
Representative Democracy versus Corporate Democracy: How Soft Money Erodes the Principle of “One Person, One Vote”

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This selection first appeared in the *Harvard Journal on Legislation* 35, no. 2 (summer 1988): 377–86. In this article Senator Feingold (D-Wisc.) explains the concern with soft money that motivates the legislation he and Senator John McCain (R-Ariz.) coauthored. The McCain-Feingold bill is not the only bill (in fact, there are many) introduced that would further restrict contributions and expenditures in federal elections, but it has been the major vehicle for debate and amendment.

America’s electoral process is rooted in the principle of “one person, one vote,” but that principle is drowning in a flood of unlimited political campaign contributions that are, through their ability to secure privileged access to lawmakers, undermining the integrity of both our elections and the legislative process.¹

As candidates and parties battle to win elections, they are forced to raise ever-greater sums of money.² The current campaign finance system

1. The concept of “one person, one vote” has been exhaustively examined both in case law and in scholarly articles. Many commentators trace the phrase to Justice William Douglas’s majority opinion in *Gray v. Sanders*. See 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

2. Congressional candidates raised a total of \$790.5 million in the 1996 election cycle, a 20 percent increase from the \$659.3 million raised in 1992. See Federal Election Commission, *Congressional Fundraising and Spending Up Again in 1996*, April 4, 1997 (visited Apr. 27, 1998) (<http://www.fec.gov/press/canye96.htm>). The Democratic and Republican parties raised \$638.1 million combined in the 1996 election cycle, increasing party fundraising 43 percent from their total of \$445 million in the 1992 cycle. See Federal Election Commission, *FEC Reports Major Increase in Party Activity for 1995–96*, Mar. 19, 1997 (visited Apr. 27, 1998) (<http://www.fec.gov/press/plye1.htm>).

has taken on the dynamic of the Cold War arms race, with both sides unwilling to relinquish real or perceived political advantages that come from spending more and more money, particularly on negative campaign advertising. The course that both parties so zealously pursue poses a serious threat to the integrity of our democratic process.

That threat is the transformation of our representative democracy into what I call a corporate democracy, in which the “one person, one vote” principle is supplanted by a system that allocates influence over the political process in proportion to the amount of money an individual or group puts into that process.

In this essay, I will describe the insidious role that so-called “soft money” is playing in the transformation of our representative democracy into a corporate democracy and explain how the campaign finance reform legislation I have introduced with Senator John McCain (R-Ariz.), the McCain-Feingold bill,³ would end the pernicious influence of soft money. I will also address the argument that a ban on soft money violates the Constitution.

CORPORATE DEMOCRACY AND SOFT MONEY

I learned about the difference between representative and corporate democracy at an early age. When I was thirteen years old, a relative gave me a gift of one share of stock in the Parker Pen Company, an economic fixture in my hometown of Janesville, Wisconsin. My relative wanted me to learn something about how the stock market worked. My one share was probably worth about \$13 then, but my father told me that because I owned a share of stock, I owned a small piece of the company. Therefore, I was entitled to a vote at the company stockholders’ meeting.

By that age, I was already excited about the political process, and I thought voting at a shareholders’ meeting was like voting in an election. I was anxious to exercise my new power so I asked my father when I could go to the shareholders’ meeting to vote.

3. See *infra* note 17.

My father explained that I could go to the meeting but my vote would not count for much, because the number of votes you get at a shareholders' meeting depends on how many shares you have. Needless to say, my enthusiasm was somewhat dampened, but I quickly came to understand how power in a corporation is apportioned according to the size of the stake held in that corporation by various investors.⁴

This makes sense in the corporate world because those who have invested the most should have the most say about a corporation's direction. But the model of power in a corporation is antithetical to the democratic process of electing representative lawmakers and, by extension, making public policy. I am deeply disturbed that our representative democracy, while still existing in theory, has been transformed in practice to the corporate model.

Soft money contributions, which can run into the hundreds of thousands of dollars from one donor alone, are the main engine behind this transformation. Soft money is a popular umbrella term describing contributions to political parties from sources that are otherwise prohibited from making contributions in connection with federal elections, such as corporations and labor unions, or by wealthy individuals in amounts greater than the limits allowed by federal law.⁵ Because they

4. Shareholders in a corporation usually vote *pro rata*, rather than *pro capita*. See, e.g., *Davis v. American Telephone and Telegraph Co.*, 478 F.2d 1375 (2d Cir 1973):

Even assuming that appellee's public character is sufficient to subject it to Fourteenth Amendment requirements, certainly it does not exercise "normal governmental" authority, and its actions, to the extent they affect stockholders qua stockholders, affecting each stockholder in proportion to the number of shares he owns. . . . Therefore, the strict equal protection standard implicit in the phrase "one man, one vote" does not apply.

