

Reforming Campaign Finance Michael Passante

Abstract

This paper touches on most aspects of campaign finance reform. It first reviews the Watergate origins of modern federal campaign finance, looks at the loopholes that have opened since then, and summarizes the funding of the 2000 Presidential and Congressional elections. It then analyzes possible reform goals and some proposals to meet them, including a soft money ban, public funding of elections, and independent expenditure restrictions. Finally, it examines the prospects for reform, including McCain-Feingold and beyond.

Introduction

It is thought that the 2000 Presidential and Congressional elections will end up costing a total of about \$3 billion (Center for Responsive Politics 2001b).¹ Where does this money come from, and why should we be concerned about it? How has the role of money changed in the 2000 Presidential election compared to previous Presidential elections? How should the system be reformed? This paper will address each of these questions.

Part I reviews the recent history of American federal election finance, including the 1970s Watergate campaign reforms and the loopholes that have opened since then. Part II examines the role of money in the 2000 Presidential and Congressional elections and concludes that the biggest changes were the increased use of soft money and independently financed issue advocacy ads. Part III analyzes the goals of campaign finance reform and how well various reform proposals meet them. Options examined include a soft money ban, public funding of elections, and independent expenditure restrictions. I conclude that some combination of all three of these options would be ideal, but that a soft money ban and reasonable independent expenditure restrictions are currently more politically viable than public funding. Part IV describes the prospects for reform, including the current status of the McCain-Feingold legislation (as of April 2001) and what reformers should do if McCain-Feingold becomes law.

I. Recent History of Federal Election Finance

The Watergate Era Reforms

Responding to the Watergate scandals, Congress passed the Federal Election Campaign Act amendments (FECA) in 1974 to reduce the potential for government corruption. These amendments created both the Federal Election Commission (FEC) to enforce campaign laws and a presidential election system of volun-

tary public finance through a federal income tax checkoff box. Presidential candidates that meet a set of complicated requirements in the primary can receive federal ‘matching funds’ for the money they raise. In exchange, these candidates abide by state-by-state spending limits. In the general Presidential election, extensive federal public funds are awarded to candidates who agree to limit overall spending, eliminating the need to raise more hard money.

FECA also required donor information disclosure for all contributions of \$200 or more, set limits on wealthy candidates’ self-financed campaign expenditures, and limited the amounts of so-called ‘hard money’ donors could contribute to campaigns. ‘Hard money’ thus has strict contribution limits – currently \$1,000 per candidate per election for individual donors and \$5,000 per candidate per election for Political Action Committees (PACs). The primary and general count as *separate* elections. Each individual donor is also limited to contributing \$25,000 total per year to all candidates and parties.

Campaign Finance Loopholes

Since FECA was passed in the 1970s, at least three loopholes have decreased the law’s effectiveness: the *Buckley* ruling, soft money, and independent expenditures. First, the Supreme Court’s landmark 1976 decision in *Buckley v. Valeo* (424 U.S. 1, 1976) upheld FECA’s contribution limits as acceptable for eliminating corruption in the political system, but struck down the overall Congressional spending limits as a violation of free speech. Since then, the only presidential primary candidate who has taken advantage of the self-financing loophole *Buckley* created was multi-millionaire Steve Forbes in 1996 (Hagen and Mayer 2000, 5 and n9). So unless *Buckley* is someday overturned, Congress is prohibited from enacting mandatory overall spending limits (although not necessarily voluntary ones) on campaigns, wealthy candidates, or independent expenditures.

The second loophole, created by the 1979 amendments to FECA, is ‘soft money.’ The parties and their principal Congressional committees are the primary recipients of soft money.² Soft money comprises almost all of the fundraising in the general presidential election since the presidential candidates’ hard money expenditures are limited if they choose to accept federal funds. Soft money differs from ‘hard money’ in two principal ways. First, soft money evades the legal limitations of hard money. Individuals and PACs face contribution limits for hard money, but can give unlimited amounts of soft money. Corporations and labor unions are barred from giving hard money, but not soft money. Second, soft money cannot be used to advocate the election or defeat of specific candidates, while hard money can. At least in theory, soft money is only supposed to be used for ‘party building activities’ such as voter registration drives or issue advocacy. For many years, the parties assumed that the law prohibited them from engaging in candidate-focused advocacy rather than party-focused advocacy, but FEC inaction encouraged a change

Kennedy School Review

of thinking. The major parties spent substantial sums on television ads for the first time in 1996 without penalty (Brennan Center for Justice and Goldstein 2000), and now candidate names appear in almost all of the so-called party-sponsored 'issue ads' (Brennan Center for Justice 2001).

A little reported fact about soft money is that the national party committees must use \$2 of hard money for every \$1 of soft money in order to run issue ads in support of their presidential or congressional candidates. This rule limits parties' ability to collect too much in soft money relative to hard money, but they are now circumventing the rule by transferring money to the states. When the soft money is transferred from national to state parties, about \$2 in soft money can be combined with \$1 in hard money to run issue ads, although the formula varies from state to state (Center for Responsive Politics 2001a).

The third major loophole, which has developed more recently, is that of 'independent expenditures.' These are expenditures by outside groups to promote a certain political issue (eg. the environment or tax cuts) without advocating the election or defeat of a specific candidate. Campaign reformers criticize these groups because their 'issue advocacy' ads are often thinly disguised attempts to help or hurt particular candidates, and yet the groups are not required to disclose the sources of their funds as parties do. As long as express words of advocacy like 'vote for,' 'elect,' 'support' or 'defeat' do not appear in these ads, they are virtually unregulated by the FEC – even if candidates' names appear in them. As political consultant Michael Berman put it in a lecture at the John F. Kennedy School of Government (28 September 2000), to get an issue ad, just take a candidate ad and remove the magic words 'elect' and 'defeat.' Often the groups sponsoring and paying for the ads do not identify themselves,³ and sometimes use mysterious front-names such as 'Committee for Fairness' or 'Citizens for Better Medicare.'

