Campaign Finance Reform Issues Brought to the Forefront by the Special Investigation

I. Introduction

On March 11, 1997, the Senate passed Senate Resolution 39 empowering the Senate Governmental Affairs Committee to investigate "illegal and improper" activities that arose during the 1996 federal elections. While the Senate Governmental Affairs Committee does not have jurisdiction over campaign finance reform legislation, one of its oversight responsibilities encompasses operation of the current federal campaign finance system. Therefore, it is the Governmental Affairs Committee's obligation, to report our findings to the Senate committee with legislative authority in this area, the Senate Rules Committee. Included in this section of the report are examples of violations of the campaign finance laws that were revealed by our investigation, as well as findings of improper federal campaign activity. These findings should be taken into consideration in any Senate evaluation of federal campaign finance system reform.

As a result of the Governmental Affairs Committee investigation into illegal and improper federal campaign activity during the 1996 federal election two things are abundantly clear. First, there is no doubt that a wide range of activity undertaken by the Clinton/Gore '96 Re-election Campaign Committee, the Democratic National Committee, the AFL-CIO, various non-profit organizations, and a variety of other individuals either explicitly violated the Federal Election Campaign Act (the "FECA"), or violated the spirit of the FECA. Second, the never ending quest by those involved in the campaign process to use any vagaries of the law to their own advantage, and the resulting legal uncertainties based upon twenty years of the courts' and the FEC's stressing and straining to provide coherent interpretations of the FECA, have made it timely and appropriate for Congress to consider revisions to the existing law.

In the 1996 election President Clinton decided to accept federal campaign funding in return for an agreement to cap spending, but he nevertheless coordinated with the DNC on expenditures of soft money above that cap to broadcast thinly disguised issue advertisements meant to advocate his election. Due to such activity the federal campaign finance system virtually collapsed. When the FECA was passed in the early 1970s, no member of Congress could have foreseen some of the developments that will be discussed in this section of the report: the distinction between "hard" and "soft" money; the use of "issue advocacy" to advance the election of specific candidates; the total direction and control that a presidential candidate would come to assert over national and state party committee expenditures; the explosive growth in the cost of running for office and placing television campaign advertisements; and how the creation of an untested independent regulatory agency structure to oversee the FECA would impact the law. As a result of the Committee's investigation and examination of various illegalities and improprieties during the 1996 federal elections, it appears that it may be time to re-evaluate the effectiveness of the campaign finance system as it exists today.

It must first be recognized that the regulation of federal campaigns today is not carried out under the comprehensive scheme anticipated by Congress when it enacted the FECA. As Thomas Mann, Director of Government Studies at the Brookings Institute testified, "the 1974 law worked pretty well at the Presidential level, but because the Court intervened [to] cut of[f] pieces of the law on free speech grounds, the Congressional system was really never in play."[1] During

[1] Testimony of Thomas E. Mann, September 23, 1997, p. 64.

testimony before the Committee, Professor Burt Neuborne, Legal Director of the Brennan Center for Justice at New York University School of Law, asserted that the current system "is the worst of all possible worlds" because it has "emerged as a judicial mutant."[2] Although Congress originally devised and enacted a comprehensive statute, the provisions of which were intended to interact through checks and balances, over time various legal interpretations issued by the courts and the Federal Election Commission ("FEC") produced a system quite different from the one Congress enacted.

The law now in place had its genesis in the Federal Election Campaign Act of 1971, together with the 1971 Revenue Act. The FECA, effective April 7, 1972, not only required full reporting of campaign contributions and expenditures, but also limited spending on media advertisements. These limits on media advertisements were later repealed. The FECA incorporated an explicit ban on foreign contributions that had been enacted in 1966. The FECA continued the long standing ban on direct contributions by corporations (first enacted in the 1907 Tillman Act) and a similar ban imposed on unions (part of the Taft-Hartley Act of 1947), but at the same time established the basic legislative framework for separate segregated funds, popularly referred to as PACs (political action committees). Thus, the FECA provided corporations and unions a previously unavailable opportunity to participate in federal elections through PACs, but limited that opportunity only to PAC involvement. The sole use of corporate and union general treasury funds allowed under the FECA was for the PAC's establishment, operation and solicitation of <u>voluntary</u> contributions. It is these voluntary donations that in turn are contributed to Federal races. Under the 1971 Revenue Act -- the first of a series of laws implementing

[2] Neuborne Prepared Testimony submitted to the Governmental Affairs Committee.

Federal financing of Presidential elections -- citizens could check a box on their tax forms authorizing the Federal government to use one of their tax dollars to finance Presidential campaigns in the general election.

It was not until passage of the 1974 amendments to the FECA, however, that Congress created a comprehensive structure regulating the financing of federal political campaigns. This system incorporated a number of features from the regulatory past -- the ban on union, corporate and foreign contributions, for example -- and it strengthened the reporting requirements while creating the Federal Election Commission to enforce and administer the legislation. The FEC was given jurisdiction in civil enforcement matters, authority to write regulations and responsibility for monitoring compliance with the FECA.

The new post-1974 FECA was primarily a structure of limitations on the movement of money and a venture into public funding of presidential politics. The 1974 legislation imposed a variety of limitations on contributions. Individuals were limited to contributions of $1,000 per candidate per election, and to a total calendar-year contribution cap of $25,000, of which $20,000 could go to national party committees. PACs and party committees could contribute no more than $5,000 per election to a candidate, except for the major party senatorial committees that were allowed to contribute $17,500 to each party senatorial candidate. Expenditure limits were also put in place, but all of them except those limiting expenditures by party committees were eventually struck down by the courts.[3]

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[3] Buckley v. Valeo, 424 U.S. 1, 39-59. The Court emphasized that the interest in "equalizing the relative financial resources of candidates" was not sufficient to justify the First Amendment infringement imposed by expenditure ceilings.

Based on the law as modified by the courts, the Governmental Affairs Committee made an initial examination of illegal and improper activities carried out during the 1996 federal elections. In late September, 1997 the Committee reflected on its investigatory findings to that point by holding four days of hearings on the statutory flaws and omissions that campaign finance experts maintained allowed or encouraged the very activities under Committee review. During these four days of hearings the Committee made a deliberate attempt to gain insight from a broad range of experts representing truly diverse viewpoints toward federal campaign finance regulation. As part of the discussion of campaign finance statutory shortcomings, the Committee examined proposed legislative action advocated to prevent future illegalities and improprieties. The various experts who testified advocated everything from replacement of the current federal campaign finance system's reliance on contribution limits and prohibitions with an open market system relying solely on disclosure[4] to a highly regulated system involving a full public financing option.[5]

As a result of these four days of testimony, in addition to knowledge gained through the overall investigation, the Committee identified several issues as particularly problematic in the current statutory scheme regulating federal campaigns in the United States. Issues that seem particularly salient and partly responsible for the widespread abuses in the 1996 federal elections include the following: failure to properly vet large contributions; the use of soft money to circumvent restrictions in the law; the conflict between First Amendment guarantees of free speech and campaign spending limitations; campaign spending by non-profits; the potential to undermine the current campaign system through coordination between entities; the use of union

[4] Testimony of Leo Troy, Sept. 24, 1997, p. 171.

[5] Testimony of Ellen Miller, Sept. 24, 1997, p. 188.

members' dues in political campaigns; as well as a variety of structural problems related to administration of the current system. The problem areas examined by the Committee for possible reform are highlighted below. This review is not intended to advocate or criticize any particular reform, but rather it is designed to ensure that the results of this investigation are considered whenever Congress undertakes reform of the FECA.

II. Soft Money

Much of the testimony the Committee heard involved "soft money," as opposed to "hard" money which is raised within the prohibitions and limitations of the FECA. "Soft" money is raised and spent in the political process outside of the FECA prohibitions and limitations. As a result of the evolutionary process discussed in this section, national party committees now raise and spend "soft" money received from corporations, unions and individuals in unlimited amounts. This money is in turn spent by national and state political party committees. In certain instances outlined below, national party committees allocate specific expenditures between soft and hard money according to predetermined ratios established by the FEC to reflect the percentage of impact such expenditures are estimated to have on federal versus other elections. According to testimony before the Committee, $265 million in such soft money funds entered national party committee coffers for uses related to the 1996 federal elections.[6] In addition to the corporate and union sources, much of this money was made up of unlimited individual contributions from those who had otherwise given the maximum amount permitted to given political committees under the FECA limits.

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[6] Testimony of Burt Neuborne, Sept. 25, 1997, p.129 and A. Corrado, T. Mann, D. Ortiz, T. Potter and F. Souraf [HEREINAFTER Corrado], <u>Campaign Finance Reform A Sourcebook</u>, 167 (1997).

Soft money has also grown to mean money spent directly by corporations, unions, non-profits or individuals to impact specific elections through the discussion of issues, but which avoids the Buckley Court's "magic words" of express advocacy[7] on behalf or in opposition to an identifiable federal candidate. Such funds, according to current regulation, whether expended by party committees, unions, corporations, or other entities, are supposed to be expended only on "get-out-the-vote" campaigns and other non-candidate specific activities.

This is an area of the law where vagueness, court interpretations, and FEC guidance have encouraged those active in campaigns to avoid the restrictions of the system in a manner that the authors of the FECA could not have possibly foreseen. As a result of the demand for campaign funds, some believe that the limits established by federal law have been rendered meaningless. Some like Professor Burt Neuborne argue "soft money is nothing more than a campaign contribution. It is a contribution by a person to a political party with the funds to be used in some sense in connection with a campaign."[8]

A. Background of Soft Money

The alleged abuses of the soft money stem from two provisions of the current FECA, and court interpretations of those provisions over the past twenty years. First, party committees are limited in the amount of money they are allowed to spend on behalf of their individual candidates.[9] These coordinated "hard" money accounts must consist of contributions from non-prohibited

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[7] See discussion of Advocacy Standards below.

[8] Neuborne testimony, p. 130.

[9] 2 U.S.C. § 441a(d).

sources (no union, corporate or foreign money),[10] and be within the $20,000 limit placed on individual contributions to party committees.[11] Disbursements from these accounts are called "coordinated expenditures" because they can be made in direct coordination with a candidate's campaign. (They are also known as 441a(d) monies, since this is the section of Title 2 of the United States Code that authorizes such spending.) Given that the FECA indexes these coordinated amounts for inflation, by 1996 they were roughly three times their original level: National party committees could spend $12 million on behalf of a presidential candidate, or $30,910 for a House candidate ($61,820 in a single-district state), and from $61,820 in the smallest states, to $1.4 million in California on behalf of a Senate candidate.[12]

Prior to the 1996 election, it was presumed that the full amount of party expenditures on any broadcast advertisements placed to assist a party's candidate would necessarily be paid for with hard dollars from such coordinated hard dollar accounts.[13] As a result of the Supreme Court's decision in Colorado Republican Federal Campaign Committee v. FEC, (Colorado Republican), 116 S. Ct. 2309 (1996), the last federal election also saw the advent of party committee independent expenditures made on behalf of non-presidential federal candidates. Thus, for the first time since the passage of the FECA, party committees were allowed to expend unlimited hard money to expressly advocate the election or defeat of clearly identified federal

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[10] 2 U.S.C. §§ 441b(a) & 441e.

[11] 2 U.S.C. § 441a(a)(1)(C).

[12] 2 U.S.C. § 441a(d) and *1996 Coordinated Party Expenditure Limits*, 22 Federal Election Commission Record 14 (April, 1996).

[13] See the discussion below of changes wrought by FEC Advisory Opinion 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 at 12,109 (August 24, 1995).

candidates and not count those expenditures against their 441a(d) limits, so long as those expenditures were not made in express coordination with a candidate in the particular race.

The various uses of soft money in 1996 are a culmination of a long evolutionary process. In amendments to the FECA passed by Congress in 1979 to encourage grass-roots participation, greater leeway was given to party organizations to spend federal funds (hard money) with respect to election-related activity. As a result of these amendments party organizations could spend unlimited amounts of hard money on voter registration and identification, certain types of campaign material, and voter turnout programs. Although these 1979 Amendments authorized a circumscribed realm of unlimited party expenditures, they did not sanction unlimited spending by party committees of unregulated (soft money) on activities designed to assist a particular candidate for federal office. The latter activity came into vogue as a result of FEC interpretations of the FECA. In Advisory Opinion 1978-10 the FEC declared that the Kansas Republican State Committee could use corporate and union money to finance a share of their voter drives, so long as it allocated its costs to reflect the federal and nonfederal shares of any costs incurred.[14] They did this because in Kansas, as in many states, the use of corporate and union money in state elections is permissible. By direct analogy, national party committees have since been allowed to split the costs of such grassroots "state based" activity between soft and hard money elements. The practice grew because federal and state committees are largely allowed to transfer funds

[14] FEC Advisory Op. 1978-10, Fed. Election Camp. Fin. Guide (CCH) ¶ 5340 at 10,335 (August 29, 1978).

without restriction.[15] The practice also grew despite the eventual acknowledgment by the courts that such grassroots activity directly impacted federal elections.[16]

Thus, just as Congress was allowing party organizations to spend unlimited amounts of money raised under federal rules on voter programs and other activities, the FEC allowed them to pay a share of such costs with funds not subject to federal limits.[17] As a result of this evolution, national party committees could now spend ever greater amounts of soft money, and the quest was on to find a way to spend this money outside of the system to directly benefit federal candidates.