5. Corporations and unions are prohibited from making contributions or expenditures "in connection with any election to any political office:" 2 U.S.C. § 441b(a) (1994). Corporations have been barred from making such contributions since the passage of the Tillman Act of 1907, ch. 420, 34 Stat. 846. Labor unions have been similarly barred since 1943, when Congress passed the Smith-Connally Act as part of the War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943). Individuals have been limited to contributing \$1,000 to candidates and \$20,000 per year to national political parties since passage of amendments to the Federal Election Campaign Act in 1974. See 2 U.S.C. § 441 a(1) (1994). Because it is not subject to

are unlimited, soft money donations have the largest potential to tilt the electoral playing field away from ordinary Americans in favor of very wealthy individuals and organizations.⁶

Soft money was not created by federal law but by the evolution of party fund-raising strategies in response to Federal Election Commission advisory opinions.⁷ Originally, soft money was only used for party-building activities such as get-out-the-vote campaigns and voter registration drives. But in the last election cycle, the parties paid for much of their tens of millions of dollars of television advertising supporting candidates with soft money.⁸ The soft money channel, deeper than a well and far wider than a church door, has allowed millions upon millions of dollars that would have otherwise been barred by federal law to pour into our political system. And, just as floodwaters can wash away everything in their path, so has the flood of soft money overwhelmed our political process.

It has been widely publicized, for example, that during the 1995–1996 election cycle, the Republican and Democratic parties raised more

the restrictions of federal law, soft money is sometimes referred to by the Federal Election Commission as “non-federal money.”

6. Philip Morris Companies, Inc., including its executives and subsidiaries, donated slightly more than \$1.4 million to the Republican and Democratic parties between January 7, 1997 and December 31, 1997, making it the largest soft money donor last year. See Common Cause, *Party Favors: An Analysis of More Than \$67 Million in Soft Money Given to Democratic and Republican National Party Committees in 1997* (Feb. 1997) (visited Apr. 27, 1998) (<http://www.commoncause.org/publications/partyfavors6.htm>). It also was the biggest soft money contributor in the 1996 cycle, giving over \$3 million to the political parties. See Center for Responsive Politics, *1995–96 Soft Money Update* (visited Apr. 27, 1998) (<http://www.crp.org/btl/top10soft.htm>). The top 10 soft money contributors for 1997 gave over \$337,000 each. See Common Cause, *supra*.

7. For a good description of the development of the soft money loophole, see *Campaign Finance Reform: A Sourcebook*, 168–73 (Anthony Corrado et al., ed., 1997). FEC Advisory Opinion 197810 may have opened the soft money door. That opinion, responding to inquiries from Kansas State Republican Party, states: “It is also the Commission’s view that with respect to an election in which there are candidates for Federal office, expenditures for registration and get-out-the-vote drives need not be attributed as contributions to such candidates unless the drives are made specifically on their behalf.” See *id.* at 191.

8. See *id.* at 175.

than \$263 million in soft money, more than a threefold increase over the previous presidential election cycle, 1991–1992.⁹

Despite almost continuous news reporting of fund-raising scandals and several congressional investigations into allegations of illegal fund-raising, and despite the growing public outrage surrounding political fund-raising, the soft money chase continues apace. In fact, the pace is picking up. During calendar year 1997, the FEC reports, the Democratic and Republican parties raised a total of more than \$67 million in soft money. This was \$8 million more than the parties raised in 1995 and more than double the amount raised in 1993, the analogous year in the previous presidential election cycle.¹⁰

I believe this huge amount of unregulated money represents a threat to the stability and integrity of our representative political system. That is why soft money should be banned.

I am convinced that large campaign contributions are frequently made with at least the expectation of some kind of benefit returning to the contributor. Consider the results of a *Business Week*/Harris poll, which surveyed 400 senior executives from large public corporations, asking questions regarding their opinions on campaign finance and how best to reform the current system.¹¹ Half the respondents claimed that securing access to lawmakers “to gain fair consideration on issues affecting our business” constituted the major reason for making political contributions—and an additional 27 percent acknowledged that seeking access was at least part of the reason for making contributions. Fifty-eight percent said fear of losing influence to labor or environmental organizations or being placed in a competitive disadvantage to a rival was at least one reason, if not the major reason, for making contributions. Forty-one percent acknowledged that at least part of the reason

9. See Federal Election Commission, *Political Parties' Fundraising Hits \$881 Million*, Jan. 10, 1997, available in LEXIS, CMPGN/ELCT 96 Library.