Many types of organizations that are separate from parties can serve as campaign finance vehicles. 'Joint committees' are organizations set up by interest groups and politicians (including many U.S. Senators in the 2000 election) to run issue advocacy ads. 'Leadership PACs' are set up by members of Congress to distribute money to certain candidates to curry favor for Congressional leadership positions. Until very recently, 'stealth PACs' created under Section 527 of the tax code were permitted to raise unlimited political funds with no disclosure requirements, which is arguably worse than soft money, which has at least required donor disclosure since a 1992 FEC ruling. In June 2000, Congress closed its first campaign finance loophole in more than two decades when it required public disclosure by these 'stealth PACs' (Trister 2000, 32).

The Current System

The current presidential campaign finance system is essentially the original 1970s

FECA rules seriously weakened via the loopholes enumerated above. The 2000 presidential primaries were financed mainly by a combination of public funds and hard money raised by candidates facing contribution limits, much as the FECA rules had intended. The 2000 presidential election, on the other hand, was financed primarily by a combination of public funds and soft money raised by parties. The original FECA rules had intended to limit presidential general election spending to the public funds, but they did not anticipate the rise of soft money later permitted by the 1979 amendment. Fortunately, the soft money loophole has largely been confined to the general election, since party organizations do not take sides financially in presidential primary contests. Congressional elections are mostly financed by a combination of hard money and soft money, with some independent expenditures and no public funds at all.

II. Money in Election 2000

In the 2000 election cycle, all categories of political fundraising increased, including hard money raised by presidential candidates, hard money raised by House and Senate candidates, and soft money raised by the parties (Center for Responsive Politics 2001b). The biggest change in 2000 election finance compared to previous election cycles was likely the rise of both soft money issue advocacy and independent expenditures. The transfer of money from national party committees to the states in order to circumvent soft money spending restrictions has also been increasingly popular. Several individuals gave more than \$1 million each, and the top ten categories of donors were the retired, lawyers, securities and investments, real estate, health, insurance, entertainment, computers, oil and gas, and business services (Center for Responsive Politics 2001e and 2001f).

Public Funding in the 2000 Presidential Election

Table 1 lists the federal matching funds received by the 2000 presidential candidates in the primary and the total primary expenditures for the four major candidates.

Table 1: Matching Funds and Expenditures by 2000 Presidential Primary Candidates⁴

Candidate	Federal Matching Funds Received for Primary (\$)	Total Primary Expenditures 1/1/99-8/31/00 (\$)
Al Gore	15,456,000	46,996,000
John McCain	14,475,000	46,316,000
Bill Bradley	12,462,000	42,680,000
George W. Bush	0	94,559,000
Gary Bauer	4,825,000	N/A
Pat Buchanan	4,124,000	N/A
Alan Keyes	4,021,000	N/A
Dan Quayle	2,103,000	N/A
Lyndon LaRouche	1,285,000	N/A
Ralph Nader	664,150	N/A
John Hagelin	574,000	N/A
Steve Forbes	0	N/A

Kennedy School Review

In the primaries, both Bush and Gore out-raised their opponents, although Gore's financial advantage over Bradley was smaller than Bush's advantage over McCain.⁵ All primary candidates except Bush chose to accept public matching funds and the state-by-state spending limits that went with them. Bush rejected public funds because early in the pre-primary period, he had already amassed tens of millions in private hard money. He calculated that he was better off forgoing public funds to avoid state spending limits and outspend his opponents. Bush spent about \$100 million to win his party's nomination and depleted almost all of his funds in the process (Center for Responsive Politics 2001b). This was more than twice as much as McCain, his most potent rival, who spent about \$46 million (including matching funds) in the primary.⁶

For the general election campaign, both Bush and Gore accepted public funding of about \$67.5 million each.⁷ Both limited their hard money spending to that level, exclusive of legal compliance and party convention costs. Both major party conventions were partially paid for with public funds. The 2000 Reform Party nominee, Pat Buchanan, was also eligible for general election public funds since the party's 1996 presidential candidate, Ross Perot, received more than the needed 5% popular vote threshold. Buchanan received about \$12.5 million in public funds (FEC 2001), but only after winning a legal dispute over the money against rival candidate John Hagelin.

Hard Money in the 2000 Presidential Election

For the primaries, Bush and Gore raised substantial sums of hard money with extensive networks of fundraisers. Bush raised more hard money than any candidate in American history,⁸ due in large part to his group of top fundraisers, the 'Pioneers.'⁹ While using fundraising networks is hardly a new development in presidential election finance, the extensive amounts of money raised through these networks in election 2000 led some experts to conclude that the people who raise money are now more influential than the people who give money.⁹ Both Bush and Gore collected about three-quarters of their hard money contributions from donors who gave the maximum \$1,000 contribution (Center for Responsive Politics 2001b). The largest presidential campaign expenditures have typically been on media (television ads in particular). Other expenses include polling, communication, debates, field operations, travel, management, and legal costs. Table 2 lists primary and general election receipts and expenditures, including hard money,¹⁰ for Bush and Gore. These totals do not include soft money or Congressional spending.