As an outgrowth of Common Cause court action against the it,[18] the Federal Election Commission finally issued new soft money regulations that took effect on January 1, 1991. Under these rules, all party committees raising and spending soft money in conjunction with federal elections must file regular disclosure reports of their contributions and disbursements with the FEC. These reports must identify any contributors to national party committees who give more than $200 to soft money accounts or party building-fund accounts.

Most importantly the new regulations established specific allocation formulas for the use of soft and hard money. These rules require national party committees to pay for 65% of all their

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[15] 2 U.S.C. § 441a(a)(4).

[16] See Common Cause v. Federal Election Commission, 692 F. Supp. 1391 (D.D.C. 1987) and Common Cause v. Federal Election Commission, 692 F. Supp.. 1397 (D.D.C. 1988).

[17] FEC Advisory Op. 1978-10, Fed. Election Camp. Fin. Guide (CCH) ¶ 5340 at 10,335 (August 29, 1978).

[18] See Common Cause v. Federal Election Commission, 692 F. Supp. 1391 (D.D.C. 1987) and Common Cause v. Federal Election Commission, 692 F. Supp.. 1397 (D.D.C. 1988).

overall "generic voter drive" costs made in a presidential election year out of "hard dollar" accounts (60% must come from hard dollars in non-presidential election years). Thus, 35% of the money spent on generic activity during a presidential election year (40% in non-presidential election years) may come from money raised outside the limits and prohibitions of the Federal Election Campaign Act.[19] As a result of these new regulations, the public learned in 1992 that the major party committees raised more than $83 million in soft money, or about four times the amount of soft money estimated to have been spent by party committees in 1984. In the 1996 cycle the explosion in soft money continued. Soft money receipts at the Republican national party committees increased by 178% over 1992 to $138.2 million, while Democratic party committee receipt of soft money increased 242% over 1992 levels to $123.9 million.[20] Due to such disclosure we now know the extent and potential impact of party committee soft money in the federal political process. No such disclosure exists for direct corporate, or large individual soft money expenditures on "issue advertisements."

The latest, and perhaps the most significant event, contributing to the current questionable use of soft money for issue advocacy advertisements was the FEC's issuance of Advisory Opinion 1995-25.[21] In Advisory Opinion 1995-25 the FEC ruled that party issue advertisements relating solely to congressional legislative proposals would have to be paid for by a mixture of hard and

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[19] 11 C.F.R. § 106.5(b).

[20] Corrado, Campaign Finance Reform A Sourcebook, 175 (1997).

[21] FEC Advisory Op. 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 at 12,109 (August 24, 1995).

soft money, even if they did not expressly advocate the election or defeat of any identifiable federal candidate. The FEC ruled that such party issue advertisements must be paid for by using 60% (1995 was a non-presidential election year) hard money. The FEC reasoned that because of the very nature of a national party committee, it would not make any generic expenditures that did not in some way benefit federal election candidates.

B. Problems Arising from Soft Money

As outlined above, soft money can be spent directly by a national party committee for a portion of its state based generic party building and issue advocacy, or transferred to the various affiliated state party committees for similar activity. Under no circumstances can soft money be utilized to advocate the election or defeat of a clearly identifiable federal candidate (i.e. express advocacy). The statute, FEC application of the law, and court opinions make clear that party committees in particular are further prohibited from spending soft money on any kind of electioneering message. As defined by the FEC, "electioneering messages" are statements "designed to urge the public to elect a certain candidate or party."[22] The electioneering message standard is discussed in greater detail in the advocacy section of this report.

As described in further detail in the coordination section below, the Clinton/Gore '96 campaign devised a way to circumvent the DNC's 441a(d) coordinated expenditure limit and, in violation of the FECA, illegally utilize approximately $44 million in national committee soft money to their candidate's advantage through electioneering messages that they claim to be pure issue advertisements. These advertisements carefully avoided expressly advocating the election of

[22] FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 - 11, 186 (May 30, 1985).

President Clinton, but these party committee expenditures were clearly made for the purpose of influencing the Presidential election. This election influencing purpose has been acknowledged by those who worked directly with President Clinton on them, including Dick Morris[23] and Leon Panetta.[24]

It is established practice that national party committees and state party committees work in tandem when spending for federal, state and local elections. Given that state party committees may spend the same coordinated amounts as the national party organizations in House and Senate races, "agency agreements" have gained popularity. In those states or districts where a state party lacks adequate funding to meet the coordinated spending limit, and a national party committee, usually a congressional or senatorial campaign committee, considers a race strategically important, the state and national party committees form an "agency agreement" that transfers the state party's spending quota to the national committee. With national party committees now able to spend soft money on an expanding array of things that they formerly paid for with hard money[25], "agency agreements" have become increasingly common because national party committees have larger reserves of hard money to maximize potential coordinated expenditures on express advocacy in tight contests.

In addition to agency agreements, the DNC deftly utilized state party committees in 1996 as a conduit to further increase their illegal expenditure of soft money on electioneering messages

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[23] Deposition of Dick Morris, August 20, 1997, pp. 274 & 345. <u>See</u> also the section of this report on The Thirst for Money.

[24] *Meet the Press* (NBC television broadcast, March 9, 1997).

[25] Witness the broadcast issue advertisements that appeared as a result of FEC Advisory Op. 1995-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 6162 at 12,109 (August 24, 1995).

favoring the re-election of President Clinton, all the time claiming such advertisements consisted of pure issue advocacy outside of the realm of the FECA. Such manipulation of the current FECA for party committee advantage results from the regulatory distinction establishing different hard to soft expenditure ratios for state party committees and national party committees.[26] The FEC lacks jurisdiction to regulate any state party committee spending outside that made on behalf of federal candidates. Therefore, FEC guidelines leniently allow general state party expenditures that have an incidental federal election impact to be allocated over a two year election cycle using the ratio of federal to nonfederal candidates on that State's November ballot. For example, in a state where the ballot includes candidates for two types of federal races -- say, presidential and congressional -- and candidates for eight nonfederal offices, the state party could pay for 80% of the generic activities with soft dollars. Given that hard dollars (raised in $1,000 increments from FECA non-prohibited sources) are significantly more difficult to raise, the distinction described above creates an incentive to have the state party pay for as many activities as possible using soft money. To take advantage of the current system, national party committees have begun transferring soft money to state party committees to utilize the various states' higher soft money allowance. Substantial amounts of such transfers are made to state and local political parties for "generic voter activities" that in fact ultimately benefit federal candidates because the funds for all practical purposes remain under the control of the national committees. The use of such soft money thus allows more corporate, union treasury, and large contributions from wealthy individuals into the system.

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[26] Testimony of Anthony Corrado, September 25, 1997, p. 7.

Despite disclosure regulations for the national party soft money accounts, monies raised and spent by state and local committees that claim to be unrelated to federal election express advocacy do not have to be reported to the FEC (but they are often reported at the state level). Of course, transfers to the state party committees from the national party committees are reported as expenditures on the national party committee FEC filings. Disclosure reports required to be filed at the state level by state party committees are often inadequate to fully disclose the ultimate use of such transferred funds.[27]

In the crucial 1995 pre-election year, according to FEC reports, the DNC transferred almost $11.4 million in soft money to state parties, followed by another $6.4 million in the first quarter of 1996. In sharp contrast, the RNC shifted a little over $2.4 million to the states from January 1, 1995 to February 29, 1996. Ultimately the DNC quietly transferred at least $32 million,[28] and perhaps as much as $64 million,[29] to state Democratic party committees in the 1996 cycle. This transfer of funds allowed state party committees to utilize a higher proportion of the national party committee's soft money in areas impacting federal elections than if the national party committee had made the expenditures directly. The DNC on its own would have had to purchase the very same air time under the much tighter federal allocation guidelines requiring a higher percentage of hard dollars.

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[27] Testimony of Anthony Corrado, September 25, 1997, p. 8, ll. 7-12 .

[28] *Democrats Used the State Parties to Bypass Limits,* New York Times, October 1, 1997, at A1.

[29]Anthony Corrado testimony, p. 7.

Recent history is replete with evidence that these different state and national allocation formulas are being utilized to circumvent the FECA. In October 1990, the DNC accepted a $230,000 contribution in soft money from Louisville, Kentucky newspaper publishing heiress Mary C. Bingham. Shortly thereafter, the DNC transferred $215,000 to the Kentucky Democratic Party, which in turn paid for an advertising blitz that closely paralleled the themes that Bingham's favored candidate used in campaigning for the U.S. Senate.[30] In the Spring of 1995 the Pennsylvania Democratic Party was $200,000 in debt, but after receiving $2.8 million from the DNC it used approximately $2.7 of the funds to pay for television spots created by DNC media consultant Squier, Knapp & Ochs. The Squier firm was also paid by the Clinton/Gore '96 campaign committee, and ads that it produced for the Clinton/Gore '96 committee were either identical to, or closely mimicked by state party and DNC re-election campaign ads.[31] The flow of funds in and out of the Michigan Democratic Party during the first quarter of 1996 vividly displays this scheme. On five separate occasions, the DNC shifted cash from both its federal and nonfederal accounts to the Michigan Democratic Party. Within days of each transfer, the Michigan Democratic Party wrote a check in the same amount to the Squier firm to pay for pro-Clinton ads.[32] Moreover, the proportion of hard and soft dollars that the Michigan Democrats

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[30] Federal Election Commission Enforcement Matter Under Review 3182 (DNC, Kentucky Democratic Party, Harvey Sloane for U.S. Senate, et al.).

[31] J. Barnes, *Party Favors*, National Journal, May 11, 1996, p. 1038.

[32] For example, the investigation uncovered an advertisement containing the same visuals incorporating President Clinton giving a speech and the exact language which, according to the disclaimers on the advertisement, was alternatively paid for by the DNC, or the Michigan Democratic Party. The narration of that advertisement stated the following: "Every year in America, one million women are the victims of domestic abuse. It is a violation of our Nation's values. It's painful to see. It's time to confront it. The President's plan: Increased child support

used to pay Squier was exactly the same as the hard and soft-dollar transfers from the DNC. All told, the DNC conveyed $172,731 from its federal (hard-dollar) account and $281,824 from its nonfederal (soft-dollar) account to the Michigan Democrats. That is exactly the same ratio as the FEC allocation formula that applies to the cost of generic activities paid for by the Michigan Democrats in 1996: 38% hard and 62% soft. If the DNC had directly paid for those ads in Michigan, its 65/35 FEC allocation formula would have required the committee to spend $295,461 in hard dollars and $159,094 in soft dollars.[33] Thus, the DNC saved $122,810 in hard dollars by using the Michigan Democratic Party as a conduit to pay for these particular advertisements. If this is not a violation of the current FECA, it is definitely a manipulation of an undesirable "loophole" in violation of the spirit of the law.

FEC reports of the receipts and expenditures of a dozen state Democratic parties from July 1, 1995, through March 31, 1996, indicate that the state entities operated as little more than a pass-through for the DNC to pay for the production and broadcasting of ads by the Squier firm. Clearly, the Democratic National Committee produced commercials that various state Democratic party committees in turn placed in their local media market with a disclaimer stating that the advertisements had been paid for by that specific state Democratic party committee. In news accounts the Pennsylvania Democratic Party spokeswoman Kelly McBride said, when asked about DNC transfers and the subsequent ads, "The state party cooperated with the national party

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enforcement. Work, not welfare, to encourage stronger families. Improve and enforce domestic violence laws. One million women. A test of our national character. A challenge we will meet." Given the acknowledged "gender-gap" of the 1996 election there is little doubt that this mention of President Clinton during an election year was intended to influence the Presidential election.

