties. This is all possible because they are able to transfer unlimited funds to their affiliated state organizations.¹⁶

¹⁵ The Federal Election Commission reported the following figures (in millions of dollars): the Democratic National Committee raised \$65.8 hard money and \$31.4 soft money (1991-1992), \$39.8 hard money and \$43.9 soft money (1993-1994), \$108.1 hard money and \$43.9 soft money (1995-1996); the Republican National Committee raised \$83.5 hard money and \$35.9 soft money (1991-1992), \$82.0 hard money and \$44.9 soft money (1993-1994), \$187.2 hard money and \$110.3 soft money (1995-1996). See *Party Money Just Keeps on Growing*, NAT'L J., Jan. 18, 1997, available in 1997 WL 7228000.

¹⁶ There are no disclosure requirements for donations to the non-federal accounts or party building funds of state parties, other than those required by state law. 55 FED. REG. 26,058 (June 26, 1990); Scott E. Thomas, *Hot Issues and Lukewarm Legislation*, 771 PLI/CORP 285 (March 1992). James Barnes of the National Journal has meticulously traced the transfer of \$17.8 million in so-called "soft" money from the Democratic National Committee's coffers to state parties.

After party building and non-federal political activities developed, a third activity began, that is, generic party advertising. You may remember some of this; for example, advertisements that said "Vote Republican for A Change" or "Vote Democratic." My personal favorite was the advertisement showing a large limousine full of lobbyists pulling up to the treasury building, once again allowing them access to federal funds, courtesy of the Democrats. Doesn't this scenario show it was time to vote Republican, "for a change"?

Finally, in a true testament to human ingenuity, the congressional campaign committees became involved in the soft money game, under the rationale of party building.¹⁷ The argument, which is a stretch, reasons that by contributing to state legislatures and party building, a congressional campaign committee is able to build congressional candidates of the future. The committees assert that national support for notable state officials later enables them to become notable congressional candidates. Thus, the congressional committees found a way to access soft money. As they became involved in "non-federal activities," part of their staff and overhead costs could be paid with soft money, thus freeing up hard money that could be used to support federal candidates.

Basically, a premium has been placed on soft money because it is a means to make hard money go further. Accordingly, there was a dramatic growth in the use of soft money throughout the 1980s. In the 1980 election, by best estimates, about \$19 million

Laundering the \$17.8 million of federal soft money through state party organizations allowed the Democratic National Committee to spend millions on party advertising without violating FEC regulations. *Dodging for Dollars*, *supra* note 12, at A18.

¹⁷ The Congressional Campaign Committee is the general name given to 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). The purpose of these four committees is to elect federal candidates to Congress by raising and spending soft money. *See Soft Money and the Investigation into Campaign Finance Practices of the 1996 Campaign: Before the Senate Govt. Affairs Comm.*, 105th Cong., 1st Sess., Sept. 24, 1997 (statement of Ann McBride and Donald J. Simon, President and Executive Vice President & General Counsel, Common Cause), available in 1997 WL 592075.

was raised and spent in soft money funds. In 1988, soft money soared to \$45 million; by 1992 it jumped to \$85 million, with a noted Republican advantage.¹⁸

Yet these amounts pale in comparison to the estimated amounts of 1996. The national party organizations, independent of the states, raised \$262 million in soft money alone, approximately three times that raised in 1992.¹⁹

These figures illustrate extraordinary rates of growth. The reason for this dramatic increase in the most recent election is that parties found a new way to spend money and developed a new strategy to help their candidates. This new strategy, issue advocacy advertising, opened the door to a "wild west" of fundraising and spending.

Issue advocacy influences federal elections without making use of federal election related spending. Because these advertisements do not expressly advocate the election or defeat of a candidate, they are not considered election related spending under the Federal Election Campaigns Act.²⁰ The Democrats made use of this strategy to promote their health care bill and counteract the opposing "Harry and Louise" advertisements.²¹ Faced with this clever onslaught against national healthcare, the Democratic party spent money on advertising promoting the healthcare bill under the rubric of "issue advocacy." This activity was the model for subsequent party advertisements promoting the budget plan and medicare. Parties quickly realized that such advertising could be adapted to the candidate arena. After the disastrous congressional

