2000

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CAMPAIGN FINANCE REFORM: A BUSINESS PERSPECTIVE

Charles E.M. Kolb* and Christopher Dreibelbis**

America now enjoys the distinction of being the world’s sole superpower as well as the world’s greatest participatory democracy. Although our reputation as a superpower is beyond question, our practice is somewhat open to doubt when it comes to democracy. These doubts are fostered by a significant decline in voter turnout in recent years, not only for the off-year congressional elections, but also for the four-year presidential election cycles.1

I. WHY CAMPAIGN FINANCE REFORM MATTERS

Although there is no directly established correlation between voter participation and campaign financing, recent surveys strongly suggest that one of the key reasons why people are choosing not to vote is because of their disgust with the current system of campaign finance.2 The 2000 presidential election cycle provides the latest terrain on which the effort to reform our campaign finance system is being played.3 Both

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2. See, e.g., National Ass’n of Secretaries of State, New Millennium Project Part I: America Youth Attitudes on Politics, Citizenship, Government and Voting (visited Aug. 31, 2000) <http://www.tarrance.com/nass/default.asp?strTitle=nass%20new2%20millenium%20Project>. The Tarrance Group, Inc. and Lake, Snell, Perry & Associates conducted this survey during November 14-19, 1998. See id. The survey questioned 1,005 youth (ages 15-24) and asked voting-age survey respondents “for their opinion of why many young people do not vote.” Id. The plurality of respondents said it was because “they don’t think their vote makes a difference.” Id. In the same survey, 64% of all respondents agreed that “government is run by a few big interests looking out for themselves, not for the benefit of all.” Id.

major party candidates have advanced their own reform ideas against a backdrop of bipartisan abuse of the campaign finance laws during the 1996 presidential campaign.⁴

Public opinion polls, however, tend to list campaign finance reform at or near the bottom of issues about which the public cares.⁵ When people are asked whether they believe our campaign finance system is broken, however, a large majority of those asked answer affirmatively.⁶ Likewise, a spring 2000 survey by News Hour with Jim Lehrer of some 18,976 viewers found campaign finance reform heading the list of important election issues.⁷ The second most important issue was health care, which 7.9% of

⁴ See Bush-Cheney 2000, Campaign Finance Reform (visited Aug. 17, 2000) <http://www.georgewbush...1&bhab=-1&FormMode=FullText&ID=35> for Republican presidential nominee, Texas Governor George W. Bush’s proposal to ban “soft” money donations from corporations and labor unions, but not individuals. Governor Bush also supports raising individual contribution limits and instant disclosure of contributions. See id. See also Katharine Q. Seelye, Gore Proposing Endowment Fund To Pay for Political Campaigns, N.Y. TIMES, Mar. 27, 2000, at A1 for a report on Democratic nominee, Vice President Al Gore’s proposal to pass the McCain-Feingold legislation and then establish an endowment to fund campaigns. Contributions from individuals, labor unions, corporations, and other sources would fund the endowment. See id. The money from the endowment would go to House and Senate candidates in general elections who promise not to accept money from other sources. See id. Gore also relies on broadcasters’ donations of free air time to campaigns. See id. For examples of abuses during the 1996 campaign, see S. REP. NO. 105-167, at 31-50 reprinted in 1998 U.S.C.C.A.N. 4557-9506 (1998). See also Roberto Suro, Audits Fault Clinton, Dole on ’96 Party Ads, WASH. POST, Dec. 2, 1998, at A1 (discussing the use of illegally raised funds by both the Clinton and Dole campaigns); Roberto Suro & John F. Harris, Reno is Now Probing Clinton’s Fund-Raising, WASH. POST, Sept. 21, 1997, at A1 (reporting on Attorney General Janet Reno’s decision to investigate allegations of illegal use of White House telephones for fundraising during President Clinton’s 1996 campaign); Bob Woodward, Gore Was ‘Solicitor-in-Chief’ in ’96 Reelection Campaign, WASH. POST, Mar. 2, 1997, at A1 (reporting on Vice President Al Gore’s role in soliciting millions of dollars in campaign contributions).

⁵ See Fox News/Opinion Dynamics (visited Aug. 14, 2000) <http://www.nationaljournal.com/scripts/printpage.cgi?/members/polltrack/200.../0mosti mportant.ht> [hereinafter Fox News]. Opinion Dynamics conducted the poll on July 19-20, 2000 and found that one percent of those asked to name the most important issue that the federal government should address chose campaign finance reform.


⁷ NewsHour with Jim Lehrer: A Look at the Agenda (PBS Television broadcast, Jan. 4, 2000) (summarizing a number of responses received from viewers and guests from June to December 1999 on what the 2000 Presidential campaign should focus). Of the 18,976 responses, the following results indicate the percentage of those believing an issue to be most important: Campaign Finance – 11.8%, Health Care – 7.9%, Education – 7.7%,
the respondents selected. How does one explain these two apparently contradictory surveys? One explanation is fairly simple: most Americans care more about the issues that touch them and their families directly. Accordingly, issues such as health care, education, crime, and the environment are typically mentioned as top priorities.

Moreover, most Americans do not contribute to political campaigns. They have other priorities for their money, such as saving for a home, college education, a new car, or even a vacation. In fact, fewer than one percent of Americans make political contributions. Those who do not contribute may well conclude that they have no stake in the American political system, especially when they see or read about thousands of “big money” donors making six-figure contributions to the two main political parties. Some of those who choose not to give and not to vote draw a logical, albeit cynical, conclusion: We don’t give, and nobody listens to us. Why should we bother to vote?