10. See Common Cause, *supra* note 6.

11. See Amy Bonus and Mary Beth Regan, *The Backlash Against Soft Money*, *Bus. Wk.*, Mar. 31, 1997, at 34.

they made political contributions was the hope of receiving “preferential consideration on regulations or legislation benefiting our business.”¹² Potential loss of access to lawmakers and other policy professionals was clearly a concern for the respondents.

Some lawmakers have learned to play on this expectation. On one hand, they extend the offer of special access, as one fund-raising letter, sent out over the signature of Senator Mitch McConnell (R-Ky.), chairman of the National Republican Senatorial Committee, did last year. Senator McConnell promised “the rewards of leadership, friendship, effectiveness and *exclusivity*” to contributors in exchange for a \$5,000 contribution that would secure membership in a group called the Presidential Roundtable.¹³ On the other hand, lawmakers can make it clear to the representatives of various special interests that their chances of being heard when they drop by to discuss legislation may have a direct relationship to their ability to raise and contribute money to their legislators. In 1995, for example, the *Washington Post* reported that House Majority Whip Tom DeLay of Texas maintained a ledger listing amounts and percentages of money that the 400 largest political action committees contributed to Republicans and Democrats during the previous two years.¹⁴ Large contributors to Republicans were labeled “Friendly,” the others “Unfriendly.”¹⁵ The *Post* story then recounted a meeting between DeLay and an unnamed corporate lobbyist:

“See, you’re in the book,” DeLay said to his visitor, leafing through the

12. *Id.* at 36. Sixty-eight percent of the business executives polled agreed with the statement, “the system is broken and is in need of fundamental reform.” *Id.* When the Harris poll-takers offered a list of possible reforms, 68 percent of the respondents recommended ending unlimited “soft money” contributions. *Id.*

13. Letter from Sen. Mitch McConnell, Chairman of the Nat’l Republican Senatorial Comm. at 4 (Aug. 30, 1997) (emphasis added) (on file with author).

14. See David Maraniss and Michael Weiskopf, *Speaker and His Directors Make the Cash Flow Right*, *Wash. Post*, Nov. 27, 1995, at A1. This is one of many press reports on the nexus between contributions and political influence. See, e.g., Leslie Wayne, *A Special Deal for Lobbyists: A Getaway with Lawmakers*, *N.Y. Times*, Jan. 26, 1997, at 1.

15. See Maraniss and Weiskopf, *supra*, note 14, at A1.

list. At first the lobbyist was not sure where his group stood, but DeLay helped clear up his confusion. By the time the lobbyist left the congressman's office, he knew that, to be a friend of the Republican leadership his group would have to give the party a lot more money.¹⁶

Anecdotes like this illustrate the transformation that is so deeply disturbing to me. With our representative democracy becoming a corporate democracy, the amount of money one can put into the electoral process determines the "voice" one has in the legislative process. This transformation raises fundamental issues about how our democracy is supposed to work, and who it is supposed to serve. In a representative democracy, elected officials are accountable to all people equally, but in a corporate democracy, they become the servants of those who give the most money. Those who have greater wealth can purchase a greater voice in determining the outcome of the public policy debates, for large campaign contributions easily translate into special access to lawmakers.

THE MCCAIN-FEINGOLD BILL:

A FIRST STEP TOWARD RECLAIMING OUR DEMOCRACY

For more than two years, I have worked closely with Senator McCain and several other Senate colleagues on a bipartisan, comprehensive campaign finance reform proposal, which has come to be known as the McCain-Feingold bill.¹⁷ This legislation, which is now supported by a majority of the United States Senate, would take an important first step toward reversing the transformation of our political system to a corporate democracy.

16. *Id.*

17. The first campaign finance legislation that Senator McCain and I introduced died in a filibuster in June 1996. See Senate Campaign Finance Reform Act of 1996, S. 1219, 104th Cong. (1996). We reintroduced the legislation as Senate Bill 25 on January 21, 1997. See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997). A modified version, introduced on September 25, 1997, was considered on the floor of the Senate in September and October 1997, and again in late February of this year.