[33] J. Barnes, *Party Favors*, National Journal, May 11, 1996, p. 1038.

to produce those commercials." This scheme to avoid FEC mandated allocation is especially odious in that it allows national party committees to continue to control the content and placement of advertisements, and at that same time avoid adherence of the FEC's specific regulations. The truth was probably most accurately reflected by Florida Democratic Party communications director Jo Miglino who said, when asked about such Florida Democratic Party advertising in her state, "Those aren't ours; those are the DNC's."[34]

C. Potential Reforms Directed at Soft Money

Under the FECA's current system of contribution limitations, the investigation has found, soft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defeat or benefit of specific candidates. The development of soft money has severely undermined the party coordinated expenditure limits of the FECA, since party committees that reach this coordinated limit can now continue to spend money to influence federal elections beyond the coordinated limit through a variety of means. One option available to national party committees is to simply shift their spending to issue advocacy ads (those having a bearing on issues of the specific election contest, but avoiding explicit advocacy of any candidate). Another course national parties can now pursue as a result of the Colorado Republican decision (discussed *infra*) is to make independent expenditures[35] that can benefit a candidate without counting against any party spending ceilings. Finally, unlimited national party committee soft money can be transferred to state parties to pay

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[34] Id.

[35] See discussion elsewhere in this section of Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996).

for issue advertisements carefully designed to influence a federal election, but at the same time avoid reporting by not expressly advocating the election or defeat of an identifiable federal candidate.

Reforms in the area of soft money must recognize that state parties are governed by state laws; that traditional party-building activities from voter registration and get-out-the-vote drives to sample ballots impact both the campaigns for state and local office and campaigns for federal office; and that most students of the system believe it is desirable to enhance the role of parties. One solution for the "soft money" morass that the Committee heard advocated was a suggestion to simplify the current complicated distinctions between hard money, soft money, coordinated money, and independent expenditures. Anthony Corrado suggested a clear statutory definition of national party committee money, subjecting it all to federal limitations and prohibitions.[36] Eliminating the legal distinction between non-federal (soft) and federal (hard) funds at the national party committee level is a tempting proposal, if a decision is made to rid the system of soft money. Many people maintain that the Buckley decision allows political parties to be subjected to the same source and amount restrictions that apply to candidate contributions.[37] Don Simon of Common Cause brought to the Committee's attention a letter co-signed by 124 constitutional scholars from across the country. That letter concludes that Congress clearly possesses the power to limit the soft money system through such a limitation on national party committee funds.[38]

[36] Testimony of Anthony Corrado, Sept. 25, 1997, pp. 96 & 97.

[37] Neuborne testimony, September 25, 1997, pp. 130 - 134.

[38] Letter from Ronald Dworkin and Burt Neuborne to Senator John McCain and Senator Russell Feingold, September 22, 1997.

The wisdom of extending the hard money limitations now being imposed on candidates to party committees, hinges on the assumption that national political party expenditures inevitably affect the outcome of federal elections, that national party committees do not expend funds unless they benefit their candidates, and that the courts will accept the argument that such contributions to party committees have the potential to influence a legislator's votes and thus can have a corrupting influence. Court decisions support the proposition that Congress has broad power to regulate the flow of funds into the electoral process. Courts have upheld limitations ranging from the overall $25,000 individual annual contribution limit to the $5,000 PAC contribution ceiling.[39]

In return for prohibiting national party committee receipt of soft money, some advocate raising the existing limits on individual contributions to parties, such as creating a separate $25,000 annual limit to party committees above and beyond any other annual limit imposed on individual contributors. At the same time, party committees could be allowed to allocate these "hard money" resources among their candidates as they choose without restriction.[40] Under this reform scenario, the party committees would retain control of their spending priorities, the public would have full disclosure of the source of funds, and the party system would be freed of excessively large contributions from individuals, unions or corporations that might lead to the appearance of corruption or actual quid pro quo.

[39] See California Medical Ass'n v. FEC, 453 U.S. 182 (1981); FEC v. National Right to Work Committee, 459 U.S. 197 (1982), and Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

[40] Testimony of Norman Ornstein, Sept. 24, 1997, p. 82 and Testimony of Douglas C. Berman, Sept. 24, 1997 p. 200.

Curtis Gans, Executive Director of the Committee for the Study of the American Electorate, proposed Congress merely prohibit the use of party committee soft money for broadcast advertising. Rather than completely eliminating soft money, this approach would allow its continued use for non-federal grassroots activity and institutional building.[41] On the other hand, Anne McBride of Common Cause testified that any compromise under which soft money was allowed to exist at the state level, but not at the federal level, would result in more manipulation and "gaming" of the system.[42]

One witness testified that soft money limitations on national party committees would be unconstitutional because money to party committees raises no compelling state interest in preventing quid-pro-quo corruption.[43] Brent Thompson, former director of the Fair Government Foundation, credits soft money for allowing party organizations to increase their role in elections and thus strengthen the "federalism" of the American party structure.[44] He also argues that party committee receipt of such soft money separates the source of the funds from the candidates, and thus prevents the appearance of corruption or actual quid pro quos for campaign dollars.

Yet others note that candidates, such as President Clinton, essentially <u>are</u> the party committee,[45] and as such control party solicitations and reap the rewards of these excessive

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[41] Testimony of Curtis Gans, September 24, 1997 p. 157.

[42] McBride testimony, p. 5.

[43] Testimony of Roger Pilon, Senior Fellow, CATO Institute, Sept. 25, 1997, pp. 144, and 153-155.

[44] Brent Thompson, *Despite Reform Frenzy, Don't Blame Soft Money for Campaign Scandal*, <u>Roll Call</u>, March 27, 1997, p.12.

[45] Deposition of Richard (Dick) Samuel Morris, August 20, 1997, pg. 30.

contributions. Such a posture makes the candidate just as susceptible to corruption or actual quid pro quos as if the contributions were given directly to the candidate's campaign committee. Failure of the FECA to effectively address the symbiosis between a sitting President and his party committee is another example of the need for an overall coherent set of checks and balances to counteract the revisions read into the FECA since its passage.

During the Committee's hearings, witnesses such as Edward Crane, President of the CATO Institute and Roger Pilon, Senior Fellow at the CATO Institute, argued that there should be no restrictions at all on the source or amount of party committee expenditures. Under such a system, prompt and complete disclosure is seen as sufficient regulation to control the potential evils of union, corporate and large contributions.   There is no explanation of how such disclosure prevents state reporting gaps, potential delays in federal reporting, or the FEC's previous inability to sufficiently sanction violators of similar provisions in order to avoid reoccurrence. Despite all of these options discussed, it may be impossible to completely control the flow of soft money as our system of Federalism makes it unlikely that federal legislation could constitutionally deprive the various state party committees of the right, where it is now legal under state law, to continue to raise corporate, union and large individual contributions.

III. <u>Foreign Contributions</u>

A central focus of the Committee's investigation was the manner in which illegal foreign money made its way into the federal election process. Title 2 U.S.C. § 441e explicitly makes it illegal for any foreign national to contribute to any federal or non-federal election in the United

States, either directly or indirectly.[46] This prohibition dates from 1966 legislation responding to congressional hearing revelations that Philippine sugar producers and agents of Nicaraguan president Luis Somoza contributed to federal candidates. The foreign contribution prohibition also prevents domestic subsidiaries of foreign corporations from establishing PACs if the foreign parent finances the PAC's establishment, administration, or solicitation costs, or if individual foreign nationals within the corporation have an impact on the decisions of the PAC, participate in its operation, or serve as officers.[47] Since federal law prohibits a foreign national from making contributions through another person or entity, the FEC has made it clear that domestic subsidiaries of foreign parent corporations may only make contributions out of domestic profits.[48]

The Committee's investigation heard testimony that three problems led to increased illegal foreign contributions in the 1996 federal elections. First, organizations like the Democratic National Committee (DNC) failed to establish and abide by sufficiently stringent vetting

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[46] **§ 441e Contributions by foreign nationals**
(a) It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national.

(b) As used in this section, the term "foreign national" means --
(1) a foreign principal, as such term is defined by section 611(b) of title 22, except that the term "foreign national" shall not include any individual who is a citizen of the United States; or
(2) an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence, as defined by section 1101(a)(20)of title 8.

[47] 11 C.F.R. § 110.4(a)(3).

[48] FEC Advisory Op. 1992-16, Fed. Election Camp. Fin. Guide (CCH) ¶ 6059 at 11,813 (June 26, 1992).

procedures to review even the largest contributions. Second, the solicitation of massive amounts of soft money increased the perception that large contributions could result in some quid pro quo, and thus foreign contributors decided their money might influence policy. Finally, the foreign contribution prohibition is very difficult to enforce for the average contribution because recipient committees lack a reliable method to ensure that donors who are not known to campaign solicitors are in fact American citizens.

Foreign contributions were encouraged by many contributors' belief that the DNC's obviously desperate and aggressive search for large contributions meant contributing in 1996 was more likely than ever to lead to personal gain. One prime example of the DNC's encouragement of this state of mind is found in a $250,000 contribution from South Korean businessman, John K. H. Lee.[49] Michael Mitoma, the mayor of Carson, California, testified during the Committee's public hearings on September 5, 1997 that he believed arrangement of a meeting between President Clinton and Lee would encourage Lee's decision to locate a factory in Carson.[50] Once Mitoma related information to John Huang about a Korean businessman who was considering starting a business in America, Mr. Huang and his colleagues at the DNC anxiously arranged a photo-op for Lee with the President in exchange for a $250,000 contribution. Any casual observer, let alone someone vetting a $250,000 contribution to the President of the United States, should have quickly come to the conclusion that the source of this particular corporate soft money contribution, Lee's newly incorporated U.S. company Cheong Am America, Inc., was merely a

[49] See detailed discussion of the John K.H. Lee contribution in the section of this report on John Huang's illegal fundraising at the DNC.

[50] Testimony of Michael Mitoma, September 5, 1997, p. 126.

front for processing an illegal foreign contribution from Lee. Despite the fact that Lee spoke no English, and needed to fly to Washington from Korea, he and four individuals of his choice were able to meet on April 8, 1996 with Don Fowler, Richard Sullivan, Peter Knight, and ultimately the President. A simple check of the California incorporation records would have shown that Cheong Am was incorporated at the end of February 1996.[51] Thus, even without the bank records showing that the Cheong Am America bank account was funded by a transfer of $1.3 million from Korea on March 26, 1996,[52] one could have surmised that it was unlikely Cheong Am America had operated long enough to generate the U.S. revenue needed to make a U.S. political contribution. This $250,000 contribution was covered with red flags -- all of which were ignored.

In their zeal to raise money, DNC officials at best neglected to ask the obvious questions, and at worst deliberately looked the other way. The drive for large contributions led the DNC to accept the Lee contribution. Considering that the legal hard dollar limit for individuals is $1,000 per election, the person solicited for a $250,000 soft money contribution would logically anticipate something in return, or at least expect a higher level of access. As Common Causes' Ann McBride pointed out in her testimony,

> [i]f you look at what this Committee exposed about foreign contributions, . . . [they] simply would not have found a way into the system if this huge unlimited, unregulated system did not exist, and so we believe the best reform to end the problem revealed in this Committee about foreign contributions is to end the soft money system.[53]

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[51] See section of this report entitled "John Huang's Illegal Fund-raising at the DNC," Ex. 11, State of California Certificate of Incorporation.

[52] Id., Ex. 12, Assorted bank records of Cheong Am America.

[53] McBride testimony, p. 5.

During the 1996 election, the issue of whether this foreign national prohibition applies to the gift of "soft" or nonfederal money to a national party committee came to the forefront. The FECA definition of "contribution" is limited to "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[54] As seen in the footnote above quoting the FECA foreign prohibition, it only bans foreign contributions. Technically, soft money as described above, by definition may not therefore constitute a "contribution" because it is supposedly not made "for the purpose of influencing any election for Federal office." In response to a question from Senator Thompson challenging her stance that "soft money" never constitutes a "contribution,"[55] Attorney General Janet Reno's testimony before the Senate Judiciary Committee on April 30, 1997, indicates that the Department of Justice interprets Section 441e to prohibit soft money contributions to party committees from foreign nationals.[56] Certainly that was the common understanding prior to the 1996 elections, and clearly the DNC believed such a prohibition to exist as it refunded all such foreign soft money contributions that it was found to have received. Regardless of this questionable new interpretation limiting the reach of the FECA's foreign contribution prohibition, the President's unprecedented use of soft money to advance his re-election prospects renders the acceptability of foreign soft money contributions moot in the present context.

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[54] 2 U.S.C. § 431(8)(A)(i) (emphasis added).

[55] Attorney General Reno letter to Senator Orrin Hatch, April 14, 1997.

[56] See Department of Justice Oversight, *Hearing of the Senate Judiciary Committee*, Federal News Service, April 30, 1997.