Likewise, many people are increasingly concerned about the role played by special interests in politics and government. More often than not, these special interests are seen as the American business community—the main providers of unregulated “soft” money contributions to state and national political parties.

Foreign Policy – 7.6%, Poverty/Wage Gap – 5.9%, Leadership – 5.4%, Budget/Debt – 5.2%, Environment – 5.0%, Role of Government – 4.3%, Entitlements – 4.1%. See id.

8. See id.

9. See Fox News, supra note 5. Respondents named education (24%), health care (23%), social security (20%), and taxes (17%) as the top issues the federal government should address. See id.


13. “Hard” money refers to campaign contributions that are subject to the limits and restrictions of federal law. See generally Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431-455 (1994). Under the law, individuals and political action committees (PACs) are allowed to contribute directly to political campaigns for federal office with limits to how much each can give. See generally id. Individuals are allowed to donate $1000 per candidate per election (primary and general elections count as separate elections) with an aggregate limit of $25,000 that each individual can give to candidates, PACs, and parties in a given calendar year. See id. § 441a(a). PACs are allowed to contribute $5000 per candidate per election with no aggregate limit. See id. Individuals are allowed to contribute up to $5000 per calendar year to PACs. See id.

“Soft” money refers to funds donated to political parties and their affiliates, which fall
II. THE ROLE OF AMERICAN BUSINESS: FUNDER OF THE SYSTEM OR CATALYST FOR REFORM?

It is in this context—and mindful of the scandals emanating from the 1996 presidential election cycle—that the Trustees of the Committee for Economic Development (CED) decided in 1997 to study America’s system of campaign financing.14 Founded in 1942, CED is a business-led research and policy organization that includes more than 200 senior corporate executives and university presidents. The CED mission is “to propose policies that bring about steady economic growth at high employment and reasonably stable prices, increased productivity and living standards, greater and more equal opportunity for every citizen, and an improved quality of life for all.”15 Those Trustees who wanted CED to address campaign finance reform did so because they believed that a political system that was financed in a manner that many considered to be corrupt, or corrupting, undermined America’s democratic institutions and hurt the business community—and ultimately our economy in the process.16

CED’s Program Committee authorized the campaign finance reform study in November 1997. A subcommittee was then established by

outside the limits and restrictions imposed by federal law. Corporations, labor unions, interest groups, and foreign interests that cannot contribute directly to candidates under FECA can all contribute unlimited amounts of money to party organizations. See FEC Advisory Opinion, 1978-10 (Part A) (Aug. 29, 1978). Individuals can also contribute unlimited amounts of money to parties. Party committees raising and spending “soft” money must, however, disclose contributions and disbursements. See, e.g., Federal Elections, 11 C.F.R. §§ 104.8(e)-(f), 104.9(c)-(d) (2000). FECA severely limits party committees from directly aiding candidates for office, but parties are allowed to spend unlimited funds for party-building activities such as voter-registration, get-out-the vote drives, brochures, buttons, bumper stickers, and other related materials and activities. See 2 U.S.C. § 431(8)(B).

14. CED was founded in 1942 by the late Paul Hoffman for the express purpose of devising strategies to avoid economic recession after World War II. CED is an independent research and policy organization, and its more than 200 Trustees determine the issues the organization will address. These Trustees then work in subcommittees assisted by professional staff and outside experts to prepare policy statements, which include findings and recommendations on domestic as well as international issues. CED’s Research and Policy Committee has the responsibility for approving CED policy statements prepared by the various subcommittees. Subjects are initially decided upon by the Program Committee, which is a subset of the Research and Policy Committee.

15. COMMITTEE FOR ECONOMIC DEVELOPMENT, INVESTING IN THE PEOPLE’S BUSINESS: A BUSINESS PROPOSAL FOR CAMPAIGN FINANCE REFORM iv (1999) [hereinafter CED REPORT].

16. For example, see Letter from Edward B. Fitzgerald, Managing Director, Woodmont Associates, to Sol Hurwitz, then President of CED (Oct. 25, 1996) (on file with author). In the letter urging CED to study campaign finance reform, Mr. Fitzgerald writes, “the current political campaign certainly makes it apparent to me that our campaign finance practices are out of control and are not well serving our nation.” Id.
CED's president who asked two CED Trustees, Edward Kangas, Global Chairman of Deloitte Touche Tohmatsu, and George Rupp, President of Columbia University, to co-chair the study.\textsuperscript{17} After a nearly yearlong study, CED's campaign finance reform subcommittee recommended a comprehensive set of reforms to address the problems it identified in the current campaign finance scheme.\textsuperscript{18} In doing so, these business and university leaders reflected upon their own experience with the existing system, and in the case of some of the business leaders involved, noted that they had been pressured repeatedly by both political parties to contribute both hard and soft dollars to individual campaigns and the parties. Some of them had clearly had enough and were willing to say so publicly. As Edward Kangas explained when the CED report was released on March 18, 1999, "'[a] government which is overly susceptible to money will be viewed at the least as suspect, and at the worst as corrupt. Bad government is bad for business.'\textsuperscript{19}

CED's report both raised eyebrows and irritated some important politicians. When CNN covered the CED report in its March 18, 1999 edition of \textit{AllPolitics.com}, the lead-in to the story announced the episode as a "man bites a dog" story.\textsuperscript{20} Here was a group of business leaders calling the campaign finance system "broken" when, after all, it was the larger business community that for the most part funded that same system. What was going on here?