¹⁸ *Loophole Luxuries: Political Campaign Coffers Reap Benefits of Flaws in Limitation*, STATE J. REG. (Springfield, Ill.), Sept. 8, 1996, at 1. In 1992, the Republicans raised about \$49 million in soft money, the Democrats about \$35 million. *Id.*

¹⁹ Mary Beth Reagan & Amy Borrus, *The Fed-Up Golden Goose*, BUS. WEEK, June 23, 1997, at 160. The Republicans raised \$138 million, up drastically from the \$49 million raised in 1992. The Democrats raised \$122 million, up from the \$35 million raised in 1992. *Id.*

²⁰ 2 U.S.C. §§ 431-455. See also Jack W. Germond & Jules Witcover, *A Blow to Campaign Finance Reform*, NAT'L J., Apr. 20, 1996, at 897.

²¹ Germond & Witcover, *supra* note 20, at 897 (describing advertisements "sponsored by the Health Insurance Association of America . . . featuring two homespun characters questioning Clinton's proposal").

election of 1994,²² Democrats aimed to help Clinton in the election of 1996 by building up his image through a well-funded "issue advocacy" campaign.

President Clinton's advisors wanted to spend \$55 million on this advertising effort. However, federal law limits the entire primary campaign to a budget of \$37 million.²³ Thus, a \$55 million expenditure does not fit within publicly funded campaign spending plans. The solution to the dilemma: let the Democratic National Committee run the advertisements. So long as the advertisements did not say "vote for Bill Clinton," they could promote the President's agenda without being deemed election spending.²⁴

Hence, the Democrats quickly embarked on an unprecedented advertising campaign. By December of 1995, the Democrats had spent \$19 million on advertising to promote Clinton in 42% of the markets in the country.

The money spent on advertising largely targeted states related to the presidential campaign, including \$4 million in California and several million dollars each in Illinois, New York and some other key electoral states. By June of 1996, the Democrats had spent \$34 million on such advertisements, \$22 million of which was financed through soft money.²⁵ Democrats further realized that they could get a better "bang for their buck" at the state party level. That is, they realized that the most effective way to finance these advertisements was not to pay for them out of the Democratic National Committee accounts, but from state party offices. Had the advertisements been sponsored by the Democratic National Committee,

²² The 1994 congressional election marked the first time in forty-two years that Republicans captured the House of Representatives from the Democrats. The Republicans gained fifty-two seats, giving them a 230-204 majority; it was the largest net partisan swing since 1948. Republicans also took control of the Senate with a 53-47 majority. Gary C. Jacobson, *The 1994 House Elections in Perspective*, POL. SCI. Q., June 1, 1996, at 203.

²³ Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash*, WASH. POST, Feb. 9, 1997, at A01.

²⁴ *Id.*

²⁵ See Bob Woodward & Ruth Marcus, *Papers Show Use of DNC Ads to Help Clinton*, WASH. POST, Sept. 18, 1997, at A01.

the applicable laws regarding the allocation of funds would require that two-thirds of the money be hard money. Instead, the Democrats sent the money, for example, to the Ohio state democratic party. The law assumes that the Ohio state democratic party is more concerned with non-federal activity and therefore, probably has a two-third soft money requirement. Thus, by simply running the money through the Ohio party's account, the party could use almost twice as much soft money when buying advertisements.

In effect, there was an extensive effort to transfer money to the state level so that state parties could spend it in a fashion beneficial to the "higher-ups." In this way, greater benefit was gained from the soft money component.

As you may well imagine, Republicans were not about to sit idle and let the Democrats go unchallenged.²⁶ Upon Bob Dole becoming the Republican nominee, Haley Barbour announced that the Republican National Committee would begin an issue advocacy campaign of its own. In addition, the Republicans later mounted an effort costing around \$20 million to counteract the \$21 million issue advocacy advertising campaign launched by labor unions to inform voters about the voting of Republican legislators on such issues as the minimum wage.²⁷ But, they did not tell you how you should vote — they just wanted you to know.

As a result, there was an insatiable demand for money that placed pressure on the national party organizations. The parties could only compete in two ways. First, they could find new sources of money, such as the Asian community that was a particular focus of the solicitation efforts of John Huang.²⁸ Second, they could encourage their traditional donors to move from being \$50,000 or \$100,000 donors to becoming \$100,000 or \$250,000 donors. When you are dealing with such sums, parties need to provide an

²⁶ See Marcus, *supra* note 23, at A01.