The dismantling of the DNC vetting procedures[57] only exacerbated the problem of foreign contributions finding their way into the 1996 federal elections. For the 1992 election cycle the DNC implemented a system for vetting contributions over $10,000. Any check for $10,000 or more was to go through a vetting desk.[58] This desk was supervised by Barbara Stafford, an attorney in the DNC's Office of General Counsel. Stafford had full-time responsibility for vetting contributions, as did her assistant, David Blank.[59] In fact, the 1992 vetting system involved an entire group of individuals, usually numbering between six and ten, who did nothing but vet major contributions.[60] Current DNC Deputy General Counsel Neil Reiff confirmed to the Committee that there was once a separate "unit" of about seven or eight people, supervised by Barbara Stafford, that vetted checks.[61] Indeed, current DNC General Counsel Joseph Sandler has testified that "for the 1992 election a procedure known as Major Donor Screening Committee" was in place.[62] Sometime after the 1994 election this vetting procedure was dismantled.[63] According to FEC records, the DNC received 178 contributions of $100,000 or more in 1995 and 1996 without an appropriately established vetting procedure, and without in fact checking to determine if they

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[57] See the section of this report on The DNC Dismantled Vetting System.

[58] Deposition of Robert J. Stein, June 17, 1997, p. 58.

[59] Stein deposition, p. 81.

[60] Deposition of Melissa A. Moss, June 11, 1997 pp. 12 and 17.

[61] Deposition of Neil Paul Reiff Esq., June 20, 1997, p. 30.

[62] Deposition of Joseph E. Sandler, May 15, 1997, p. 47.

[63] For a fuller account, see the section of this report on The DNC Dismantled Vetting System.

were legal. The DNC's failure to properly vet donations facilitated the funneling of foreign contributions to the DNC by fund-raisers like John Huang.

In addition to strengthening sanctions imposed upon those who do not take appropriate precautions to avoid violating existing FECA provisions, witnesses at the Committee's hearings raised the possibility of establishing through law stringent vetting procedures. There are currently no established statutory or regulatory requirements detailing appropriate vetting procedures to be utilized by political committees to ensure acceptance of contributions within the limitations and prohibitions of the FECA. Such vetting procedures could be modeled after the FEC's regulatory requirements detailing the best efforts required of political committees to obtain required contributor information.

As a result of the discussion above, application of the foreign contribution prohibition to soft money also might be reformulated. Banning contributions from permanent non-citizen residents did not meet with much approval when it was discussed during the Committee's hearings.[64] One alternative raised would prohibit those who cannot legally vote from contributing to political campaigns (i.e., non-U.S. citizens, as well as those who are not 18 years old or who are convicted felons).[65] A bright line test such as a voting eligibility requirement is easily understandable and could be communicated through a required disclaimer on all campaign solicitations.

IV. <u>Advocacy Standards</u>

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[64] Discussion between Senator Akaka and Thomas E. Mann, September 24, 1997 pp. 55-56.

[65] Discussion between Senator Akaka and Thomas E. Mann, September 24, 1997, p. 56.

A. Issue Advocacy, Express Advocacy and Electioneering Message

The FECA, as interpreted by the FEC and various court opinions, allows the government regulation of the political speech of corporations, unions, non-profits and individuals on First Amendment grounds in only those instances containing express advocacy of the election or defeat of a clearly identifiable candidate.[66] The Supreme Court in Buckley v. Valeo indicates the following explicit advocacy terms satisfy the strict "express advocacy" test applied when limiting First Amendment rights: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"[67] Still, at no point did the Court state that this list was exhaustive. The Court stated such a strict line was required because,

> the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.[68]

According to the Court, a standard that depends on the speaker's intent or purpose has a chilling effect on political speech.

Applying the Supreme Court's reasoning in Buckley, the Ninth Circuit in Federal Election Commission v. Furgatch, 807 F. 2d 857 (1987), cert denied, 484 U.S. 850 (1987) reviewed the following advertisement text:

> DON'T LET HIM DO IT.
> The President of the United States continues degrading the electoral process and lessening the prestige of the office.

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[66] Buckley v. Valeo, 424 U.S. 1 (1976); see caveat in Coordination section below.

[67] Buckley, 424 U.S. at 44 n.52.

[68] Id. at 42.

> It was evident months ago when his running mate outrageously suggested Ted Kennedy was unpatriotic.
> The President remained silent.
> And we let him.
> It continued when the President himself accused Ronald Reagan of being unpatriotic.
> And we let him do it again.
> In recent weeks [Jimmy] Carter has tried to buy entire cities, the steel industry, the auto industry, and others with public funds.
> We are letting him do it.
> He continues to cultivate the fears, not the hopes, of the voting public by suggesting the choice is between "peace and war," "black or white," "north or south," and "Jew vs. Christian." His meanness of spirit is divisive and reckless McCarthyism at its worst. And from a man who once asked, "Why not the best?"
> It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherences, ineptness and illusion, as he leaves a legacy of low-level campaigning.
> DON'T LET HIM DO IT.[69]

Despite the lack of any of the magic words from Buckley, the Ninth Circuit found this to constitute express advocacy. The opinion specifically stated, "[a] test requiring the magic words 'elect,' 'support,' etc., or their nearly perfect synonyms for a finding of express advocacy would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act. 'Independent' campaign spenders working on behalf of candidates could remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate."[70] Instead of the magic words test, the Furgatch court outlined the following three prong test to determine whether advocacy comes within the purview of the FECA: (1) speech constitutes express advocacy if it is "unmistakable and unambiguous, suggestive of only one

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[69] Furgatch, 807 F. 2d at 858.

[70] Id. at 863.

plausible meaning;" (2) such express advocacy speech must present a "clear plea for action"; and (3) it must be clear what action is being advocated.

When applying Buckley to determine whether advocacy falls within the regulatory framework of the FEC, other federal appeals courts have held that the express advocacy test set out in Buckley can only be met by communications that contain explicit and unambiguous words that urge readers (or viewers) to elect or defeat a clearly identified candidate. This includes the First [Faucher v. Federal Election Commission, 928 F. 2d 468 (1991), cert. denied sub nom., 502 U.S. 820 (1991)], the Second [Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F. 2d 45 (2d Cir. 1980)], and the Fourth circuit [Federal Election Commission v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), aff'd, No. 95-2600, slip op. (3d Cir. Aug. 2, 1996)].

When the FEC tried to incorporate the Furgatch express advocacy standard into its regulations it was successfully challenged in the First Circuit, where a district court ruled the new regulations are unconstitutional on their face. Maine Right to Life Committee, Inc. v. Federal Election Commission, 914 F. Supp. 8 (D. Me. 1996). In striking down the Commission's "express advocacy" regulations, the court distinguished between mere "contact," which the court ruled cannot be regulated, and issue advocacy that is "coordinated" with or authorized by a candidate, which the court suggested could be. The court pointed out that "Buckley talked only about prohibiting expenditures 'authorized or requested by the candidate,' interpreted at its broadest as 'all expenditures placed in cooperation with or with the consent of a candidate.' The

FEC has gone far beyond 'cooperation' or 'consent' in these prohibitions of all contact and consultation in the preparation of voter guides . . ."[71]

Thus, currently the laws have been interpreted to allow pure uncoordinated "issue advocacy" to be paid for directly by corporations, unions, non-profits or individuals with soft money (i.e. from sources and in amounts beyond the prohibitions and limitations of the FECA). In the 1996 cycle this distinction led to abuses as unions and non-profits ran "issue advertisements." Evidence shows that these advertisements were coordinated with candidate committees, and in some instances seem to cross the line from issue based advertising into candidate targeted express advocacy.

As opposed to the clearly independent entities discussed above, the courts have indicated, and the FEC has clearly implemented, an "electioneering message" threshold for regulation of party committee expenditures coordinated with federal candidates and made in connection with a candidate's federal election."[72] In her April 14, 1997 letter to Senator Hatch and the Senate Judiciary Committee, Attorney General Reno reaffirms the "electioneering message" standard as appropriate when applied to "party media advertisements that focus on 'national legislative activity.'"[73] The FEC advisory opinions cited by the Attorney General define "electioneering

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[71] Clifton v. Federal Election Commission, 927 F.Supp. 493, 499 (D. Me. 1996).

[72] See FEC Advisory Op. 1995-25, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6162, at 12,109 - 12,110 (August 24, 1995); and FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 - 11, 186 (May 30, 1985).

[73] Reno Letter to Hatch, April 14, 1997 at 7 (citing FEC Advisory Opinions above).

message" to mean statements "designed to urge the public to elect a certain candidate or party."[74] This distinction from the standard applied to independent groups flows from the following Supreme Court discussion found in Buckley:

> [I]ndependent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending [the FECA] contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions, rather than expenditures under the Act (emphasis added). [The FECA's] contribution ceilings . . . prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions . . . 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 a quid pro quo for improper commitments from the candidate.[75]

The Court later limited the express advocacy standard to the banks, corporations, and labor organizations discussed in section 441b of the FECA:

> [W]hen the maker of the expenditure is not within these categories -- when it is an individual other than a candidate or a group other than a 'political committee' -- the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434(e) [detailing FECA reporting requirements] is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.[76]

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[74] FEC Advisory Op. 1985-14, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5819, at 11,185 - 11, 186 (May 30, 1985).

[75] Buckley v. Valeo, 424 U.S. 1, 46-47.

[76] Buckley, 424 U.S. at 80 (emphasis added). See also FEC v. Massachusetts Citizens for Life ("MCFL"), 479 U.S. 238, 249 (1986).

The Court in Buckley made clear that the term "political committee" can "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress."[77] As provided throughout the FECA, "political committees" are more highly regulated than other entities. Thus, coordinated electioneering messages by political committees (such as the DNC) must be paid for with so called hard-money (money acquired within the limits established by the FECA and from non-prohibited sources).

B. Examples of Questionable Issue Advocacy

1. The DNC

In the 1996 election the Governmental Affairs Committee investigation found blatant electioneering messages illegally paid for with soft money funds by the Democratic National Committee and its affiliated state party committees, all of which were made at the behest of the Clinton/Gore '96 campaign. In clear contradiction to the FECA, court pronouncements and FEC guidance, these party committees maintained that their advertisements were immune from federal regulation because they constituted issue advertisements, which did not expressly advocate the election or defeat of the Clinton/Gore ticket. Such attempts at clever obfuscation of the appropriately applicable legal standard, through positive or negative portrayal of certain candidates in the context of issues, does not ultimately exempt a party committee from the electioneering message standard.

[77] Buckley, 424 U.S. at 79.

The following are sample DNC and Democratic state party committee advertisements which the investigation reviewed from videotapes, and which appear to constitute "electioneering messages" within the FECA's jurisdiction (despite DNC insistence that they are appropriate issue advertisements) outside the jurisdiction of the FECA:

- "American values. Do our duty to our parents. President Clinton protects Medicare. The Dole/Gingrich budget tried to cut Medicare $270 billion. Protect families. President Clinton cut taxes for millions of working families. The Dole/Gingrich budget tried to raise taxes on eight million of them. Opportunity. President Clinton proposes tax breaks for tuition. The Dole/Gingrich budget tried to slash college scholarships. Only President Clinton's plan meets our challenges, protects our values."

- "America's values. Head Start. Student loans. Toxic cleanup. Extra police. Protected in the budget agreement; the President stood firm. Dole, Gingrich's latest plan includes tax hikes on working families. Up to 18 million children face healthcare cuts. Medicare slashed $67 billion. Then Dole resigns, leaving behind gridlock he and Gingrich created. The President's plan: Politics must wait. Balance the budget, reform welfare, protect our values."

- "Head Start. Student loans. Toxic cleanup. Extra police. Anti-drug programs. Dole, Gingrich wanted them cut. Now they're safe. Protected in the '96 budget - because the President stood firm. Dole, Gingrich? Deadlock. Gridlock. Shutdowns. The President's plan? Finish the job, balance the budget. Reform welfare. Cut taxes. Protect Medicare. President Clinton says get it done. Meet our challenges. Protect our values."

- "The President says give every child a chance for college with a tax cut that gives $1,500 a year for two years, making most community colleges free, all colleges more affordable . . . And for adults, a chance to learn, find a better job. The President's tuition tax cut plan."

- "Protecting families. For millions of working families, President Clinton cut taxes. The Dole-Gingrich budget tried to raise taxes on eight million. The Dole-Gingrich budget would have slashed Medicare $270 billion. Cut college scholarships. The President defended our values. Protected Medicare. And now, a tax cut of $1,500 a year for the first two years of college. Most community colleges free. Help adults go back to school. The President's plan protects our values."

The Republican National Committee's issue advocacy campaign seems to have complied with the law. It is true that the RNC broadcast a series of commercials highlighting key legislative and other issues confronting the country during the spring and summer of 1996. It also ran a commercial discussing traditional American values shared by Senator Dole in helping to formulate the Republican legislative agenda. The commercial called on Americans to urge their elected officials to support the agenda of welfare reform, criminal justice reform, and ending wasteful government spending. In educating Americans on these key issues, the RNC's spots did not expressly advocate the election or defeat of any candidate, and do not otherwise seem to reflect an electioneering message.