\textsuperscript{17} The members of the CED Subcommittee on Campaign Finance Reform are: Edward A. Kangas, Global Chairman, Deloitte Touche Tohmatsu, Co-Chair; George Rupp, President, Columbia University, Co-Chair; Alan Belzer, Retired President & COO, AlliedSignal Inc.; John Brademas, President Emeritus, New York University; John B. Cave, Principal, Avenir Group, Inc.; W. D. Eberle, Chairman, Manchester Associates, Ltd.; Patricia O'Donnell Ewers, Former President, Pace University; Edmund B. Fitzgerald, Managing Director, Woodmont Associates; Rosemarie Greco, Principal, Greco Ventures; William F. Hecht, Chairman, President & CEO, PP&L Resources, Inc.; Robert J. Hurst, Vice Chairman, Goldman, Sachs & Co.; Eamon M. Kelly, Retired President, Tulane University; Thomas J. Klutznick, President, Thomas J. Klutznick Co.; Victor A. Pelson, Senior Advisor, Warburg Dillon Read Inc.; Peter G. Peterson, Chairman, The Blackstone Group; Ned Regan, President-designate, Baruch College; E.B. Robinson, Jr., Chairman Emeritus, Deposit Guaranty Corp.; Daniel Rose, Chairman, Rose Associates, Inc.; Howard Rosencrantz; Chief Executive Officer, Grey Flannel Auctions; Rocco Siciliano; Stephen Stamas, Chairman, The American Assembly; Paula Stern, President, The Stern Group; James A. Thomson, President & CEO, RAND; Anthony Corrado, Associate Professor of Government, Colby College, Project Director; Michael S. Berman, President, The Duberstein Group, Inc., Advisor; Kenneth Gross, Skadden, Arps, Slate, Meagher & Flom, Advisor; Trevor Potter, Wiley, Rein & Fielding, Advisor.

\textsuperscript{18} See CED REPORT, supra note 15, at 4-6.


\textsuperscript{20} Id.
III. CED'S REPORT AND RECOMMENDATIONS

CED's report and its recommendations are contained in a policy statement entitled, Investing in the People's Business: A Business Proposal for Campaign Finance Reform. The report contains a discussion of how the current campaign finance system works, the problems noted with that system, and a series of recommendations that are intended to be taken as a comprehensive package of reform.

The report's opening paragraph makes clear in no uncertain terms the fundamental perspective of the CED Trustees who prepared and endorsed the document:

The American public believes that our campaign finance system is broken. The vast majority of citizens feel that money threatens the basic fairness and integrity of our political system. Two out of three Americans think that money has an "excessive influence" on elections and government policy. Substantial majorities in poll after poll agree that "Congress is largely owned by the special interest groups," or that special interests have "too much influence over elected officials." Fully two-thirds of the public think that "their own representative in Congress would listen to the views of outsiders who made large political contributions before a constituent's views."[2]

While the report details the concerns about this campaign finance system for the public at large and our democracy in particular, it also lays out frankly the worries that the CED Trustees have as "business leaders":

As business leaders, we are also concerned about the effects of the campaign finance system on the economy and business. Americans identify "special interests" principally with corporations. A vibrant economy and well functioning business system will not remain viable in an environment of real or perceived corruption, which will corrode confidence in government and business. If public policy decisions are made—or appear to be made—on the basis of political contributions, not only will policy be suspect, but its uncertain and arbitrary character will make business planning less effective and the economy less productive. In addition, the pressures on businesses to contribute to campaigns because their competitors do so will increase. We wish to compete in the marketplace, not in the political arena.[3]

22. Id. at 1 (footnotes omitted).
23. Id.
Notable in its approach, the CED report does not say that money in politics is bad for the country or the economy. The concern is over how those dollars—particularly the unregulated “soft” dollars that go to the political parties—are raised. This distinction is an important one to bear in mind, and it is a point which often distinguishes the CED recommendations from those advanced by others in the reform community who would prefer to replace the current system with complete public financing of political campaigns. The CED subcommittee considered—and explicitly rejected—total public financing.

The CED policy recommendations are based on four important findings or problems with the current financing system. In CED’s view, these problems—if left unaddressed—challenge and undermine the “basic principles of democratic government.”

1. Money and fundraising have become too important and demanding in American political life. The pressure on incumbents, and especially challengers, to raise money is enormous, especially given rising campaign costs. The average candidate for the U.S. House of Representatives spends over $500,000 campaigning, and the average U.S. Senate contender spends almost $3.8 million. Because “hard” dollar campaign limits restrict contributions from individuals to not more than $1000 per election cycle, candidates must spend considerable time raising the funds needed to wage effective campaigns.