²⁷ David Hackson, *Election 96: Much Ballyhooed Campaign Funding Reform Stalled: Dole, Clinton Ducking Limits*, CHI. TRIB., May 19, 1996, at 3.

²⁸ Huang is a former Democratic fundraiser who became involved in a scandal when he raised several million dollars for President Clinton's re-election campaign from foreign contributors. Brian Williams, *Two Men Named John Huang Have Both Visited the White House on Numerous Occasions* (MSNBC television broadcast, Nov. 1, 1996).

incentive for increasing donations; why not offer large donors coffee with the President?

Many of the current campaign finance problems are directly related to the insatiable demand for money exemplified in 1996. Therefore, no regulatory regime will be effective unless it addresses soft money spending and issue advocacy. Past legislative approaches, like McCain-Feingold,²⁹ have centered around limits of one kind or another without addressing soft money or issue advocacy and, as a result, have been essentially meaningless.

The soft money problem must be addressed. Parties and their traditional activities have a valid role in the political system. Additionally, it must be recognized that federal, state and local campaign laws are inevitably going to overlap. Therefore, the "best" way to enhance the role of parties is to simplify the law.

The focus should be on the contributions going into parties, since they can be controlled with relative ease. We should start by eliminating this hard/soft money distinction. There should be one pot of money, that is, "party money." The parties should be allowed to raise money, for whatever purposes they seek, with limits on the sources of that funding. However, the amount an individual can give to a party organization should be increased, perhaps to \$25,000 per year. Large corporate contributions and large labor union treasury fund gifts should be eliminated so that contributions are voluntarily submitted and all fully disclosed. Then the party could be allowed to spend the money as it thinks best.

Under the current system, parties are the organizations that provide the most support for those individuals challenging incumbents. Parties have a vested interest in seeing their challengers win. Therefore, if the restrictions are taken off parties and they

²⁹ McCain-Feingold is a proposed campaign finance reform bill which would further restrain political contributions and expenditures through such avenues as expanding the definition of "express advocacy." *Common Cause Statement on McCain-Feingold Campaign Finance Reform Bill*, U.S. NEWSWIRE, Sept. 23, 1997, available in 1997 WL 13913047. On October 7, 1997, the Senate voted against closing debate on the McCain-Feingold bill and postponed any immediate change to the current campaign finance system. See Editorial, *Thunder in the Senate*, N.Y. TIMES, Oct. 8, 1997, at A22.

are allowed to spend the money to which they have access, the need to utilize technical loopholes may effectively be eliminated.

Moreover, I firmly believe the issue of advocacy spending may be effectively addressed. A model for reform is provided on Capital Hill by the postal patron mailings. In that instance, regulations were developed to limit mailings within 90 days of a primary or general election to ensure that these mailings are not being designed to influence the campaign.³⁰ Why can we not subject campaign advertisements, run within 90 days prior to the election, to similar restrictions? The advertisements should be able to run so long as they disclose the sources and amount of funding and they are the result of voluntary contributions permitted under federal law. Such regulations would prevent labor union treasury funds or corporate gifts from being used to finance these advertisements and would ensure that the public knows who is attempting to sway their votes. Simultaneously, these regulations would ensure that we are not unconstitutionally restricting free speech rights implicated in this type of advertising.

³⁰ Under 39 U.S.C. § 3210, members of Congress may send mail through the postal service without having the cost for such mailings deducted from their budget. Members of the Senate may not do a mass mailing 60 days (90 days for the House of Representatives) before a primary or general election. 39 U.S.C. § 3210(a)(6). The regulation is designed to help “assist and expedite” the official business of Congress. 39 U.S.C. § 3210(a)(1). Even with the 90 day rule, members of Congress running for re-election have an advantage over their opponents when these members of Congress do mass-mailings to constituents in their districts by sending questionnaires to determine what issues are important to the voters. For example, Representative Taylor (R.-NC) made use of this postal regulation, especially during election years when he ranked fourth highest among the 435 members in total franking expenses. Taylor spent approximately \$30,000 more in mailing costs in 1994, the year he was running for re-election, than in 1993, an non-election year. Chris Collins, *Rep. Taylor Makes Liberal Use of Free Mail, Especially in Election Years*, GANNETT NEWS SERVICE, June 19, 1997, available in 1997 WL 8830426.