The centerpiece of the bill is a ban on soft money.¹⁸ It would require all contributions to the national political parties to comply with the restrictions on hard money contributions in current federal election law.¹⁹ In addition, it would bar federal officeholders and candidates for those offices from soliciting, receiving, or spending soft money.²⁰ Further, to prevent the loophole from simply migrating from national to state party fund-raising, McCain-Feingold would prohibit state and local political parties from spending soft money on any activity that might affect a federal election.²¹ It would also prohibit the political parties from fund-raising for, or transferring money to, nonprofit organizations.²²

18. As amended on the floor in February 1998, the bill contains a number of other important reforms, including restrictions on corporate and union spending on campaign advertisements close to an election, a requirement for disclosure of funding sources for campaign advertisements by outside groups, incentives for candidates to curb the amount of personal wealth they contribute to their campaigns, a ban on fund-raising on federal property, and various provisions designed to improve FEC disclosure and enforcement. See Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997).

The September 29, 1997 version of the bill was introduced during the February 1998 campaign finance reform debate as an amendment to S. 1663, the Paycheck Protection Act, introduced by the Majority Leader, Sen. Trent Lott (R-Miss.). See 144 Cong. Rec. S933-38 (daily ed. Feb. 24, 1998). Subsequently, the Senate adopted an amendment proposed by Sen. Olympia Snowe (R-Me.). That amendment replaced § 201 of McCain-Feingold with provisions that define and regulate “electioneering communications,” a term referring to radio and television advertisements clearly identifying a candidate for federal office that are made within 60 days before a general election or within 30 days of a primary election, and that are broadcast to an audience that includes the electorate for that election. See *id.* at S938-39.

19. See *id.* at S933-34. Section 101 creates a new section, § 324, of the Federal Election Campaign Act. The requirement that national party committees raise only hard money is contained in § 324(a)(1). See *id.* at S933. The requirement applies to all entities controlled or maintained by the political party committee and its officers and agents. See *id.*

20. See *id.* at S933-34.

21. See *id.* at S933. During the 1996 elections, both political parties frequently transferred soft money to state committees, which under current FEC regulations are permitted to fund a larger percentage of their activities with soft money. See, e.g., Kevin McDermott, ‘Soft’ Money Sent Through Illinois, *St. Louis Post-Dispatch*, Oct. 6, 1997, at B1; Jill Abramson and Leslie Wayne, *Democrats Used the State Parties To Bypass Limits*, *N.Y. Times*, Oct. 2, 1997, at A1.

22. See 144 Cong. Rec. S933-34 (daily ed. Feb. 24, 1998). The most notorious of such

These provisions would bring some sanity back to the federal election laws by closing the most prominent loophole in the system today. Few opponents of reform defend soft money, but some do argue that the ban would run afoul of the Supreme Court's 1976 decision in *Buckley v. Valeo*, the landmark U.S. Supreme Court decision striking down certain parts of the post-Watergate amendments to the Federal Election Campaign Act.²³

Campaign finance reform bills often raise difficult questions of constitutional law. Whether Congress has the power to ban soft money, however, is not one of them. Last September, 126 constitutional scholars co-signed a letter from the Brennan Center for Justice at the New York University School of Law stating that the soft money ban contained in the McCain-Feingold bill will pass constitutional muster.²⁴

In *Buckley v. Valeo*, the Supreme Court held that individual contributions can be limited—the current federal limit, which the Court upheld, is \$1,000 per election from an individual to a candidate.²⁵ The Court found that restrictions on the source and size of contributions to candidates are permissible in order to protect our electoral system from corruption or the appearance of corruption. The Court concluded that unrestricted contributions could undermine the integrity of our elections and our democracy.²⁶

transfers in the 1996 campaign was the Republican Party's gift of \$4.6 million to Americans for Tax Reform to pay for direct mail and phone bank activities in the last weeks before the election. See, e.g., Charles Babcock, *Anti-Tax Group Got Big Boost from RNC as Election Nears*, *Wash. Post*, Dec. 10, 1996, at A4.

23. 424 U.S. 1 (1976) (per curiam).

24. Letter from the Brennan Ctr. for Justice to Sens. John McCain and Russell Feingold (Sept. 22, 1997) (reprinted in *Cong. Rec.* at S10104 (daily ed. Sept. 29, 1997)) (hereinafter "Brennan Center Letter").

25. See 424 U.S. at 23–35; 2 U.S.C. § 441a (a)(1)(A) (1994).

26. See 424 U.S. at 26–27. The Court noted:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after

This is exactly what is happening with soft money. In recent years, both political parties have collected soft money contributions and used them to benefit federal candidates.²⁷ The McCain-Feingold bill would enforce the law's current restrictions on the size and sources of contributions that the parties can accept. The suggestion that closing the soft money loophole that currently allows prohibited money to make its way back into the system violates a constitutional right is simply wrong.