2. The high cost of campaigns and the burdens of fundraising have reduced competition and the pool of qualified candidates in federal elections. One result of this situation is the growing importance of personal wealth to finance a campaign. Incumbents often use the power of incumbency to amass sizeable campaign war chests to discourage challengers from their own, as well as other parties. Consequently, the cam-

26. Id. at 2.
27. See Mike Allen, Multimillionaire Beats Ex-Governor for Senate Nod, WASH. POST, June 7, 2000, at A6. Former Goldman Sachs Chairman Jon Corzine recently broke the spending record in a U.S. Senate campaign for a seat from New Jersey by spending $34 million of his own money in the primary alone. See id. The previous record was set by Michael Huffington of California, who spent $30 million of his own money in a run for the U.S. Senate. See id.
28. See Federal Election Commission, Twenty Year Report (visited Sept. 6, 2000) <http://www.fec.gov/pages/20year1.htm> [hereinafter FEC, Twenty Year Report]. “Most of [the incumbents’] money went to create what one critic calls a ‘gold-plated permanent political machine’—a well-funded campaign organization used to discourage challengers from entering the race.” Id. (discussing the 1990 congressional elections).
campaigns of challengers—particularly in the House—are often underfunded. With relatively less or weak competition facing incumbents, voter choice is significantly diminished.

For incumbents, this situation ensures a low probability of being defeated. Since 1976, the reelection rate of incumbent members of the U.S. House of Representatives varied between 74.7% and 92.4%. If the outcome is therefore unlikely to change, it is not unreasonable for potential voters to become apathetic and cynical about the value of their participation in our election process.

3. The role of the small donor has declined. Rather than appeal to large numbers of people for smaller contributions, both incumbents and challengers respond to the obvious incentives created by the current rules: it is simply more cost-effective for them to concentrate their efforts on raising larger sums from fewer individuals. In 1998, 68% of the funds that congressional candidates received from individual donors came in contributions of $500 or more. This figure was far higher than the 41% some fourteen years earlier.

Additionally, this process encouraged candidates to rely more on PAC contributions than in the past. Although subject to limits on both the amounts able to be contributed and spent, PAC money comes from in-

29. See CED REPORT, supra note 15, at 17-18 ("Incumbents normally enjoy a very large advantage in campaign fundraising and are therefore capable, in most instances, of outspending their opponents by substantial margins.").


31. See DREW, supra note 12, at 65 (quoting Washington lobbyist Robin Wexler on the emergence of PACs and their influence over legislators as saying that: "This whole thing blew apart in the eighties, when congressmen could raise all this money. Before, they'd attend twenty-five-dollar barbeques.").


33. Id.

34. See Frank J. Sorauf, Introduction to Political Action Committees, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 123 (Anthony Corrado et al. eds., 1997). PACs essentially bundle voluntary individual donations into a single fund in order to support the interests of the sponsoring organization through political contributions. See id. Typically associated with the business community and special interest groups, the first PAC was founded by the Congress of Industrial Organizations (CIO) in 1943 in response to Congress's ban on direct contributions from labor unions to campaigns. See id. PACs have seen their numbers rise and their political clout skyrocket since FECA's passage in 1974. See id. From 1978 to 1996, PAC contributions to congressional candidates rose almost six-fold. See id.

35. See supra note 13 and accompanying text (discussing limits on PAC contributions).
dividends (as distinguished from unlimited "soft" money that comes from individuals, corporate treasuries, or union treasuries) and is typically seen as money from "special interests" seeking to buy or ensure access to a lawmaker.36

4. Unregulated funds raised and spent in federal elections have increased dramatically. Perhaps CED's principal concern was the growth of party "soft" money financing and candidate-specific "issue advertising." If "soft" money were, in fact, used as was originally intended in the 1974 campaign finance legislation, today's concerns most likely would not exist. What has occurred, beginning in the mid-1980s and mushrooming in the 1990s and 2000, is an enormous growth in unlimited "soft" money contributions.37 These dollars go directly to the political parties, ostensibly to fund party organizing efforts such as get-out-the-vote drives or general advertising about the parties. Instead, through exercising a loophole in the law, individuals, corporations, and labor unions avoid the "hard dollar" limits on individual donations and circumvent the laws that prevent corporations and labor unions from giving to political candidates.38

Now, "soft" money dollars are being used by the political parties to fund what amounts to candidate-specific advertising that is nonetheless characterized as otherwise legitimate issue advertising. This loophole is the result of the unintended consequences of the 1974 law and the subsequent decision by the United States Supreme Court in the 1976 case, Buckley v. Valeo.39 Under Buckley's so-called "magic words" test, as long as a campaign ad refrains from urging someone expressly to vote for or vote against a particular candidate, the ad is not covered by the fed-

36. See FEC, Twenty Year Report, supra note 28, at 3.
37. CED REPORT, supra note 15, at 3. CED's Vice President for Government Relations and Business Policy, Michael J. Petro, previously served as a fundraiser for the Democratic National Committee and several Democratic campaigns. In conversation with the authors, Mr. Petro indicated that in the mid-1980s when he received "soft" money contributions at the Democratic National Committee, the party had a strong preference for "hard" money, which could be used directly in campaigns. "Around 1986, I brought in a check for $100,000 and was told that I should have brought four checks of $25,000 each. The attitude there was that because only $25,000 from that check could go directly to campaigns, the remaining $75,000 was relatively useless and would have to be used to pay the rent and bills."
eral campaign finance laws and is not subject to funding limits.\textsuperscript{40} The extent to which “soft” money has become a problem is evident merely by comparing the 1996 and 2000 election cycles. In the 1996 cycle, the national party committees raised and spent more than $250 million in unlimited “soft” money.\textsuperscript{41} In 1998 (a non-presidential election year), the parties raised $201 million—a new record for a midterm election.\textsuperscript{42} The Republicans raised 112% more than in 1994, while the Democrats raised some 89% more.\textsuperscript{43} Much of this money comes in contributions of $100,000 or more.\textsuperscript{44} At this stage in the 2000 election cycle, the two major political parties have raised more than $250 million in “soft” money,\textsuperscript{45} and the expectation is that the final 2000 figure will be nearly twice the amount raised in 1996.\textsuperscript{46}