Table 2: Money Received and Spent by Major Party Presidential Candidates for 2000 Primary and General Elections Combined¹¹

Category of Money Received	Bush (\$)	Gore (\$)
Individual donations	101,520,773 (52.6%)	45,612,601 (34.3%)
Federal public funds ¹²	67,560,000 (35.0%)	83,016,084 (62.5%)
PAC donations	2,229,056 (1.2%)	0
Candidate self-financing	0	0
Other ¹³	21,778,821 (11.3%)	4,271,567 (3.2%)
Total Receipts	193,088,650 (100.0%)	132,900,252 (100.0%)
Total Spent	185,860,812	120,369,160

Soft Money in the 2000 Election

Soft money was particularly notable in the 2000 election for several reasons. First, compared to other fundraising categories, soft money saw the largest percentage increases over previous years. For both parties, the soft money intake nearly doubled. Republicans raised \$244.4 million in soft money (a 73% increase over the same period in 1995-96) while Democrats raised \$243 million (a 99% increase), for a total of almost \$500 million that shatters all previous soft money records (FEC 2001, 2).

Secondly, this was the first recent election in which the parties spent more television advertising dollars in the general election (in soft money) than their chosen presidential candidates did (in public funds). As Joshua Rosenkranz, President of the Brennan Center for Justice put it, 'soft money has become the loophole that swallowed the law' (Brennan Center for Justice and Goldstein 2000).

Thirdly, the transfer of funds, particularly soft money, from national to state parties increased significantly. This is not surprising given the larger sums of soft money and inability to use it under the 'two-thirds hard money' national rule rather than the more favorable 'one-third hard money' state rules. In the 2000 election cycle, the Democratic and Republican Parties' national committees transferred \$226.9 million and \$184.9 million respectively to the states (the majority in soft money for both parties) (FEC 2001, 2). Not surprisingly, the soft money that was transferred from the national parties went disproportionately to the presidential swing states (Center for Responsive Politics 2001a).

Fourthly, the 2000 presidential election further weakened the rule that close coordination between candidates and parties is not allowed. The FEC seldom enforced the rule to begin with, and recent FEC and federal court rulings have weakened it even further.¹⁴ Unfortunately, this rule has been violated so often that it has become almost meaningless. Bush, for example, personally stopped a soft money issue advocacy ad paid for by the RNC, and few people even raised an eyebrow (Hamburger 2000).

Kennedy School Review

Independent Expenditures in the 2000 Election

Independent expenditures refer to political spending by groups other than candidates and parties. A study by the Annenberg Public Policy Center at the University of Pennsylvania found that the number of issue ads, the number of groups using them, and total spending on them increased in the 2000 election cycle compared to previous cycles (Mintz 2000). The best-known independent expenditures from the 2000 election were probably the primary ads sponsored by ‘Republicans for Clean Air’ criticizing McCain’s environmental record. The \$2.5 million ad buy was actually purchased by Bush fundraiser and Texas billionaire Sam Wyly and his brother Charles.

A Brennan Center study shows that independent groups spent roughly equal amounts on ads for federal Republican and Democratic candidates in the 2000 election.¹⁵ Groups that generally helped Republicans included Citizens for Better Medicare (a pharmaceutical industry group), the U.S. Chamber of Commerce, Business Roundtable, and Americans for Job Security (a ‘stealth PAC’ established by Senator Trent Lott under section 527 of the tax code). They spent 75% of their total \$27.5 million on ads for House candidates, while only spending \$2.1 million for Bush. Groups that generally helped Democrats included Planned Parenthood, AFL-CIO, Handgun Control, and Emily’s List. They, on the other hand, spent 50% of their total \$29 million on ads for Gore, so that Gore benefited far more than Bush from outside issue ads. Outside groups paid for 18% of all ads aired for Gore, compared with 2.4% of all ads aired for Bush. One outside group alone, Planned Parenthood, paid for almost 10% of Gore’s TV ads. But despite Gore’s advantage among outside groups, total nationwide expenditures on Bush ads (\$86.1 m) still exceeded total nationwide expenditures on Gore ads (\$77.1 m).

Congressional Spending in the 2000 Elections

Spending on 2000 Congressional races increased dramatically compared to 1998 Congressional races, in part because of the close contest for control of the new Congress and Democrats’ increasing success in matching Republican fundraising totals. According to the FEC, Congressional campaign spending in the 1999-2000 election cycle was about \$858 million, including both self-financing and hard money from individuals and PAC’s, a 39% increase from the 1997-98 cycle. Individuals contributed \$490.9 million to Congressional candidates, PACs and other committees contributed \$243.1 million, and candidates themselves contributed \$128.9 million in loans and gifts.¹⁶ Spending on Senate races increased significantly from 1998,¹⁷ in part due to extremely expensive campaigns by Hillary Clinton and Rick Lazio for the seat of New York and multimillionaire Jon Corzine’s campaign for the seat of New Jersey (Corzine broke the record for a self-financed Senate campaign by spending \$60 million of his own money). Table 3 shows money raised and spent in the 2000 Senate and House races by party.