The Committee found no evidence of coordination between Senator Dole and the RNC sufficient to make these RNC issue advertisements in-kind contributions to the Dole for President Committee. The Committee gathered no evidence contradicting Senator Dole's assertion that the RNC retained editorial control over its advertising at all times.[78] There is no evidence that anyone at the Dole for President Committee -- including Senator Dole -- dictated what the content of RNC advertisements would be, or decided where or how often the advertisements would be broadcast.

2. Unions and Non-Profits[79]

While the Democratic National Committee opened the soft money advocacy wars in 1995 with advertisements designed to deter primary challengers to President Clinton and bolster his support by portraying him as standing up to the new Republican congressional majority,[80] the

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[78] *Dole: Illegal Ads Cost Him Election*, AP Wire Story, January 9, 1998.

[79] For a detailed discussion of 1996 nonprofit activity reviewed by the Committee's investigation see the section of this report on "Misuse of Nonprofit Groups in the 1996 Elections."

[80] <u>See</u> the section of this report on The Thirst for Money.

AFL-CIO followed suit by announcing a $35 million soft money issue advertising campaign aimed at the legislative records of potentially vulnerable Republican House incumbents.[81] As discussed in the Misuse of Nonprofits section of this report, these advertisements often crossed over into express advocacy due to the level of alleged coordination between candidates and the AFL-CIO. After the conventions, a variety of issue groups and organizations, usually tax-exempt 501(c)(4) organizations, began running "issue ads" to counter the AFL-CIO efforts in targeted districts and states[82].

Currently, tax-exempt organizations that utilize issue advocacy attempt not to cross the line into judicially defined express advocacy to avoid election law limits on the amount and sources of campaign contributions and contributor restrictions. However, such non-profits often secretly, and illegally, coordinate their efforts with the candidates they favor in particular elections. Such mixing of politics and non-profits carries little risk to any politician who might benefit because financial penalties imposed by the Internal Revenue Code for prohibited political activity can only be levied against the charity and its managers. Besides, by the time the IRS pursues such activity the money can be spent and the organization disbanded.

C. Proposed Reform

The Committee heard testimony from Professor Daniel R. Ortiz, that "[t]o anyone interested in campaign finance reform, issue advocacy is the 800-pound gorilla. Without taming it, campaign finance reform -- no matter how thoroughly it addresses public funding, soft money,

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[81] Id.

[82] Id.

PACs, and other perceived problems -- will come to naught."[83] Nothing in the Buckley decision, or the First Amendment, prevents Congress from substituting a better definition for election related activity that is more encompassing than the magic words express advocacy standard. While the Buckley decision criticized any express advocacy standard based on a subjective interpretation of the speaker's intent, one option is to establish a "totality of the circumstances test" for FECA application to speech that would objectively gauge the speakers intent. Such a standard would incorporate such considerations as proximity to the election, the use of the candidates' name or likeness, and whether the ad is geographically targeted.[84] Under this approach, much of what was labeled "issue advertising" during the 1996 elections would fall within FECA regulation, and thus the money used to pay for such ads would have to be raised and reported in accordance with the federal election laws. Thus unions, corporations, non-profits and others wishing to run candidate targeted electioneering advertisements would need to raise funds for such ads in accordance with the FECA.

Another proposal would require any advocacy that uses a federal candidate's name or likeness in a given period of time before a primary or general election date to be paid for with funds within the prohibitions and limitations of the FECA, and appropriately disclosed through reporting.[85] A 90 day time frame often has been suggested for such reporting because it reflects the same time frame used by Congress to limit lawmakers' postal patron mass-mailing communications. This proposal maintains the magic words express advocacy test of Buckley

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[83] Testimony of Daniel R. Ortiz, September 25, 1997, p. 19.

[84] Neuborne testimony, p. 136.

[85] See McCain/Feingold proposed legislation.

prior to the 90 day period, and might pass the Supreme Court's compelling interest test by imposing reporting obligations on issue advocacy for only a very limited time period. Unions, corporations and non-profits could run issue ads as they did in the 1996 race up until this 90 day threshold, after which they could continue their activity if they utilized hard money from affiliated political action committees, which register and report. The undergirding rationale behind this proposal is that the mention or appearance of any candidate in mass media advertising is bound to have some impact on that candidate's election, and that the Court might interpret Buckley to find the totality of the circumstances (e.g. timing close to an election) compelling enough in such a situation to allow "issue advertisements" to be treated as a campaign contribution. Furthermore, the courts have been more receptive to restrictions placed upon corporations and unions than any other groups. Pure issue advocacy groups (e.g. The Sierra Club, the NRA, NARAL, the National Right to Life Committee, etc.) that wish to engage in candidate directed issue advocacy during this limited 90 day time period could establish registered and reporting separate segregated funds for such activity during that time period.[86]

In response to proposed expansions in the definition of express advocacy, the obvious First Amendment sensitivity to regulating issue advocacy leads many to believe any limits violate the right to free speech. In his testimony before the Committee Professor Roger Pilon, Senior Fellow at the Cato Institute, cited Buckley when he argued that limitations on contributions and expenditures "are subject to strict judicial scrutiny: they must serve a 'compelling state interest' employing the 'least restrictive means.'"[87] Although it is not explicitly clear whether a more

[86] Neuborne Opening Statement, Sept. 25, 1997, Hearing Transcript, pp. 130 -140.

[87] Pilon testimony, pp. 143-144.

encompassing definition of express advocacy is desirable, or even constitutional, if the course of non-action is followed, it must be recognized that Congress would be encouraging further growth of union, corporate non-profit and individual independent expenditures. As was witnessed in the 1996 election, such independent expenditures often drown out the advertisements of the very candidates competing in certain congressional elections. Senator Bennett indicated during testimony that he and other candidates want more, not less, control of their own campaigns.[88]

As a result of the Supreme Court's application of the compelling state interest test to the regulation of issue advocacy, some argue in favor of a constitutional amendment allowing limited regulation of political speech, as opposed to other First Amendment protections. It has been argued that the constriction of the free speech rights of private groups and political candidates increased the influence and power of the press, and is therefore bad public policy.[89] As Edward H. Crane, President of the CATO Institute, noted during the Committee's hearings, "[t]he media functions as a gatekeeper of information to the public and its gatekeeping role is reduced when candidates [or third parties] can communicate directly with the voters."[90]

V. Coordination

The Supreme Court in Buckley distinguished between "independent" advocacy and advocacy coordinated with a candidate when it declared restrictions on independent spending by individuals unconstitutional.[91] If an entity's express advocacy expenditures are "coordinated"

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88 Hearing Testimony of Senator Bennett, Sept. 24, 1997, pp. 63 & 64.

89 Brent Thompson, *Will campaign reform hurt?*, Washington Times, 1/14/97.

90 Testimony of Edward H. Crane, Sept. 24, 1997, p. 139, ll. 17-20.

91 Buckley, 424 U.S. at 46 - 47.

with candidates, the expenditures are treated as in-kind contributions that are applicable to the entity's contribution limits. The courts have only recently begun to address whether individuals and organizations who fund issue advocacy must also act independently of candidates, or otherwise risk exposure to the financial limitations, prohibitions, registration and reporting requirements of the FECA. On the other hand, as will be discussed below, FEC enforcement matters have clearly determined that coordination of any advocacy results in in-kind contributions subject to FECA regulation.

In Colorado Republican[92] the Supreme Court overruled the previously accepted presumption that a party committee could not make independent expenditures, but in doing so made the degree of coordination between candidates and their party committees the crucial determining factor in deciding whether the expenditure was truly "independent." Indeed, in the Court's view, the "constitutionally significant fact" requiring the absence of limits on independent expenditures "is the lack of coordination between the candidate and the source of the expenditures."[93] The Court recognized that the FECA's structure would make no sense if the FECA's limits could be easily circumvented through the actions of third parties who coordinated with candidates. Importantly, Justice Breyer's plurality opinion was not the only one that stressed coordination in determining the legality of the regulation of the relationship between a party and its candidates. Two additional justices, who along with the three justices joining in Justice

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[92] Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996).

[93] Id. at 2317.

Breyer's opinion constitute a majority of the Court, believe that all party spending on behalf of a candidate is a "contribution," and hence subject to the FECA limits.[94]

The Committee's investigation discovered that the Clinton/Gore '96 Re-election campaign not only subverted the Federal Election Campaign Act by coordinating spending and other activities with the Democratic National Committee, but in fact the DNC served as little more than a conduit through which funds raised by the reelection campaign were funneled into advertisements commissioned, designed, revised and placed by the reelection campaign in order to advance the President's reelection chances. Here again, those involved in the political process have stretched to the breaking point an illogical interpretation of a provision of the FECA, in clear contradiction to FEC guidance, all in order to gain advantage.

During 1995 and 1996 the DNC paid for a variety of advocacy pieces supporting the re-election of Bill Clinton and Al Gore under the thin guise of issue advertisements. These advertisements were paid for using soft money.[95] An Annenberg Public Policy Center Report indicates that about $44 million in soft money was used for such DNC advertising.[96] None of these ads were counted against the 1996 DNC presidential campaign coordinated expenditure limit of $11,994,007.[97] There is also evidence that the Clinton/Gore '96 campaign coordinated

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[94] Id. at 2332.

[95] See the section of this report on The Thirst for Money.

[96] The Annenberg Pub. Policy Ctr., No. 16, Issue Advertising During the 1996 Campaign: A Catalog (1997).

[97] *1996 Coordinated Party Expenditure Limits*, 22 Federal Election Commission Record 14 (April, 1996).

its activities through the DNC with the AFL-CIO, EMILY's List, and others.[98] The degree of coordination between the DNC, and these other entities, and agents of the Clinton/Gore '96 campaign committee raises the specter of a wide variety of Federal Election Campaign Act violations.

A. The Law

The FECA defines "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[99] Under the FECA, payment for a communication made "for the purpose of influencing any election for Federal office" is automatically considered a contribution if it is made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."[100]

Pursuant to these statutory directives, the FEC has issued regulations that clearly and directly state that coordination of an expenditure with a candidate places such expenditure within the purview of the FECA. The FEC regulations elaborate on the statute by asserting a presumption of coordination when an expenditure is made "[b]ased on information about the candidate plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made...."[101] Under the FEC's

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[98] See specific discussions of these organizations in the section of the report on Misuse of Nonprofit Groups.

[99] 2 U.S.C. § 431(8).

[100] 2 U.S.C. §§ 431(9)(A)(i), 441a(a)(7)(B)(i).

[101] 11 C.F.R. 109.1(b)(4)(i)(A).

regulations, the financing of the dissemination of any broadcast or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents in cooperation or consultation with a third party shall be considered a contribution to that candidate from the third party for the purpose of contribution limitations and shall be the reporting responsibility of the person making the expenditure.[102] Such contributions are illegal if they violate the prohibitions and limitations of the FECA.

The FEC has pursued the issue of coordination in a variety of enforcement cases. In one such case, the FEC found illegal coordination when the agent of a presidential candidate committee recommended a vendor to assist an outside individual in towing a banner behind an airplane that read "No Draft Dodger for President."[103] Based on this illegal coordination, the FEC found the campaign had received an in-kind contribution. While the campaign committee certainly never maintained any control over the individual's expenditure, and the message did not contain express advocacy of a distinctly identifiable candidate, the FEC nonetheless found a violation. In the end, the presidential political committee admitted to the violation by its agent and paid a civil penalty.

In the FEC enforcement case most analogous to the coordination undertaken between President Clinton's reelection campaign committee and the DNC, the FEC found similar circumstances to constitute illegal coordination resulting in an excessive in-kind contribution. The FEC emphasized coordination in the Hyatt Legal Services enforcement case,[104] in which the

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[102] 11 C.F.R. § 109.1(d)(1).

[103] FEC Enforcement Matter Under Review 3608.

[104] FEC Enforcement Matter Under Review 3918.

candidate's principal media consultant also prepared issue advertisements on the public policy issues of health care and crime for an outside organization bearing the candidate's name. The Hyatt for Senate Committee's "campaign director" acted as liaison between the media consultants and the outside organization, and, in addition, the candidate exercised final editorial approval over each of the scripts for the third party organization's radio advertisements. As the FEC conceded, these advertisements definitely did not constitute express advocacy advertisements under Buckley, and they were paid for with soft money. Nonetheless, the FEC found the coordination between the campaign and the third party organization sufficient to make the expenditures for these advertisements illegal under the FECA.