A libertarian or ardent foe of government regulation might look at this situation and wonder what the problem is with giving such large amounts of money, especially if the dollars are disclosed in a timely manner.\textsuperscript{47} While prompt disclosure would certainly be important, the current situation allows individuals to end-run the $1000 limit while corporations and labor unions are able to avoid the ban on their contributing to political

\textsuperscript{40} Buckley, 424 U.S. at 43-44. Early in the 2000 elections, “527 organizations” became a favored vehicle for groups and individuals who wanted to support or oppose candidates without being constrained by any limits and without having to disclose anything about themselves or their donors. The organizations are named after the section of the Tax Code (26 U.S.C. § 527) that applies to them. Under this section of the Code, “political organizations” are tax-exempt. 26 U.S.C. § 527(a) (1994). Before a recent change in the law, these organizations did not have to disclose any information about themselves or their donors. The new law dictates that these organizations that were previously exempt from disclosure requirements must now disclose information about the organization, such as the officers and expenditures, and must also disclose who its contributors are and how much they gave. See Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, § 2, 114 Stat. 477, 479 (codified at 26 U.S.C. § 527).

\textsuperscript{41} See CED REPORT, supra note 15, at 3.

\textsuperscript{42} See id.

\textsuperscript{43} See id.

\textsuperscript{44} See John M. Broder & Don Van Natta, Jr., 12,000 to Pay Tribute to the Fund-Raiser in Chief, N.Y. TIMES, May 22, 2000, at A1; Don Van Natta, Jr., Republicans’ Goal is $1 Million Each From Top Donors, N.Y. TIMES, Aug. 9, 1999, at A1.


\textsuperscript{46} See Don Van Natta, Jr., As Political Gifts Set a Record Pace, Some Stop Giving, N.Y. TIMES, May 2, 2000, at A1 (reporting that the parties raised $262 million worth of soft money in 1996 and projecting the 2000 figure as $500 million).

candidates. As the CED report notes:

These unlimited funding devices give a relatively small group of donors great influence in the electoral process. They facilitate relationships between monied interests and candidates that increase the possibility of corruption and undermine the accountability and transparency that safeguard against it. And they threaten to place candidates and their campaign issues in the shadow of intervening interest groups, whose unregulated expenditures drive their own political agendas.  

The four problems discussed above suggest that there is no simple solution or silver bullet to address the complexity of our broken campaign financing system. As suggested above, merely deregulating the system to allow for unlimited contributions from any individual (including corporations and labor unions), coupled with immediate public disclosure on the Internet, solves some concerns, but raises others. For example, one concern addresses whether a fund-raising “arms race”—in which the bar is continually raised—is healthy. Likewise, the opposite extreme of eliminating all individual, corporate, and labor money from campaigns and installing a taxpayer-subsidized, entirely publicly financed campaign system will have consequences on candidate competitiveness as well as regulatory and allocation issues.

Successful campaign finance reform must therefore balance several competing considerations. There must be a balance between regulation and First Amendment guarantees. At the same time, the system must encourage funding needed for robust political debate and competition (especially by challengers) to curtail the undue influence of money. It is important to reiterate that the CED Trustees and others who have endorsed the CED report do not believe that money in politics is bad. Conversely, when that money enters the system subject to appropriate, effective limitations—be it from individuals, PACs, corporations, or labor unions—it will encourage, rather than discourage, participation in our democracy.

48. CED REPORT, supra note 15, at 3.
49. See id. Senator Mitch McConnell has often cited the First Amendment as a basis for opposing campaign finance reform legislation. Senator McConnell’s arguments have been discussed and questioned in a paper issued by E. Joshua Rosenkranz, Executive Director, and Debra Goldberg, Senior Attorney, at New York University School of Law’s Brennan Center for Justice. See Brennan Center for Justice at NYU School of Law, *Mitch McConnell’s Myths About the Constitutional Limitations on Campaign Finance Reform* (visited Oct. 13, 2000) <http://www.brennancenter.org/resources/resources_actionpapers.html>. Additionally, more than 125 legal scholars support the constitutionality of closing the “soft” money loophole. See Letter from Professors Ronald Dworkin and Burt Neuborne (Sept. 27, 1997) (on file with the author).
IV. THE CED REFORMS

The CED report includes four recommendations for changing our campaign finance system. The recommendations focus on issues such as "soft" money, the level of individual contributions, limited and matched public funding, overall expenditure limits, legitimate party expenditures, and reforming issue advocacy rules. Because of the complexity of the campaign finance system, the CED report urges that these recommendations be considered as part of a package of reforms. In other words, merely adopting one or two of the recommendations will fail to address other critical—and often linked—issues.