Another notable feature of the 2000 Congressional races was the relative inequality in spending between candidates. 394 of 401 House incumbents were reelected (a whopping 98.3%). Incumbents, on average, enjoyed a 4-1 fundraising advantage over their challengers.¹⁸ In nearly two-thirds of all House districts, one candidate out-raised his or her challenger by a factor of 10-to-1 or more (Center for Responsive Politics 2001c). This imbalance, partially a result of gerrymandered ‘one party’ districts, led some campaigns to transfer their extra money to more competitive districts. In Senate races, traditionally more competitive, 23 of 29 incumbents were reelected (79.3%).¹⁹

Table 3: Total Money Raised and Spent for 2000 Senate and House Races²⁰

	Senate Democrats	Senate Republicans	House Democrats	House Republicans	Grand Totals
Total Raised	\$230,738,678	203,811,741	279,637,327	308,545,808	1,022,733,554
Total Spent	226,385,062	206,312,536	258,085,162	291,833,176	982,615,936
Average²¹ Raised	6,992,081	6,176,113	747,693	840,724	-
Average Spent	6,860,153	6,251,895	690,067	795,185	-

III. Reform Options

Defining Reform

What specifically does ‘campaign finance reform’ mean, and what are its goals? People have applied this catch-all phrase to very different campaign finance changes, in part because those who want to change the system often have quite different goals in mind. Five of the most common goals of campaign finance reform are as follows. First, to ensure that someone with good ideas but neither money nor wealthy supporters can still get elected to office (dissatisfaction with the link between money and politics often arises from the tension between the premium Americans place on political equality and the reality of financial inequality). Secondly, to level the playing field between incumbents and challengers by limiting the institutional advantages of incumbency and helping challengers. Thirdly, to limit the excessive influence of special interests and large political contributors, especially when they convince legislators to help them at the public’s expense (the ‘legalized bribery’ problem). Fourthly, to alleviate the time and pressure politicians spend fundraising to allow them to engage in more socially productive activities. Fifthly, to increase political participation and help restore people’s faith in the integrity of their government in an era of cynicism – a goal which is intimately tied to the other four, and speaks to the symbolic importance of campaign finance reform.

In short, reform advocates have different ideas about the exact goals of ‘campaign

Kennedy School Review

finance reform,' and hence have different visions for the ideal campaign finance system. All of these are worthy goals, but reformers will obviously prioritize them differently. Fortunately, the various goals are usually complementary rather than mutually exclusive. Perhaps it is most useful to think of these goals as yardsticks to use in evaluating the reform proposals.

Several proposals have been put forward to achieve campaign finance reform. Those analyzed here include soft money limits, public funding of elections, and independent expenditure restrictions. There are obviously many other possible reforms, such as better disclosure requirements, reduced cost media access, or moving away from majority-takes-all Congressional districting. This paper focuses only on the first three proposals, since they are probably the most widely discussed among reform advocates.

Soft Money Limits

Soft money is widely viewed as the most harmful category of campaign financing since the contributions are unlimited and can come from unions and corporations. Banning or limiting soft money is politically viable compared to other reform proposals such as public funding, and it would limit the ability of special interests and wealthy individuals to influence legislators with single contributions of six or seven figures. While it would still be possible to donate large sums of hard money by having a group of individuals contribute the maximum, a soft money ban would at least make it more burdensome to contribute very large sums. In addition, unions and corporations are not allowed to contribute hard money, so banning their soft money contributions could reduce their political spending. At a minimum, it would tend to shift their political spending toward other avenues, such as more grassroots efforts and independent expenditures.

The primary objection to banning soft money (besides freedom of speech, which is a potential objection to almost all of these reform proposals) is that it would weaken the two major political parties. There is a good deal of truth to this point, but it is debatable whether or not weakening the parties is a bad idea. Opponents of banning soft money fear that a few wealthy individuals or interest groups will be able to buy advertising through independent expenditures, and parties will be unable to respond. The two major political parties are primarily fundraising vehicles today since they do not do much policy development. If we eliminate their responsibility for raising soft money, then their most important functions will probably be coordinating communications and nominations (unless they chose to take on other responsibilities). Opponents of a soft money ban argue that the two parties have been a stabilizing force in our political system, while third party candidates argue that the major parties do not represent a broad enough spectrum of ideological viewpoints. In any case, banning soft money would likely shift attention away from national parties and toward each parties' individual candidates, who at least

percentage-wise would bear relatively more fundraising responsibility than before. Unfortunately, this means that banning soft money would do little if anything to alleviate fundraising burdens on officeholders.

Public Funding

Another proposal is to institute at least partial public funding for Congressional elections and raise the level of public funding for presidential elections. Candidates would be given sufficient taxpayer dollars to run their campaigns, often in exchange for agreeing to abide by certain restrictions, such as limiting the amount of hard money they raise and spend. Candidates in either the primaries or the general election would qualify for public funds by meeting certain requirements, such as collecting a target number of signatures within their districts. Although direct public funding has never been a part of Congressional elections, the idea is not entirely foreign in the federal system since presidential candidates receive public ‘matching funds’ in both the primary and general elections. Public funding systems are also used to varying degrees in many state and local elections.

Public funding scores well on almost all of the reform criteria. It would reduce the influence of special interests by replacing privately raised money with ‘clean’ public funds. If politicians are indebted to who gives them money, why not have them indebted to the taxpayers, whom they are supposed to be serving? The system could be set up either with voluntary overall spending limits (a ‘floors with ceilings’ system) or without any spending restrictions (a ‘floors without ceilings’ system). Whether or not public funding would reduce the time spent fundraising or the overall amount of money in politics might depend on which of these systems is adopted. But if the main problem with the current system is the source of potentially tainted money rather than its overall amount, then this might be a moot question. Even though most contributors probably give out of genuine ideological convictions or personal affinity for a particular candidate, reformers generally believe it is problematic if even a small percentage of contributors expect large favors in return (witness special interests that hedge their electoral bets by contributing to *both* parties).