As the 126 constitutional scholars stated in their letter:

[S]oft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials. . . . The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. . . . [C]losing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.²⁸

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the 1972 election demonstrate that the problem is not an illusory one.

Id. at 26–27 (citation omitted). The scandals of the 1996 election, perhaps best symbolized by Roger Tamraz, who gave hundreds of thousands of dollars in soft money to the Democratic National Committee hoping to obtain the Clinton administration's support for an oil pipeline deal, demonstrate that the problem still exists. See David Rosenbaum, *Oilman Says He Paid for Access by Giving Democrats \$300,000*, *N.Y. Times*, Sept. 19, 1997, at A1; Marc Lacey and Robert Jackson, *Financier Says Donations Opened White House Doors*, *L.A. Times*, Sept. 19, 1997, at A1.

27. The Annenberg Public Policy Center estimates that the Democratic National Committee spent \$44 million and the Republican National Committee \$24 million on so-called issue ads supporting President Clinton and Bob Dole in the last election. A significant portion of these expenditures came from the parties' soft money funds. See Deborah Beck et al., Annenberg Public Policy Ctr., *Issue Advocacy Advertising During the 1996 Campaign* 34, 55 (visited Apr. 27, 1998) (<http://www.asc.upenn.edu/appe/reports/rep16.pdf>); see also Abramson and Wayne, *supra* note 21.

28. See Brennan Center Letter, *supra* note 24.

process. Lawmakers solicit contributions by promising special access or threatening to cut off access. The great majority of the American people, unable to make large donations, are angry and frustrated at the belief they are being excluded from their own political system.²⁹ Voter turnout in the last presidential election hit its lowest level in seventy-two years.³⁰ We must not ignore these warning signs about the health of our democracy.

CONCLUSION

While it is not the only problem that reformers must address, soft money is the hard core of the current campaign funding scandal. It is imperative that we work to limit the influence of money on the process of making public policy, and banning soft money is the first step.

Unfortunately, even taking this one simple step for reform has not been easy in the United States Senate. In late February, we were unable to muster the necessary sixty votes on the Senate floor to break a

29. Public opinion polls have consistently shown that the public wants reform of the current campaign finance system. For example, in a Gallup/*USA Today*/CNN poll conducted between October 3 and October 5, 1997, 77 percent of the respondents agreed with the statement, "Elected officials [are] influenced mostly by pressure from campaign contributors." Fifty-nine percent agreed with the statement, "Elections [are] for sale to whoever can raise the most money." Fifty-nine percent also said they believed that, no matter how the law reads, special interests will "always find a way to maintain power." Fifty-six percent said the most important goal of campaign finance reform is "protecting government from influence by contributors." See Tom Squiteri, *Thompson Challenges President, Calls on Clinton to 'Step Up to the Plate,' USA Today*, Oct. 8, 1997, at A6.

In a *Los Angeles Times* poll conducted between September 6 and September 9, 1997, 63 percent of the respondents said the campaign finance system needs either "a fundamental overhaul" or "major improvements." Seventy-three percent believed both major political parties were guilty of fund-raising abuses. Seventy-nine percent believed that limiting the role of soft money should be a goal of reform. See Jonathan Peterson, *The Times Poll: Clinton Retains High Job Rating: Gore Image Hurt*, *L.A. Times*, Sept. 12, 1997, at A1.

30. See Curtis Gans, *Voter Malaise Hobbles the Nation*, *Newsday*, Nov. 11, 1996, at A33 (reporting the Committee for the Study of the American Electorate's finding that voter turnout dropped in the 1996 elections to 48.8 percent of eligible voters). See generally Federal Election Commission, *About Elections and Voting* (visited Apr. 14, 1998) (<http://www.fec.gov/pages/electpg.htm>) (indexing FEC voter turnout information).

threatened filibuster, so, despite having majority support, McCain-Feingold did not pass.³¹ But a minority cannot prevail indefinitely. In the end, the American people will decide if they want a representative democracy or a corporate democracy, and the Congress will heed their wish. I am confident they will choose the right course.

31. A motion to invoke cloture and end debate on McCain-Feingold, which required 60 “aye” votes, failed by a margin of 51–48. See 144 *Cong. Rec.* S1045 (daily ed. Feb 26, 1998).