A. Eliminate "Soft" Money

The CED report would eliminate all "soft" or unregulated money on the premise that all dollars being used to support individual political candidacies should be regulated dollars subject to the restrictions of federal campaign finance laws. The report urges that "[n]o reform is more urgently needed than a ban on national party 'soft money' financing."50

Although CED urges voluntary compliance with a "soft" money ban, it also calls upon Congress to prohibit the raising or spending of "soft" money by the national party committees as well as incumbents and challengers.51 Likewise, CED urges state legislatures to pass complementary legislation so that state party committees cannot rely on unlimited or undisclosed funding sources.52 Such a ban, if implemented, would end the unlimited contributions from wealthy individuals as well as from corporations and labor unions, thereby effectively reinstating the 190753 and 194754 laws banning such contributions to political campaigns.

"Soft" money is raised essentially by the major political parties and the related House and Senate campaign committees. Eliminating "soft" money entirely would obviously have serious adverse consequences for the parties and these committees. To compensate at least partially for this loss, CED recommends changing the current rules that limit individual contributions to federal candidates and political committees. Today's limit is an annual total of $25,000 for all contributions to federal candi-

51. See id. at 34.
52. See id. at 35.
dates, PACs, and party committees.\textsuperscript{55}

CED would establish two separate aggregate individual limits. The first limit would allow individuals to give up to $25,000 annually to federal candidates and PACs.\textsuperscript{56} The second limit would establish a separate ceiling that would limit the aggregate amount contributed by an individual to national party committees to $25,000 annually.\textsuperscript{57} The net effect of this change would mean more, not less, money coming from individuals than is currently allowed under existing laws.

\textbf{B. Improve Candidate Access to Resources}

It would be naïve to ignore the fact that running an effective modern political campaign requires adequate resources. Communication is costly, especially if the medium employed is television. While campaign costs have escalated, candidates for federal office have been required to adhere to a ceiling of not more than $1000 from any individual contributor per election. The $1000 limit has been in effect since the federal election law was enacted in 1974.\textsuperscript{58} To address this concern, the CED report urges Congress to raise the limit on individual contributions from $1000 to $3000 per candidate per election.\textsuperscript{59} This limit would subsequently be adjusted for inflation.

Although only a small minority of Americans makes political campaign contributions, there is the perception that big money donors enjoy special access.\textsuperscript{60} The goal of effective reform, according to the CED report, should be to encourage broader participation in the campaign finance system of small dollar donors while simultaneously reducing the political influence of wealthy donors.\textsuperscript{61} To address this consideration, the CED report urges Congress to enact voluntary public funding for congressional candidates on a two-to-one basis up to a maximum of $400 in public funding for each individual contribution of up to $200.\textsuperscript{62} The money for the public match would come from appropriated dollars, as distinguished from the presidential “check-off” contribution that is op-

\textsuperscript{55} See supra note 13 (discussing current campaign contribution laws).
\textsuperscript{56} See CED REPORT, supra note 15, at 35.
\textsuperscript{57} See id.
\textsuperscript{59} CED REPORT, supra note 15, at 36.
\textsuperscript{61} CED REPORT, supra note 15, at 4.
\textsuperscript{62} Id. at 4-5.
tional on the individual Form 1040 from the Internal Revenue Service. For a federal candidate to be eligible to receive this match, the candidate would have to agree to accept spending limits as well as limit any personal contribution to his or her own campaign to $25,000.63

If adopted, this proposal would have powerful consequences for the way in which federal political campaigns are conducted. As the CED report explains:

This reform will give candidates a strong incentive to solicit small individual contributions and small contributors an incentive to make them. It will significantly reduce the emphasis on fundraising in federal campaigns because, with this amount of matching funds, candidates will have an option of receiving a majority of their campaign money from small contributions and the matching public funds. Indeed, total individual contributions plus the matching funds would be sufficient to fully finance congressional campaign spending at current levels. Finally, this change will increase competition in federal elections by substantially increasing the resources available to challengers.64

C. Reduce the Fundraising “Arms Race” with Congressional Spending Limits

In exchange for the two-to-one publicly funded matching program described above, federal candidates would be required to abide by a system of campaign spending limits much like the case now in presidential elections. The CED report urges that such limits “be generous enough to induce candidates to accept public financing, but stringent enough to reduce the growth of campaign spending.”65

For U.S. House races, a candidate receiving public funding would be allowed to spend up to $500,000 in a primary election and $500,000 in a general election.66 In the event of a runoff election, an additional $200,000 would be allowed.67 Additionally, these limits would be reviewed and adjusted for inflation at the outset of each election cycle.68

The spending limits for U.S. Senate candidates receiving public funding would be equal to a base amount of $1 million plus 50¢ times the

63. See id. at 36-37.
64. Id. at 5.
65. Id.
66. See id. at 38.
67. See id.
68. See id.
voting-age population of the "state." In the event of a runoff election, an additional amount equal to 20% of this limit would be allowed. This ceiling would likewise be adjusted for inflation.

In both instances, any campaign expenses incurred for legal services, accounting services, or legal-compliance expenses would be exempt from the limits. Also, candidates who face opponents who are not restrained by the spending limits (i.e., opponents who finance their campaigns out of their own pocketbooks) should be permitted to spend additional amounts of money and receive additional public financing subsidies equal to the amounts expended against them.

Another provision of the CED recommendations in this area would permit party committees to assist candidates by giving them financial assistance up to the level of the spending limit for the particular candidate. Political party organizations would be permitted to make coordinated expenditures on behalf of a candidate to supplement a candidate's campaign spending, so long as the total amount spent by the candidate and the party does not exceed the set limit for the race. This would allow for more coordination than is permitted under current campaign finance laws.