Public funding, even without spending restrictions, is an excellent solution for reformers who believe the main problem with the current system is that good candidates of modest means do not have sufficient resources to get their messages out. Public funds would allow less affluent candidates to compete in the political process and reduce incumbent fundraising advantages. Unfortunately, this is precisely why public funding is unpopular in Congress: no incumbent politician wants to give public funds to his or her otherwise poorly-financed rivals in the next election. This also explains why politicians hesitate to raise the levels of public funding in states that currently provide meager public funds. We know from state experiences that the key to getting politicians to choose ‘clean elections’ and accept

Kennedy School Review

public funds is to raise the levels of public funding high enough so that it does not pay to opt out and raise money privately. A good modified version of this is to double or triple the level of public funding given to candidates whose opponents opt out of the public system, which reduces the incentive to opt out.

Public funding is also a clever way of circumventing the free speech issue raised by mandatory spending caps, which *Buckley* ruled unconstitutional. Even ‘floors with ceilings’ public funding systems are set up so that candidates can choose whether or not to accept taxpayer dollars and the spending restrictions that go with them. If candidates do not wish to abide by spending restrictions, they can simply choose not to accept any public funds for their campaigns. Some public funding opponents object that this is still coercive enough to violate free speech, but most courts have disagreed and upheld such public funding systems at the state level.

Some commentators have criticized public funding on the grounds that it would reduce the power of the two major parties. Under most such systems, third party candidates could qualify for funding by meeting signature or other requirements.²² Ironically, some reformers like public funding for exactly the same reason. Others object to public funding on the basis that it is a waste of taxpayer dollars that could be better used elsewhere. I find this unconvincing. If campaign contributions help certain groups persuade politicians to spend public funds on projects or subsidies of questionable worth, then replacing such donations with public funds would probably *save* taxpayers money in the long run. Furthermore, the money needed to publicly fund all federal elections in the United States is minuscule compared to overall government spending (compare, for example, the \$3 billion cost of the 1999-2000 federal elections to Bush’s proposed \$1.6 trillion tax cut).

Restrict Independent Expenditures

Outside non-profit groups ranging from the AFL-CIO to the National Rifle Association run issue ads and election ads to influence public policy and elections. The goal of reformers here is to differentiate true ‘issue ads’ – which solely address issues – from ‘election ads,’ whose purpose is to help or hurt particular candidates. A typical proposal to limit independent expenditures might cover any ad that mentions or pictures a candidate for federal office within a certain period of time before election day. Any independent expenditures that fall into this category would then have to follow the same rules that affect campaign spending. This effectively strengthens the Supreme Court’s weak ‘magic words’ test to differentiate the two types of ads.

The Constitution is the main obstacle for reforms in this area. Controlling independent expenditures is very difficult to do since it is the most constitutionally questionable of the proposals discussed here. Any reform effort in this area must be tailored narrowly enough to avoid being declared invalid. Proposals that pro-

hibit these types of independent expenditures altogether would probably be struck down as a violation of free speech. On the other hand, proposals that only make these types of independent expenditures comply with campaign spending and disclosure rules would probably survive the scrutiny of the Supreme Court. Another problem in enacting independent expenditure restrictions is opposition from those groups whose advertising would be affected. The AFL-CIO, for example, supports a soft money ban, but opposes issue ad restrictions.

Another important point to note is that if soft money is banned, the changes in independent expenditure restrictions will suddenly become even more important. Banning soft money will cause more political spending to shift into regulated hard money and into largely unregulated independent expenditures. Many opponents of banning soft money (and some supporters of it) fear that without better independent expenditure restrictions, non-profit groups and wealthy individuals will be able to attack the parties, and the parties will be unable to respond adequately without the use of soft money.

IV. Prospects for Reform: McCain-Feingold

Prospects for Reform

Current prospects for enacting federal campaign finance reform are fairly good. At the recent opening of the 107th Congress, reformers sensed that a confluence of factors made the timing right. First, Sen. John McCain had made campaign finance reform the centerpiece of his presidential run, and had performed surprisingly well in the Republican primaries. Secondly, both Gore's fundraising scandal at the Buddhist temple and Clinton's Marc Rich pardon scandal were fresh in everyone's mind.²³ Thirdly, the 2000 Presidential and Congressional elections broke all previous spending records, in large part because of the Democratic Party's success in raising both hard and soft money. This success ironically helped to change Republican impressions that a ban on soft money would harm the Republicans more than the Democrats. Fourthly, Democrats picked up several seats in the Republican-controlled Senate, which had consistently blocked reform in the Clinton administration by filibustering. Fifthly, public opinion is strongly behind reform.

While opinion polls show that the American public strongly supports campaign finance reform, many remain skeptical about whether such reforms will actually limit the influence of special interest groups.²⁴ In October 1999, 64% said that the way federal campaigns are financed needs either major changes or a complete overhaul (compared to 34% who said the system was either fine, or required only minor changes).²⁵ An overwhelming 72% favored new laws limiting soft money, while only 24% opposed such limits (and the poll did not even mention that soft money contributions are currently unlimited).²⁶ But in October 2000, only 28% said they believed that changes in campaign finance laws could succeed in reducing the power

Kennedy School Review

of special interests, while 64% said that whether campaign finance changes were passed or not, special interests would always find a way to maintain their power in Washington.

McCain-Feingold Legislation

Reformers used McCain-Feingold, the most popular campaign finance reform legislation in Congress, to take advantage of this window of opportunity. At the time of writing (early April 2001), the McCain-Feingold legislation had passed the Senate by a vote of 59-41, but the House debate on the Shays-Meehan counterpart has not yet begun. The 106th House previously passed Shays-Meehan by a significant margin of 252-177, and since the 107th House has a partisan composition similar to the 106th House, the legislation is likely to pass once again. Although support for Shays-Meehan is strong, if the House changes the McCain-Feingold version that was passed by the Senate, the dispute will likely go to a conference committee, where reform opponents might have another opportunity to kill it. House whip Tom DeLay (R-TX) has vowed to do everything he can to defeat it (Shenon 2001).