To reach this conclusion the FEC used the following logic. Payments for any communication made for the purpose of influencing a federal election are contributions if the communication is coordinated with a candidate, a candidate's committee, or agents of the candidate or committee.[105] The FEC determined that certain communications or activities involving the participation or control of a federal candidate resulted in a contribution or expenditure on behalf of the candidate if: "(1) direct or indirect reference is made to the candidacy, campaign or qualifications for public office of you or your opponent;" or (2) reference was made to "your views on public policy issues, or those of your opponent, or [to any] issues raised in the campaign;" or "(3) distribution of the newsletter is expanded significantly beyond its

[105] 2 U.S.C. § 441a(a)(7)(B)(i).

present audience, or in any manner that otherwise indicates utilization of the newsletter as a campaign communication."[106]

Under FEC regulations and decisions, any issue advertisement containing an "electioneering message" and coordinated by a union, corporate, or non-profit sponsor with a candidate falls under the FECA's definition of "contribution" and its applicable limits.[107] Although to date the courts have not definitively dealt with coordination in the issue advocacy context, Attorney General Reno's April 14, 1997 letter to the Senate Judiciary Committee acknowledged the central importance of coordination when advocacy materials contain an "electioneering message."[108] In citing FEC Advisory Opinion 1985-14, Attorney General Reno brought to the forefront the FEC's emphasis on coordination. As noted above, in AO 1985-14 the FEC held that "[e]lectioneering messages include statements 'designed to urge the public to elect a certain candidate or party.'"[109] Although the FEC concluded that the "issue advertisements" specifically outlined in the request were not subject to the FECA limitations, it explicitly based its decision on the complete lack of coordination. The FEC stated it viewed the request "as limited to the situation where expenditures for these communications are made

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[106] See FEC Enforcement MUR 3918 [citing FEC Advisory Op. 1990-5, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5982 at 11,612 (March 27, 1990)].

[107] Noble testimony, September 25, 1997, p. 73.

[108] Letter from Attorney General Reno to Senator Orrin Hatch, April 14, 1997, at 7.

[109] FEC Advisory Op. 1985-14, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5819 at 11,185 (April 12, 1985).

without any consultation or cooperation, or any request or suggestion of, candidates seeking election to the House of Representatives in the selected districts."[110]

Lyn Utrecht, General Counsel for Clinton/Gore '96, argues that a political party is legally allowed to coordinate activities with the party's Presidential candidate because that candidate may even designate the national committee of his party as his own principal campaign committee. Ms. Utrecht fails to note that the same sections of the FECA and FEC regulations that allow a presidential candidate to declare a national party committee as his authorized campaign committee, also require that national party committee to maintain separate books of account for that purpose.[111] Furthermore, at no time did the Clinton/Gore '96 campaign designate the DNC as its principal campaign committee, nor did it maintain separate books of account as such a designation would require. She argues that the Commission has always presumed coordination between a party committee and its presidential candidate.[112] Ms. Utrecht fails to note that the Supreme Court in the Colorado Republican decision,[113] discussed above, definitively stands for the proposition that party committee's cannot be presumed to coordinate with candidates. Furthermore, the existence of FECA coordinated party expenditure limits for presidential candidates is illusory if Ms. Utrecht's interpretation is adopted.[114]

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[110] Id.

[111] See 2 U.S.C. § 432(e)(3)(A)(i) & 11 C.F.R. § 102.12(c)(1).

[112] Lyn Utrecht, *Issue Ads: They're Legal*, The Washington Post, December 4, 1997, at A23 [hereinafter: Issue Ads].

[113] Colorado Republican Federal Campaign Committee v. FEC, 116 S. Ct. 2309 (1996).

[114] 2 U.S.C. § 441a(d)(2).

B. Reform Related to Coordination

The degree of coordination undertaken between the DNC and the Clinton/Gore '96 campaign cannot be justified in light of prior court opinions, despite the lack of an explicit Supreme Court decision directly on point about coordination between a party committee and a party candidate.[115] As a result of a clear reading of the FECA and prior FEC guidance, the current General Counsel of the Federal Election Commission unequivocally stated the following in the Committee's investigatory hearings:

> "The Commission views coordination as relevant. It does matter. A candidate coordinating an ad may turn that ad into a contribution to the candidate and, thus, soft money would be prohibited being used for that ad."[116]

Committee hearing discussion on coordination reform centered mainly on the need for legislation clarifying the legal status of issue advertising paid for by third parties and coordinated with candidate committees.[117] Trevor Potter, a former Chairman of the FEC, maintained before the Committee that the Buckley decision clearly stands for the proposition that "if spending by some third party is controlled by a candidate, is done at the direction of the candidate, then it can be attributed to the candidate."[118] Professor Daniel Ortiz concurred by stating, "if there is direct coordination between a candidate and an individual or any of these other entities . . . there is a

[115] Discussion between Chairman Thompson and Thomas E. Mann, Sept. 24, 1997, pp. 25-26.

[116] Noble testimony, p. 34, ll 17-20.

[117] Discussion between Senator Cochran and Don Simon, Sept. 24, 1997, pp. 92-94.

[118] Potter testimony, September 25, 1997, p. 36.

very strong argument that should count as an in-kind contribution . . ."[119] It was thus proposed that coordination regarding issue advocacy be more explicitly prohibited between candidates and third parties.[120] Norman Ornstein pointed out the following:

> What the Supreme Court set up in the law as an independent expenditure, which meant that there could be no coordination with parties or candidates, referred to express advocacy and hard money. What we are now finding is people have begun to use that definition to get around it so that they can, in fact, collude together in ways that I think go against the grain of what we hope to have in a free and robust political debate in our process where you know who is making the charges and where you have some sense of where things are coming from.[121]

In the view of various witnesses, reformers should be careful not to shut down the availability of disclosed soft money, only to encourage candidates to hide their donations through unreported coordinated issue advocacy with third parties.[122] As Thomas Mann testified,

> if you ban soft money but do nothing about issue advocacy, the parties, the candidates, and most importantly, the consultants, will rush to this opportunity to engage in undisclosed coordination of private dollars going to sham issue advocacy campaigns, which will do more than anything else to undermine the whole notion of accountability of candidates and parties in our elections.[123]

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[119] Ortiz testimony, September 25, 1997, p. 37.

[120] Mann testimony, September 24, 1997, p. 26.

[121] Ornstein testimony, p. 57, ll. 4-13.

[122] Mann testimony, September 23, 1997, p. 65.

[123] Mann testimony, September 24, 1997, p. 24.

VI. Corporate and Union Spending in U.S. Federal Elections[124]

During the Committee's investigation, there was much discussion on the proper role of unions and corporations in federal elections, and specifically the appropriate use of membership dues paid to the unions or general treasury funds expended by corporations. Due to the disproportionate influence that unions and corporations are able to exert as a result of their ability to accumulate large amounts of funds, they have long been restricted in their involvement in the federal electoral process. The combined wealth of the corporate community is an undeniable fact, and testimony before the Committee confirmed that unions today continue to hold huge financial sway, as they "possess $10 billion in assets collectively."[125]

A. Background

Corporations have been prohibited from directly contributing to federal candidates since the 1907 Tillman Act. The Smith-Connally Act, or War Labor Disputes Act of 1943, first prohibited labor unions from using their treasury funds to make political contributions to candidates for federal office. As a war measure, Smith-Connally expired six months after the end of the World War II, but the ban was made permanent by including it as one of the provisions of the Taft-Hartley Act, or the Labor Management Relations Act of 1947. This prohibition against the use of labor union treasury funds as a source of candidate contributions has been part of

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[124] Some of the following discussion is attributable to: U.S. Library of Congress. Congressional Research Service. *The Use of Union Dues for Political Purposes and Agency Fee Objectors*. CRS Report 97-555 E, by Gail McCallion. October 14, 1997; and *Political Spending by Organized Labor: Background and Current Issues*. CRS Report 96-484 GOV, by Joseph E. Cantor.

[125] Testimony of Leo Troy, Sept. 24, 1997, p. 169.

federal law ever since, and was incorporated along with the analogous corporate prohibition into the Federal Election Campaign Act at Section 316.[126]

Presently, corporations and unions spend money to influence the political process through four principal mechanisms.[127] First, these entities use separate segregated funds (called political action committees or PACs) to influence federal elections. These funds are regulated by law, and must consist of totally voluntary union member contributions,[128] in the case of union PACs. In the case of corporate PACs, the money must be garnered voluntarily from corporate stockholders, executive or administrative personnel or their families. These PAC funds can be directly contributed by corporate or union PACs to federal campaigns, or utilized for independent expenditures, which by definition expressly advocate the election or defeat of an identifiable

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[126] "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section." 2 U.S.C. § 441b(a).

[127] U.S. Library of Congress. Congressional Research Service. *Business and Labor Spending in U.S. Elections*. CRS Report 97-973 GOV, by Joseph E. Cantor. October 28, 1997.

[128] "It shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction." 2 U.S.C. § 441b(b)(3)(A); See also 11 C.F.R. § 114.5(a).

candidate. Despite the voluntary nature of the contributions to these accounts, the costs of administering such separate segregated funds (PAC) may be paid out of general treasury funds. Second, unions are explicitly allowed under the FECA to conduct unlimited communications with union members and their families on any subject, including advocacy of the election or defeat of clearly identifiable federal candidates.[129] Similarly, corporations are allowed such unlimited communications with stockholders, executive or administrative personnel. Unions and corporations are further allowed to conduct nonpartisan registration and get-out-the-vote campaigns aimed at these same people.[130] For these activities unions and corporations may use non-regulated general treasury funds (so-called "soft money"). Third, such non-regulated union or corporate soft money may be used for contributions to state and local elections (including contributions to national parties for use in state and local elections or other purposes), in those states and local jurisdictions which do not have their own prohibition against union or corporate contributions. It has been asserted that such expenditures have a tangential impact on simultaneously conducted federal elections. The fourth, and most controversial, mechanism is the use of so-called issue advertisements (public education that promote union public policy perspectives) financed directly out of union revenue, and consequently, largely paid for by union member and nonmember dues and fees. Keeping in mind their fiduciary duties to stockholders, corporations have a similar mechanism available to them. As our investigation revealed, sometimes union and corporate revenue is given directly to third party entities, such as non-profit

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[129] 2 U.S.C. §§ 431(9)(B)(iii) and 441(b)(b)(2)(A).

[130] 2 U.S.C. § 441(b)(b)(2)(B).

organizations, so that these groups may pay for their own issue advertisements outside of FECA regulation.

In the 1996 federal elections, the AFL-CIO utilized to its advantage some of the questionable interpretations imposed on the vagaries of the FECA to advance its federal candidate specific political agenda. The AFL-CIO then allegedly expanded on those questionable interpretations by illegally coordinating its pursuit of a $35 million "issue advocacy" campaign in 1996 with the Clinton/Gore '96 Re-election campaign, as well as other entities and candidates. The AFL-CIO allegedly carried out such an advocacy program in part through a special assessment included in their member's union dues and non-member's compulsory agency fees,[131] rather than through their political action committee. The current controversy over the use of such funds centers on two issues. First, there is the question of whether such advertisements were actually issue based, or rather, cleverly designed advertisements avoiding the use of express words of advocacy, but nonetheless aimed at specific federal candidates.[132] The specific activities undertaken by unions such as the AFL-CIO and problems associated with issue advocacy, as well as proposals for legislative action in that area, are found elsewhere in this report. This section of the report centers on the second issue, which involves agency fees required to be paid by all individuals covered by union bargaining agreements as part of union security agreements permitted in 29 states and the District of Columbia.

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[131] Full union members pay union dues voluntarily, as opposed to those who resign from the union. In non-right to work states these non-members are compelled to pay "agency fees" for that portion of union expenses determined to be germane to collective bargaining.

[132] Discussion between Senator Bennett and Norman J. Ornstein, September 23, 1997, pp. 90-91.

In non-right to work states union security agreements are agreements between employers and unions that require employees to give financial support to unions as a condition of employment. Section 8(a)(3) of the National Labor Relations Act (NLRA) and Section 2, Eleventh of the Railway Labor Act[133] explicitly authorize an employer and a union to enter into an agreement requiring all employees in the bargaining unit to pay union dues as a condition of continued employment, whether or not the employees become union members. The premise was that under the principle of exclusive representation, a certified union must represent all the workers in a bargaining unit, so it is only fair that all such workers pay their fair share of the union's costs in doing so. Nonetheless, out of deference to "states' rights," under the language of Section 14(b) of the NLRA, individual states are free to prohibit agency shops and union security clauses in collective bargaining agreements. The Supreme Court has ruled that a union security agreement may not require an employee to actually join a union but only to pay union initiation fees and dues.[134] An employee who chooses not to join is called a "financial core member" or "dues-paying non-member" because he or she continues to provide financial support to the union but does not participate in other union activities.

The political use of such agency fees paid by financial core members first reached the U.S. Supreme Court when Harry Beck and twenty of his coworkers sued the Communications Workers of America (CWA) over support of Democrat Hubert H. Humphrey in his bid for the presidency in 1968. Beck and his colleagues were strong opponents of gun control, and therefore

[133] 29 U.S.C. § 158(a)(3), and 45 U.S.C. §§ 151-158.