Such a system will necessarily entail effective federal regulation. Most importantly, it will require vigilance by the Federal Election Commission (FEC), a federal agency that has occasionally received public criticism for its lack of timeliness and has often lacked the resources to carry out its mission. To achieve the goal of a strengthened FEC, the CED report urges Congress "to review the staffing, structure, and current funding of the FEC and provide it with the resources and authority needed to ensure accurate and timely monitoring and compliance with the law."

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69. See id.
70. See id.
71. See id.
72. See id.
73. See id.
74. See generally 2 U.S.C. § 441a(d) (1994) (setting forth strict limitations on coordinated expenditures, both in terms of how much can be spent and for what purposes).
75. See Karen Foerstel et al., Campaign Overhaul Mired in Money and Loopholes, 58 CONG. Q. Wkly. 1084, 1084 (2000). The authors quote Larry Makinson, Executive Director of the Center for Responsive Politics, in reference to the increasing amounts of undisclosed money flowing into campaigns, as saying that "[t]he Federal Election Commission is more useless than ever . . ." Id.; see also Joshua Wolf Shenk, Designed for Impotence: Why the Federal Election Commission Is a Lap Dog for the Political Class, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 30.
76. See CED REPORT, supra note 15, at 39.
D. Reform Issue Advocacy

As noted, it is the combined effect of existing federal law and the Supreme Court’s *Buckley v. Valeo* decision that allows circumvention of the law and the use of “soft” money for what is effectively candidate-specific advocacy. Existing federal campaign finance laws permit the regulation of “express advocacy,” which is defined by the so-called “magic words” test. In short, express advocacy is advocacy that calls for electing or defeating an individual candidate. The CED report considers this test to be far too narrow. In fact, the explosion of “soft” money on the political scene since the mid-1980s has been associated directly with this legal loophole: most of the soft dollars raised are used by the parties to run candidate-specific ads that masquerade as issue ads.

Any legal modification of the existing standard will face close judicial scrutiny. The CED report recognizes this fact but nonetheless believes that such an attempt is worth the effort. Accordingly, the CED report urges Congress to establish clear criteria for identifying public communications that constitute express advocacy and to require that the financing of such communications be subject to federal contribution limits. The report also urges Congress to provide for timely public disclosure of the sources of the funding and the amounts spent.

In grappling with an effective, workable definition of “express advocacy” that simultaneously comports with the requirements of the First Amendment, CED recommends that “express advocacy” include communications that:

(1) refer to a clearly identified federal candidate, or feature the image or likeness of a clearly identified federal candidate; (2) occur within 30 days of a primary election and are targeted at

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77. *See supra* note 40 and accompanying text.

78. *See Buckley v. Valeo, 424 U.S. 1, 43-44 (1976) (per curiam)*. Current law permits “soft” money to be used by party organizers for so-called “issue advocacy” as distinguished from “express advocacy,” which endorses or opposes specific candidates. Under the *Buckley* standard, the Supreme Court has narrowly defined “express advocacy” as advertisements which use words such as “vote for” or “vote against” particular candidates. *Id.* at 448 & n.52. CED believes that the “magic words” test is too narrow and allows the campaign finance laws to be easily circumvented. CED REPORT, *supra* note 15, at 39. For example, an advertisement can clearly support or oppose a specific candidate without using the “magic words.” *Id.* at 39-40.


82. *Id.*
the state in which the primary is occurring, or within 60 days of a general election; and (3) would be understood by a reasonable person to be encouraging others to support or oppose that candidate.\textsuperscript{83}

Needless to say, this significant reform of the issue advocacy laws will be vigorously contested in the federal courts. CED believes that its proposed reforms will withstand First Amendment scrutiny.\textsuperscript{84} In the event that CED's broader standard for determining the scope of express advocacy is not sustained by the courts, there should be prompt public disclosure of the financing source of these activities.

V. THE REACTION TO THE CED REPORT

CED released the report on March 19, 1999 at a press release and luncheon held in Washington, D.C. at which Congressman Christopher Shays was the featured speaker. That afternoon, CNN featured a news segment on the CED report on its \textit{AllPolitics.com} website in which CNN characterized the report as a "man bites a dog" story\textsuperscript{85} because, after all, the corporate community is often the source of much of the "soft" money that is raised.\textsuperscript{86} Major national newspapers and magazines reported on the CED study for many weeks following its release.\textsuperscript{87}

It was, however, the intervention of a leading opponent of campaign finance reform that brought the CED report even more widespread media attention. Senator Mitch McConnell (R-Ky.) had emerged as a fierce opponent of campaign reform in the Senate. On repeated occasions, Senator McConnell effectively blocked consideration of legislation sponsored by Senators John McCain (R-Ariz.), and Senator Russell Feingold (D-Wis.).\textsuperscript{88} Using parliamentary tactics, Senator McConnell prevented the U.S. Senate from even voting on the McCain-Feingold legislation.\textsuperscript{89}

\textsuperscript{83.} Id.


\textsuperscript{85.} Jackson, \textit{supra} note 19.


\textsuperscript{87.} \textit{See, e.g.,} Jim Drinkard, \textit{Business Group: Ban ‘Soft Money,’} USA TODAY, Mar. 19, 1999, at 7A.