President Bush has not made any definitive commitments on the McCain-Feingold bill as passed by the Senate, but he has indicated in recent days that he is likely to sign it even though he may not agree with all of its provisions (Mitchell 2001). During his presidential campaign, Bush's own campaign finance proposal called for banning corporations and unions from giving soft money without banning individuals from giving it. At the time, McCain called this proposal 'a camouflage and a joke' since it would merely allow the unlimited contributions through a different route (Mitchell 2001). Reform advocates are putting political pressure on Bush to sign the legislation over the opposition of the Republican Congressional leadership. A veto would cost him politically since one opinion poll shows that even 71% of Republican voters favor limiting soft money.²⁷ A decision not to sign campaign finance legislation could also undercut his image as a 'reformer with results,' end whatever honeymoon period he has with Congress and the public, and open Bush up to accusations of being a tool of wealthy special interests in 2004. On the other hand, signing it could be seen as capitulating to McCain, his former opponent.

As of the time of writing, the McCain-Feingold bill has three central provisions. First, it completely bans the unregulated soft money contributions that come from unions, corporations, and wealthy individuals. Secondly, it raises the individual contribution limits on hard money from \$1,000 to \$2,000, the individual contribution limits to all federal candidates and political parties from \$25,000 per year to \$37,500 per year, and the individual contribution limits to national party committees from \$20,000 to \$25,000 per year. All of these limits are set to rise with inflation. The PAC contribution limit would remain at \$5,000. Thirdly, it would

impose stringent fundraising curbs on independent advocacy groups that run sham issue ads that mention the names of candidates in the 60 days before a general election or 30 days before a primary.

There are also several other provisions in the bill. One raises contribution limits for candidates running against wealthy opponents who finance their own campaigns. Proponents argue that this evens the playing field by limiting the ability of wealthy candidates to buy elections. Critics call it an ‘incumbency protection’ measure. Another provision forces television broadcasters to provide discounted airtime to candidates, which would help limit campaign costs. Proponents argue that this proposal is justified since the airwaves belong to the public, not to broadcasters, although broadcasters characterize it as politicians giving themselves a free gift at the industry’s expense.

The independent expenditure restrictions are the most constitutionally questionable part of McCain-Feingold. If the bill becomes law, courts could strike down parts of the restrictions, which is why the defeat of the non-severability amendment was key. The Snowe-Jeffords amendment barred corporations and unions from running sham radio or television issue ads that mention candidates by name within 60 days of a general election or 30 days of a primary election. Individuals who run ads also need to meet some disclosure requirements. The Wellstone amendment then passed 51-46, which extended the ban on running issue ads mentioning a candidate to all outside interest groups, not just unions and corporations. Supporters of the Wellstone amendment were an odd coalition of genuine supporters of the idea and reform opponents who tried to kill the bill by voting for the Constitutionally questionable Wellstone provision in addition to the non-severability clause (which was later voted down, foiling the plans of reform opponents).

Many reformers rightly consider the higher hard money contribution limits to be a step backward. Hard money is by far the largest source of campaign funds, and increasing the limits so dramatically will allow more of it into the political system. Under the \$37,500 per year aggregate limit, each donor would be able to give \$75,000 in each two-year election cycle, while a couple would be able to give \$150,000 in each two-year election cycle - quite a substantial sum. This provision was added to the bill largely to gain the support of Republicans who hope that their already significant hard money fundraising advantage over Democrats will expand further with increased limits.²⁸ Many Democrats reluctantly supported the increase to make the bill truly bipartisan and to avoid a Bush veto. Supporters of the increase correctly point out that inflation has dramatically eroded the value of the \$1,000 limit set in 1974, but this argument assumes that the \$1,000 limit was a subjectively ‘correct’ level to begin with.

Reformers blocked a series of amendments that could have killed or weakened the

Kennedy School Review

bill. The Hagel bill was the main rival. Riddled with loopholes, it placed a rather high \$60,000 cap on soft money donations and was fortunately defeated in the Senate by a margin of 60-40 (New York Times 2001). A 'paycheck protection' proposal that would have prevented unions from using their members' dues for political campaigns without their explicit permission was also defeated. Such a provision would have made the bill anathema to Democrats supported by labor unions. In perhaps the most significant vote of the two-week debate, 13 Republicans joined 44 Democrats to defeat 57-43 a 'non-severability' amendment that would have thrown out the entire bill, including the ban on soft money, if courts found any one part of it, such as the independent expenditure restrictions, to be unconstitutional. Proponents of non-severability argued that it was needed to prevent an unbalanced system from emerging if courts struck down only part of the legislation, while opponents of non-severability argued that it was a 'poison pill' designed to surreptitiously kill the core of the bill, the ban on soft money. McCain cleverly said that non-severability was French for 'kill campaign finance reform' (Feingold 2001, A16).

During the debate, leading reform opponents such as Senator Mitch McConnell (R-KY) emphasized that the two party system is a force for political stability and that McCain-Feingold would weaken the parties. Opponents also view donation and expenditure limits as unconstitutional violations of donors' and candidates' First Amendment rights. They argue that since ads are paid for with money, limiting money restricts the means of free speech. There is legal precedent for this in *Buckley's* rejection of mandatory Congressional spending limits. Some civil liberties groups have forged an unusual alliance with conservative Republicans to advance this view.