[134] NLRB v. General Motors Corp., 373 U.S. 734 (1963).

they filed suit against the CWA over the use of agency fees to benefit Humphrey, who strongly advocated gun control. It took until 1988 for the Supreme Court to rule in Communications Workers of America v. Harry E. Beck, 487 U.S. 735 ("Beck"), that dues-paying non-member employees covered by union security agreements may only be charged a pro rata share of union dues and fees that are attributable to collective bargaining, contract administration, or grievance adjustment; they may not be charged a pro rata share of union dues and fees that are attributable to union expenses for political or ideological purposes.[135] In determining that the CWA should reimburse all excess fees Beck and his colleagues paid since January 1976, the Supreme Court majority placed heavy emphasis on the lower court finding that the union was unable to establish that any more than 21 percent of its funds were used in support of collective-bargaining efforts.

Individuals like Beck, who are members of a bargaining unit covered by a union security agreement, but who object to the use of their dues for political purposes, are now called agency fee objectors.[136] In order to pay a reduced agency fee, an employee must be aware of his right to object to payment of union political expenses, and then must express his objection to the union. In addition, in order to qualify as an agency fee objector, a union member must first resign his union membership. According to the U.S. Bureau of Labor Statistics, in 1996 16.3 million individuals age 16 and over were members of unions (14.5% of all those employed); and, 18.2 million individuals were represented by unions (16.2% of all those employed). Thus, in 1996, 1.9 million individuals (including government workers many of whom cannot be covered by union

[135] See: U.S. Library of Congress. Congressional Research Service. *The Use of Compulsory union Dues for Political Purposes*. CRS Report 97-618 A, by John Contrubis. July 12, 1994.

[136] Id.

security agreements, and agricultural workers) were represented by unions, but were not union members. There is no way of knowing the number of union members that, if given the option, would request a portion of their funds not be utilized for political purposes.

On April 13, 1992, President George Bush signed Executive Order 12800. This order directed the Secretary of Labor to require all companies performing federal contract work to post notices in their plants and offices during the term of their contract informing workers of their Beck rights. In do so President Bush quoted Jefferson's declaration that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical." Ultimately this all came to naught, as in one of his first official acts in office, President Clinton issued Executive Order 12836, rescinding President Bush's Executive Order 12800.

After President Clinton assumed office all agency initiatives attempting to support President Bush's Executive Order 12800 were also stymied. The Department of Labor ("DOL") had previously published 28 pages of proposed rules revising the manner in which labor unions report their financial condition to the DOL, the NLRB, and their members. One noteworthy proposed revision pertained to forms LM-2 and LM-3 and the inclusion of a new schedule entitled "Statement C-Expenses," which would be used by unions to allocate all expenses among eight new functional categories: contract negotiation and administration; organizing; safety and health; strike activities; political activities; lobbying; promotional activities; and "other." Internationals and labor organizations in general were united in the opinion that such unit-by-unit accounting would be extremely costly and burdensome, just to account for Beck related costs. On February 10, 1993, the DOL, under Clinton and then Labor Secretary Robert Reich, proposed a one-year extension in the effective date of these final rules. In Final Rules issued December 21, 1993 the Clinton administration DOL ultimately rejected most of the proposed Bush Administration changes.

The NLRB has issued three important decisions, among many others, interpreting and applying Beck. In two cases issued on December 20, 1995, *California Saw and Knife* (320 NLRB 224) and *United Paperworkers International Union* (320 NLRB 349), the Labor Board ruled that unions must inform all workers of their Beck rights when they are hired; that organizing costs are not core expenses,[137] but lobbying or litigation expenses are; that unions can limit the time during which workers may object; that a notice published once a year in a union newspaper is acceptable notice; that unions may set their own methods for handling differences with objectors and they do not have to let outside auditors see their books. In *Service Employees International Union*, 323 NLRB 39, March 21, 1997, the NLRB ordered an SEIU local to take affirmative steps to notify individuals covered by the collective bargaining agreement of their rights to remain nonmembers of the union, and to abstain from paying that part of agency fees attributable to political expenditures.

B. Problems Reviewed by the Investigation

The Committee heard testimony that union use of general treasury soft money funds for political issue advocacy violates both the spirit of the FECA and the Beck decision. Senator Kassebaum Baker testified to the following:

> I tend to believe that the unions have been coercive in their activities, have been particularly focused in those efforts, and actually the corporate contributions and

[137] Apparently one cannot be forced to pay for union efforts to proselytize others.

> individual contributions found ways to match that by utilizing this ability to use the so-called soft money, where you do not have to identify that you are for or against a candidate. You can speak to an issue and clearly influence how the viewer would regard that candidate.[138]

Professor Leo Troy, of the Rutgers University Department of Economics, testified that in reality, the Beck decision provides union members no protection from the use of their dues for political advocacy they oppose. He noted that members are not sufficiently informed about their Beck rights, nor sufficiently empowered, to take an affirmative stand against their union leadership and demand a refund.[139] Senator Nickles maintained during the hearings that Beck's solution of requiring post-hoc affirmative action by union members seeking a refund serves only to ostracize such union members from their organization. Furthermore, it was acknowledged during the hearings that Beck actually requires union members to first forfeit their union membership and any corresponding involvement in the union's policy decisions before seeking such a refund. As Senator Nickles points out, that is hardly the equivalent of a voluntary contribution.[140] Even if you accept that the advertisements run by the unions are issue oriented, and not candidate specific, Professor Troy notes that "dues-paying member[s] . . . are often being compelled to pay for something, political preferences and ideas that they do not support."[141] One need only remember that the Beck challenge initially revolved around opposition to gun control, not merely the candidate that espoused gun control.

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[138] Testimony of Senator Nancy Kassebaum Baker, September 30, 1997, p. 76.

[139] Testimony of Leo Troy, September 24, 1997, p. 192.

[140] Discussion between Senator Don Nickles and panelists, Mann, Ornstein, Simon, and McBride, September 24, 1997, pp. 109-110.

[141] Troy testimony, p. 170.

C. Reform Proposals

There are a range of ideas aimed at reforming this hotly disputed area of campaign finance. One idea is to codify some form of the Beck decision. As discussed elsewhere in the report, other witnesses testified before the Committee that legislation designed to deal with the interaction of soft money and issue advocacy is necessary to effectively tackle union and corporate manipulation of the current system.

Don Simon of Common Cause stated that "if you do ban soft money, then the only contribution that a union could make to a political party would be out of its affiliated political action committee, which by definition has voluntarily contributed money."[142] Senator Kassebaum Baker testified that she and former Vice President Mondale agreed with Presidents Bush, Carter, and Ford that one of the most needed reforms is "a ban on soft money contributions to the national parties and their campaign organizations, equally applied to corporations and unions."[143] Nonetheless, Thomas Mann, Director of Government Studies at the Brookings Institute, clarified that merely abolishing soft money would not deal with the problem because of the possibility that "shutting off soft money will lead to an incredible growth in coordinated issue advocacy with groups and their favorite candidates basically running shadow campaigns outside the regulated system."[144] Such issue advocacy was exactly the crux of the problem in the 1996 election use of $35 million in union general treasury funds composed of membership dues.

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[142] Testimony of Donald J. Simon, September 24, 1997, p. 111.

[143] Senator Nancy Kassebaum Baker, p. 5.

[144] Thomas E. Mann testimony, p. 87.

A ban on the raising of soft money by national party committees effectively deals with the use of union and corporate general treasury funds in the federal political process only if it is combined with some restriction on issue advocacy. One such proposal discussed in the issue advocacy section of this report expands the definition of express advocacy during a set period prior to an election to include any use of a candidate's name or image. As former Vice President Mondale testified before the Committee,

> [t]he McCain-Feingold amendment would repeal the availability of soft money from union treasuries or corporate treasuries for what is called express advocacy and, under the expanded definition, that would include ads that use candidates' names under the terms. I think that is a good amendment. It restores the voluntary nature of contributions from union members so that they have to be voluntary. And it seems to me that is a good resolution of the dispute.[145]

Another proposal of particular note in this area is a California state initiative that will be placed on the next California ballot. That initiative seeks to require public and private employers and labor organizations to obtain permission from employees and members before withholding pay or using union dues or fees for political contributions. Permission must be obtained annually using a prescribed form. That annual permission would be sought through a form, the sole purpose of which is for the documentation of such a request. The form would contain the name of the employee, the name of the employer, the total annual amount which is being withheld for a contribution or expenditures and the employee's signature. Labor organizations would in turn be required to maintain records of all such authorizations for review upon request of the California Fair Political Practices Commission (the California equivalent of the FEC).

[145] Testimony of Vice President Walter Mondale, September 30, 1997, p. 74, ll. 9-17.

Proposed federal legislation would codify the Beck decision by requiring unions to notify non-union members of their right to request a refund of the portion of their agency fees used for political activities.[146] Other legislation calls for notification of Beck rights in writing for each new employee, as well as annual written notification for all employees.[147] Under legislation proposed in the fall of 1997, unions would be required to notify such non-members of their reimbursement rights, and they would be required to obtain written, voluntary authorization before a union could use member or nonmember dues or fees for political activities.[148] Nonetheless, such initiatives might not successfully deal with one of the problems that existed in the 1996 elections for the reason that the AFL-CIO is not a union, per se. Technically, Beck cannot be directly applied to the AFL-CIO because it is a federation of various unions, and it could quite possibly argue that the 1996 special assessment was really the burden of the constituent unions, and not necessarily paid out of union member dues. However, non-members could challenge the possible use of their agency fees by the AFL-CIO affiliated union, and thus seek a refund after the fact.

The bills currently being considered include a variety of proposals that would, if enacted into law, have an impact on unions. They include new posting requirements, requiring unions to receive written permission to use an individual's dues for political purposes, revamping union

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[146] See: S.25 (McCain/Feingold), the Bipartisan Campaign Reform Act of 1997, Introduced January 21, 1997; referred to the Committee on Rules and Administration. Considered September 29, 1997, by the Senate, modified by unanimous consent, amendments SP 1258 through 1265 proposed.

[147] See: S. 179 (Hutchinson), the Campaign Finance Reform and Disclosure Act of 1997, Introduced January 22, 1997; referred to the Committee on Rules and Administration.

[148] See: S.9 (Nickles), the Paycheck Protection Act, Introduced January 21, 1997; referred to Committee on Rules and Administration. Hearings held on June 25, 1997, by the Committee on Rules.

financial reporting requirements, and eliminating union security provisions altogether. Labor unions object to all of these proposals on the grounds that they are too onerous and expensive to implement.

Employer posting of Beck rights, however, would not create any overt burden on a union. Posting would be the responsibility of the employer. The AFL-CIO publicly stated its willingness to accept codification of Beck rights during Senate consideration of S. 25. However, unions have also argued that it is unfair to single out Beck rights for special posting requirements. They argue that if new employer posting requirements are enacted, they should not be limited to Beck rights, but should include requirements to post employee rights to organize and join unions as well.

Unions oppose a new requirement that they receive written permission to use dues for political purposes because of the administrative burdens it would entail and because it might result in more individuals choosing to become agency fee objectors. Nonetheless, it is the constitutional right of those that might choose to become agency fee objectors to do so, and the administrative burden can hardly outweigh an otherwise unjustifiable requirement for union members to pay for support of beliefs they oppose. Supporters of this proposal argue that union members can only make educated decisions if they are fully informed of their Beck rights.

Finally, vigorously opposed by unions are proposals to abolish union security agreements, or to require unions to allow agency fee objectors to remain union members rather than, as now, to withdraw from the union when they choose to become an agency fee objector. Regarding membership requirements, one union witness before the Subcommittee on Employer-Employee Relations testified that:

> Unions, like every other voluntary association, operate on the principle that it is the right of the majority to decide the duties of membership, and that those who desire to enjoy the privileges of membership are required to become members of the organization and accept whatever responsibilities come with membership . . . to force a union to allow dissidents who withdraw from membership to retain the right to participate in membership decisions would turn Beck -- and the First Amendment -- on their heads.[149]

VII. Dealing with the Demand for Campaign Funds

Testimony by Professor Burt Neuborne described the current campaign finance regulatory system as strictly "supply side" because it only limits contributions. Prior to the Buckley court's finding that expenditure limits were largely unconstitutional unless voluntarily agreed to in exchange for some benefit, the FECA had attempted to lessen the demand for funds by placing caps on campaign expenditures. Professor Neuborne noted that as a result of the Buckley decision "expenditures, whether made by candidates from their personal wealth; or by candidates using money raised from supporters; or by independent entities wishing to support a candidate, are virtually immune from regulation."[150] Ornstein pointed out in his testimony that the inability to limit expenditures was probably for the best because "we need a significant and large sum of money or resources in our political arena because what you want in a campaign process, as what you want in the legislative arena, is a robust dialogue, a communication process that people can see."[151]

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[149] Testimony of James Coppess, Communication Workers of America, before the U.S. Congress. House. Committee on Education and the Workforce. Subcommittee on Employer-Employee Relations. Hearing on Union Dues. 105th Congress, 1st Sess., March 18, 1997, Pp. 7-8.