Reform proponents disagree, arguing that other goals are just as important as protecting free speech. There is also legal precedent for this view in *Buckley*, which upheld contribution limits as acceptable to limit political corruption. Some legal scholars, for example, argue that the First Amendment free speech rights of the wealthy should not take precedence over the Fourteenth Amendment Equal Protection rights of everyone else (see, for eg, Bonifaz and Raskin 1993). They cite cases in which courts struck down state poll taxes and high filing fees as unconstitutional violations of the rights of the poor to vote and run for office. Supreme Court Justice John Paul Stevens has also advanced the argument that money bears more resemblance to property than speech, and hence government has a limited right to regulate it.

Reform opponents also criticize the characterization of organized groups that contribute money as 'special interests.' They correctly point out that all citizens have a right to try to influence the legislative process and that political participation should not be discouraged. But to reformers, such arguments become unconvincing once money enters the picture. They argue that the political influence of any

particular constituency should be tied to the size of its membership and maybe to how well-organized it is, but not to how much money it has. To most reformers, it is fundamentally unjust for a group of wealthy professionals to have far more political influence than an equally large group of poor people who cannot afford to give large campaign contributions.

What Should Reformers Do After McCain-Feingold?

It is premature to say that McCain-Feingold will become law, but it seems likely that it will. If it is enacted, where should reformers turn their attention? Surely many reformers will not be satisfied that the changes have gone far enough, but Congress would be unlikely to enact further changes until people fully understand the changes already instituted. It would take at least several election cycles for the political system to adjust fully, and since unintended consequences are not unusual in enacting campaign finance changes, it might be wise to wait and see what the results are before enacting further changes. Another possibility is that reformers should closely monitor the new system to ensure that courts and the FEC do not open up more loopholes. A large part of the monitoring function will be defending against legal challenges that will undoubtedly be brought against the independent expenditure restrictions and soft money ban.

Finally, if a new system is settling in on the federal level, it may be more productive to shift campaign finance reform efforts to the states. It is important to remember that McCain-Feingold only covers federal elections, not the other 99% of elected offices in America. Many of the same reform principles can be applied to elections for governors, state legislators, mayors, and city council members, which are controlled by state and local laws. In fact, if special interests find that their campaign contributions are restricted on the federal level, they may shift their resources to influence policy at the state level. This might be especially productive for them in an era of devolution. Some states concerned about this, such as Vermont and Maine, have already instituted reforms. Maine, for example, now provides public funding for gubernatorial and state legislature elections.

Summary

Referring to campaign finance, a somewhat hyperbolic Common Cause President Scott Harshbarger claims 'there is no law' (Hamburger 2000), but the 2000 elections actually provide ample support for his argument. The Presidential election saw dramatic increases in every major category of presidential political fundraising, but particularly in unlimited soft money and independent expenditures. These increases, which far outstrip the rate of inflation, were unimaginable just a few decades ago. As Professor Stephen Wayne points out, current campaign finance laws are only partially successful because they increase the importance of having a large base of contributors in primary elections (when many candidates are not well

Kennedy School Review

known enough to have a large base) and fail to eliminate the soft money influence of large donors in the general elections (Wayne 2000, 59).

If the 2000 election illustrates anything about campaign finance, it is that the numerous loopholes are out of control. Public financing of elections is an excellent long-term goal for reform, but banning soft money and placing reasonable, constitutional restrictions on independent expenditures are probably the most politically viable solutions, as McCain-Feingold recognizes. Fortunately, the prospects for reform are better now than they have been in a generation.

References

Bonifaz, John and Raskin, Jamin. 1993. 'Equal Protection and The Wealth Primary' in *Yale Law and Policy Review*, Vol.11, No.2.

Brennan Center for Justice and Goldstein, Kenneth. 2000. '2000 Presidential Race First in Modern History Where Political Parties Spend More on TV Ads Than Candidates' 12/11/00 press release, www.brennancenter.org

Brennan Center for Justice. 2001. 'Five New Ideas to Deal With the Problems Posed by Campaign Appeals Masquerading as Issue Advocacy,' 1/15/01, www.brennancenter.org

Center for Responsive Politics. 2001a. 'Soft Money Transfers to the States', 1/15/01. www.opensecrets.org

Center for Responsive Politics. 2001b. 'Historical Fundraising Trends,' 1/15/01. www.opensecrets.org

Center for Responsive Politics. 2001c. 'The Competitive Edge,' 1/15/01, www.opensecrets.org

Center for Responsive Politics. 2001d. 'Stats at a Glance: Congressional Races,' Center for Responsive Politics, 3/30/01. www.opensecrets.org

Center for Responsive Politics. 2001e. 'Top Individual Contributors', 1/15/01. www.opensecrets.org

Center for Responsive Politics. 2001f. 'Top Industries', 1/15/01. www.opensecrets.org

FEC. 2001. 'Party Fundraising Escalates,' 1/12/01 press release, www.fec.gov

Feingold, Diane. 2001. 'Excerpts From Senate Debate on Donations: Skirmishing and Predictions: Senator Feingold,' *The New York Times*, Friday, 3/30/01, A16.

Hamburger, Tom. 2000. 'Use of Campaign-Funding Loophole Reaches New High,' *The Wall Street Journal*, 9/14/00

Michael G. Hagen and William G. Mayer. 2000. 'The Modern Politics of Presidential Selection: How Changing the Rules Really Did Change the Game,' *In Pursuit of the White House 2000: How We Choose Our Presidential Nominees*. Chatham House Publishers

Mintz, John. 2000. 'Everybody Can Get Into the Act With Issue Ads,' *The Washington Post*, 9/19/00, A1.

Mitchell, Alison. 2001. 'McCain Challenges Bush, Promising Early Effort to Over-

- haul Campaign Finance,' *The New York Times*, 1/5/01, A15.
- New York Times. 2001. 'Senate Rejects Effort to Derail Bill Banning Soft Money,' *The New York Times*, Wednesday, 3/28/01, A18
- Shenon, Philip. 2001. 'And in House, G.O.P. Stalwart Will Fight a Finance Overhaul,' *The New York Times*, Friday 3/30/01, A1
- Trister, Michael. 2000. 'The Rise and Reform of Stealth PACs,' *The American Prospect*; September 25, 2000
- Wayne, Stephen. 2000. *The Road to the White House 2000*. Bedford/St. Martin's

Endnotes

- 1 \$3 billion includes spending by outside groups.
- 2 Currently these include the Democratic National Committee (DNC), Republican National Committee (RNC), Democratic Senatorial Campaign Committee (DSCC), National Republican Senatorial Committee (NRSC), Democratic Congressional Campaign Committee (DCCC), and the Republican National Congressional Committee (RNCC).
- 3 The Brennan Center found that despite FCC regulations, slightly less than 25% of 1998 political TV ads in their study did not show legible sponsorship.
- 4 www.fcc.gov 'Campaign Finance Reports and Data,' 9/28/00. Taken from the summary pages of the reports filed by the campaigns.
- 5 www.fcc.gov 'Campaign Finance Reports and Data,' 9/28/00. Taken from the summary pages of the reports filed by the campaigns.
- 6 'Primary Expenditures and Related' from 1/1/99-8/31/00. Taken from the summary pages of the reports filed by the campaigns.
- 7 www.opensecrets.org '2000 Presidential Race: Total Raised and Spent,' Center for Responsive Politics, 1/15/01.
- 8 www.opensecrets.org 'Meet the President: George W. Bush,' 3/30/01.
- 9 Michael Berman in lecture at the John F. Kennedy School of Government on 9/28/00.
- 10 I use 'hard money' here to refer only to the individual and PAC donations categories, not to public funds or other categories.
- 11 www.opensecrets.org 'President George W. Bush' and '2000 Presidential Candidate Al Gore,' Center for Responsive Politics, 3/30/01. Based on 3/26/01 FEC data. All totals include compliance fund receipts.
- 12 Although Bush and Gore received the same amount of public funds for the general election, Gore received more public funds overall because he accepted them for the primary while Bush did not.
- 13 Includes all other receipts by the candidates (e.g. outside loans or interest on contributions).
- 14 Federal District Court Judge Joyce Green cleared the Christian Coalition of illegal coordination with the RNC by defining 'coordination' very narrowly. Partially in reaction to this decision, the FEC subsequently cleared the AFL-CIO of illegal coordination with the DNC. Earlier, the FEC did not sanction the 1996 Clinton

Kennedy School Review

and Dole campaigns for coordinating soft money issue ads with their parties.

15 www.brennancenter.org All information in this paragraph is taken from a 12/11/00 press release, '2000 Presidential Race First in Modern History Where Parties Spend More on TV Ads Than Candidates.' The study was limited to the nation's 75 largest media markets.

16 www.fec.gov 'Congressional Financial Activity Soars for 2000' press release, Federal Election Commission, 1/9/01, p. 1. Figure does not include candidates in special elections or candidates who lost in the primaries.

17 Senate campaign spending figures from subsequent elections are not exactly comparable because a different group of states holds Senate elections every two years.

18 www.commoncause.org '98 Percent of House Incumbents Win Reelection in 2000,' Common Cause study, 11/14/00, p. 1. I modified the incumbency statistic to account for the two House races that were not decided when the study was released (FL District 22 and NJ District 12, which both incumbents won).

19 I modified the statistic to account for the Washington Senate race that was undecided when the study was released. The challenger Maria Cantwell (D) won.

20 Based on FEC data released on 3/26/01, Center for Responsive Politics (2001c) and author's calculations.

21 Averages include all incumbents and major party challengers, but not third party challengers.

22 Two of the most common requirements for receiving public funding are signature requirements (a certain number of voters in the district must sign a petition supporting the candidate) or poll requirements (candidates or their parties must have a certain threshold level of support in recent public opinion polls). For example, a candidate is eligible for public funding in the general presidential election if he or she is the nominee of a party that received at least 5% of the vote in the previous presidential election.

23 In Clinton's departing days at the White House, he pardoned Marc Rich, a fugitive financier wanted for tax evasion and racketeering. His ex-wife Denise Rich had given hundreds of thousands in campaign contributions to the Democratic Party, creating a strong impression that the pardon had been purchased.

24 www.gallup.com All public opinion data here are from the Gallup Organization's polls on campaign finance, most recently conducted on Oct. 6-9, 2000. Unless noted otherwise, they were based on telephone interviews with a randomly selected national sample of 1,052 adults 18 years and older. The margin of error is +/- 3%, although question wording and practical survey difficulties can introduce additional bias.

25 Based on a sample of 568 national adults. Margin of error +/- 5%

26 Question: 'As you may know, soft money is the amount of money that individuals, businesses, and labor unions are legally allowed to contribute to the national political parties. Would you favor or oppose new federal laws limiting the amount of soft money that any individual or group can contribute to the national political parties?'

27 Gallup News Service poll released 10/18/00.

28 In the 2000 campaign, Republicans and Democrats raised approximately equal amounts of soft money, but Republicans outraised Democrats in hard money \$447 million to \$270 million. From 'Influential Senate Republican Says He Would Back Ban on Soft Money as Part of Deal,' *The New York Times*, Friday, 3/23/01, A12.