[150] Neuborne testimony, September 25, 1997, pp. 130 -140.

[151] Testimony of Norman J. Ornstein, September 23, 1997 p. 66, ll. 20-25

Nonetheless, the desire to win political contests, and the demand for the money participants believe necessary to do so, helps drive the never-ending cycle of fund-raising.[152] Under such circumstances, the Court's interpretation that there is no legally enforceable upper expenditure limit for federal candidates only increases the drive not to fall behind in fund-raising. Spiraling campaign costs are further exaggerated by the media costs associated with a candidate's important task of getting his message to the public. The Committee heard testimony that 60 percent of every competitive Senatorial campaign dollar goes to media and 30 percent goes to fund-raising, with the remaining 10 percent for travel and staff.[153] Ornstein, and others the Committee heard from, argue that in order to get a grasp on current campaign improprieties, legislation must somehow appropriately deal with the desperate pursuit for campaign funds that creates an environment wherein propriety and the law are stretched to the breaking point.[154] Ornstein expressed the feelings of most witnesses on this issue in the following statement:

> I am not for spending limits. I am uneasy about spending limits, and I am afraid, especially now as I see what is happening with the issue ads, that if we put spending limits on candidates that it is going to enhance the role of some of the outside groups.
>
> I would prefer to go in a different direction which is to increase the incentives and provide [other] ways of ameliorating the demand . . ..[155]

[152] See the section of this report on The Thirst for Money.

[153] Gans testimony, September 24, 1997, p. 155.

[154] Ornstein testimony, September 23, 1997, p. 56.

[155] Ornstein testimony, September 24, 1997, p. 107.

Below is a discussion of ideas advocated to dampen demand for campaign spending, increase public participation and allow candidates more time to concentrate on the issues of the election instead of spending excessive time fund-raising.

A. Free or Subsidized Postage and Television time

Most proposals for dampening the demand for campaign funds center around the provision of some free or subsidized postage and/or television time to candidates and parties. Testimony before the Committee indicated that television costs are increasingly a larger percentage of every candidate's costs, and such costs are clearly driving up the overall costs of campaigns.[156] Proposals range from block grants of television time given to the party committees to allocate as they see fit, to fund-raising qualification thresholds for individual candidates to receive television time in their markets of choice. The argument is that party committees and candidates will spend less time raising funds and more on the issues if they are assured the opportunity to espouse their beliefs.

While there is no requirement that the provision of such free services necessarily be in return for anything, testimony before the committee noted that if free television or reduced postal rates are enacted in return for overall expenditure limitations, the net impact may be an undesirable reduction in the overall political discourse. Professor Pilon quoted the Eighth Circuit when it assessed similar state provisions: "one is 'hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are

[156] McBride testimony, September 24, 1997, p. 58.

allowed to engage.'"[157] While free television time might be made contingent on certain candidate behavior, it could instead be provided with no strings as a floor enabling all qualified candidates the ability to spread their views to the voting public.

B. Public Financing

The Committee heard testimony that some sort of extension of the Presidential public funding system to Congressional elections would eliminate the demand-driven pressure to obtain campaign contributions. The public financing currently available at the state or local level in Maine, Arkansas, and Nebraska was noted. Twelve states are currently considering public funding legislation.[158]

A compromise suggestion to encourage small contributors is creation of a 100% tax credit for contributions of $100 or less to federal candidates. To truly encourage broad-based small contributions, as opposed to subsidizing current large contributors, this tax credit could be limited to individuals who contribute less than $500 during the tax year.[159] As one witness testified, "[r]ight now, let us face it, a candidate is going to do a cost-benefit analysis before spending time to raise money, and raising money from small donors takes a lot of time, and the return is not there."[160] In addition to lessening the candidates' scramble for funds, this reform suggestion stems from the belief that encouragement of small contributors will lead citizens to become more

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[157] Pilon Opening Statement, September 25, 1997 Hearing Transcript, quoting Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422, 1426 (8th Cir. 1995).

[158] Senator John Glenn Hearing Transcript, September 24, 1997 p. 126.

[159] Ornstein testimony, September 23, 1997, p. 84.

[160] Ornstein testimony, September 24, 1997, p. 123.

involved in the political process. It is hoped that such small contributors will feel they have more at stake in the process, and it will reduce the public's perception that contributions buy legislative action.

C. Revising Contribution Limits

There was much discussion before the Committee about the possibility of revising the current contribution limits imposed on individuals, candidates and party committees. Many agreed with Senator Bennett's assessment that "one of the problems we have now is campaign contribution limits. . . . Certainly the greatest demand on your time is fund-raising."[161] When discussing Eugene McCarthy's primary challenge of Lyndon Johnson, both Senator Bennett and Curtis Gans made the point that today's $1,000 per contributor limit would have prevented the relatively unknown McCarthy from mounting any campaign.[162] In fact, the individual contribution limit of $1,000 (set in 1972) is worth approximately $259 today. In order to have the same amount of purchasing power today as in 1972, individual contribution limits would need to be increased to approximately $3,800.

Edward H. Crane, President of the CATO Institute, advocated abolition of campaign contribution limits all together. He noted "[t]he First Amendment applies to all Americans, not just those in the media, which is why we should eliminate contribution limits on individual

[161] Hearing transcript iscussion between the Senator Robert F. Bennett and panelist Ann McBride, September 24, 1997, p. 65-66.

[162] Remarks of Senator Robert F. Bennett, September 23, 1997 p. 37 & Gans testimony, September 23, 1997, p. 154.

contributors."[163] Toward the other extreme, Norman Ornstein testified contribution limits are necessary, otherwise "contributor[s] cannot say, 'Jeez, I'm sorry I've maxed out at some point,' the relentless pressure can be very, very great, which is not good."[164]

Most discussions in this area centered around adjusting the current $1,000 figure for inflation since the FECA was enacted, and providing some sort of automatic future inflation adjustment devise.[165] Particular emphasis was placed on raising the individual contribution limit to political campaign committees. Currently individuals have a $25,000 annual limit, and of that, a sub-limit of $20,000 can be given to party committees. Testimony before the Committee advocated creating two separate $25,000 annual individual limits: one for party committees and the other for all other federal contributions.[166] It was pointed out that a ban on soft money would make such a revision all the more important. Without such a revision party committees would be in direct competition for scarce resources with their very own candidates.[167]

VIII. Political Action Committees (PACs)

Other than the ability of PACs to coordinate their activities with affiliated soft money independent expenditure issue advocacy programs, the Committee heard little testimony regarding problems with PACs. The Committee heard of no improprieties that arose from the FECA's

[163] Testimony of Edward H. Crane, September 24, 1997, p. 140.

[164] Ornstein testimony, September 23, 1997, p. 67.

[165] Ornstein testimony, September 24, 1997, p. 73.

[166] Ornstein testimony, September 24, 1997, p. 82 & Testimony of Douglas Berman, September 24, 1997, p. 200.

[167] Ornstein testimony, September 24, 1997, p. 85.

treatment of PACs. The Committee did hear testimony indicating that a ban on political action committees would be found to be unconstitutional because there is no empirical evidence that such a ban would meet the compelling governmental interest of preventing corruption as defined by the courts --- “a financial quid pro quo, dollars for political favor.”[168]

IX. The Federal Election Commission and Enforcement

As Professor Neuborne pointed out in his testimony before the Investigation Committee, “[i]f you have good rules, but you do not have an enforcement mechanism, people will laugh at the rules . . ..”[169]

A. A Brief History of the Federal Election Commission

In 1975, Congress created the Federal Election Commission (FEC) to administer and enforce the Federal Election Campaign Act (FECA) - the statute that governs the financing of federal elections. The regulation of federal campaigns emanated from a congressional judgment that our representative form of government needed protection from the corrosive influence of unlimited and undisclosed political contributions. The laws were designed to ensure that candidates in federal elections were not - or did not appear to be - beholden to a narrow group of people. Taken together, it was hoped, the laws would sustain and promote citizen confidence and participation in the democratic process.

Guided by this desire to protect the fundamental tenets of democracy, Congress created an independent regulatory agency - the FEC - to disclose campaign finance information, to enforce the limits, prohibitions and other provisions of the election law, and to administer the public

[168] Pilon Written Testimony, p. 5.

[169] Neuborne testimony, September 25, 1997, p. 137.

funding of Presidential elections. The FEC is made up of six members, appointed by the President and confirmed by the Senate. Each member serves a renewable six-year term; and two seats are subject to appointment every two years. By law, no more than three Commissioners can be members of the same political party, and at least four votes are required for any official Commission action. This structure was created to encourage nonpartisan decisions. The Chairmanship of the FEC rotates among the members each year, with no member serving as Chairman more than once during his or her term.

B. Structural Problems

Critics of the Federal Election Commission claim it is designed to fail. Further, these critics cite political patronage and the exclusion of third party commissioners as detrimental to the FEC's professional even-handed interpretation of the law.[170]

One problem that arises is due to the fact that there are an even number of Commissioners, which often leads to stalemates over their decisions. The six voting members are traditionally equally divided between Democrats and Republicans, making it difficult if not impossible for the FEC to move against a campaign that is seen as injurious to only one of the parties. Such a structure is not conducive to coherent rulings, but there are a limited number of proposals that are designed to restructure the Federal Election Commission. The major proposal is with regards to the terms of the FEC Commissioners. If the repetitive six-year terms that Commissioners now serve were replaced with a single eight year-term having no holding over after expiration, some of the problems inherent with shorter patronage appointments might be relieved. Specifically, it is

[170] Id. at 138-140.

hoped that this will preserve the independence of Commissioners from political pressure related to their re-appointment.

Another proposal has to do with strengthening the office of the FEC chairman and creating a new presiding officer as the Commission's "Chief Administrator."

C. Disclosure

One of the primary missions of the FEC is to disclose to the public the source of federal candidate campaign contributions, as well as the ultimate use of those funds by candidates. Faster and more complete disclosure will aid in alleviating many of the problems found in the current system. To facilitate speedy and universal access to campaign reports this Committee heard testimony from Thomas Mann and Norman Ornstein recommending that electronic filing become mandatory for all federal candidates and reporting committees after a de minimus threshold is crossed. Such electronic filing was almost universally endorsed by those appearing to testify.[171] Such mandatory electronic filing is already the rule in state elections held in California.

Yet another idea to enhance disclosure is to require a campaign to provide all requisite contributor information to the FEC before allowing deposit of any contribution. Should any disclosure information be missing, a contribution could be put in an escrow account where the money cannot be spent. In turn, the current ten-day maximum holding period on checks would have to be waived. This would solve past reporting discrepancies where some committees achieved over 95% contributor identification disclosure, while others supplied the required identification for less than half of their contributors.

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[171] Testimony of Becky Cain, September 24, 1997, p. 151; Ornstein testimony, September 23, 1997, p. 77; Mann testimony, September 23, 1997, p. 79.

D. Other Suggested Changes

To speed the process of justice and avoid inaction resulting from partisan splits on the FEC, many people advocate the creation of a private cause of legal action directly against the alleged wrongdoer where the FEC is a) unable to act by virtue of a deadlock, or b) where injunctive relief would be necessary and appropriate (a high standard requiring a showing of immediate, irreparable harm). To deter frivolous actions, a "loser pays" standard should apply to requests for injunctive relief. Another suggestion involves streamlining the process for allegations of criminal violations, by creating more shared procedures between the FEC and the Justice Department, and fast-tracking the investigation from the FEC to Justice if any significant evidence of fraud exists.

X. CONCLUSION

As reflected throughout this report, the committee's investigation uncovered blatant abuses and violations of the FECA. The current state of our campaign finance system is in serious need of an overhaul. Unanticipated loopholes discovered in the federal campaign finance laws since they were developed in the 1970s, as well as the active manipulation of vague aspects of the FECA by parties trying to gain advantage through the system, lead to dissatisfaction with the currently enforced system by all parties. After this investigation, the Committee can reaffirm the following statement made by Senator Thompson, which accompanied the investigation's original charter: "[t]he Founders of this Republic did not believe that the errors of government were self-correcting. They knew that only constant examination of our shortcomings, and learning from them, would enable representative government to survive."[172] The Committee's investigatory hearings have certainly provided a learning experience for both participants and the general public. Now is the time to apply the knowledge gained from this experience to effective legislation, or the American public must be prepared to endure more blatant campaign finance law manipulation and corruption.

[172] Senator Fred Thompson, March 10, 1997, Senate Report 105-7 at 2.