\textsuperscript{89.} \textit{See id.} (quoting Senator McConnell as saying that: "'The Senate did the country a favor' by keeping the bill bottled up.").
Perhaps not coincidentally, Senator McConnell also chaired the National Republican Senatorial Committee, the organ of Republican Senators dedicated to recruiting Republican candidates to run for the Senate as well as raising "soft" money dollars to support these races around the country.  

On May 27, 1999, using letterhead from the National Republican Senatorial Committee, Senator McConnell wrote to several CED Trustees expressing his "concern" over their support for CED’s campaign finance reform recommendations. Senator McConnell’s letter conjectured that CED improperly listed the names of several of its business leaders as supporters of its reforms without their knowledge. The Senator then characterized the CED plan as one that would "deny corporations the right to make perfectly legal non-federal contributions to political parties; restrict the right of political parties to advocate positions on issues; limit the free speech of candidates; and force taxpayers to subsidize political activities with which they may not agree." Calling the CED plan a strategy for "nothing less than unilateral disarmament," the Senator concluded by stating that "I am certain that CED has invoked your name in error, and to ensure that we quickly put this embarrassment to rest, I would welcome any clarification you can provide." 

Senator McConnell never disclosed to whom he sent his letter, but roughly two months later, he wrote again to several CED Trustees with a much stronger and more pointed message. An advertisement which appeared in The Hill magazine on July 21, 1999, urging Congress to enact

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90. The National Republican Senatorial Committee is the Republican Committee charged with raising funds to support Republican senatorial candidates around the country. The committee also raises funds to support these races and directs how the dollars should be allocated among various races. Its Chairman is Senator Mitch McConnell (R-Ky.), and its Executive Director is Stephen J. Law.


92. Id.

93. Id.

94. Id. Senator McConnell addressed his letter to several CED Trustees who were not on CED’s Campaign Finance Reform Subcommittee or its Research and Policy Committee. All CED policy statements carry the following disclaimer: "Except for the members of the Research and Policy Committee and the responsible subcommittee, the recommendations presented herein are not necessarily endorsed by other trustees or by the advisors, contributors, staff members, or others associated with CED." CED REPORT, supra note 15, at iv. Accordingly, some of the individuals to whom the Senator wrote had neither participated in the subcommittee’s deliberations nor endorsed the recommendations.

campaign finance reform legislation, prompted Senator McConnell to write this second letter. CED was a signatory to the advertisement, along with other organizations such as the Sierra Club, the League of Women Voters, Common Cause, PIRG, Campaign for America, AARP, and Public Citizen & Public Campaign.

Senator McConnell characterized the signatories' position as one "that would ban corporate political activism and render the Republican Party powerless to defend pro-business candidates from negative TV attacks by labor unions, trial lawyers and radical environmentalists." The penultimate paragraph stated that: "If you disagree with the radical campaign finance agenda of the Committee for Economic Development and resent its abuse of your company's reputation, I would think that public withdrawal from this organization would be a reasonable response." And then, in his own handwriting, Senator McConnell wrote across the bottom of each letter, "I hope [your company] will resign from CED."

Whether Senator McConnell's actions are appropriate for a U.S. Senator is a question for the relevant Senate oversight body. From a commonsense perspective, however, there can be no doubt that the Senator's message was one of intimidation—a veiled threat with an underlying in terrorem message to the effect that "if you keep playing with them, I won't play with you." For companies with interests before the Congress, such a message was tantamount to saying that you would no longer enjoy access to certain lawmakers.

Roughly one month later, the New York Times learned of the McConnell letter to CED, and it blasted the Senator's tactics with a lead editorial on Sunday, August 29, 1999 entitled 'Thuggish' Tactics in Congress. The Times editorial explained that "[t]he inference drawn [from the McConnell letter] by some donors is that if they do not behave, Republicans will not fight for their interests." The editorial further noted that "[t]he idea that campaign reform is some sort of plot against Republicans is absurd." The Times then quoted the CED response to the Senator, which stated that "we find it ironic that you are such a fervent defender of the First Amendment freedoms but seem intent to stifle our efforts to express publicly our concerns about a campaign finance system that

\[\begin{align*}
96. & \quad Id. \\
97. & \quad Id. \\
98. & \quad Id. \\
99. & \quad Id. \\
100. & \quad \text{Editorial, 'Thuggish' Tactics in Congress, N.Y. TIMES, Aug. 29, 1999, at 14.} \\
101. & \quad Id. \\
102. & \quad Id. 
\end{align*}\]
many feel is out of control." Although some defenders of the current campaign finance system see the principal issue as freedom of speech, others seeking reform are concerned about what might be perceived as corruption, extortion, or just simply a shakedown for money.

Senator McConnell's tactics had precisely the opposite effect of what he intended. Rather than lose members of its Board of Trustees, CED actually recruited additional Trustees who signed on because of CED's position on campaign finance reform. The organization also continued its effort to enlist additional endorsers from corporate America. More than one half of its board endorsed the recommendations, and using that network, by late 1999, more than 250 individuals had publicly endorsed CED's recommendations. Finally, the organization continued to receive favorable press and editorial commentary from around the country.

In early October 1999, Congress again considered campaign finance reform legislation in the form of the McCain-Feingold bill. The House of Representatives passed similar legislation on September 14, 1999, and the legislation was pending before the Senate with a vote expected on October 19, 1999. On October 6, 1999, CED sponsored a luncheon in Washington, D.C. to coincide with the Senate's deliberations at which Senators John McCain and Russell Feingold were the featured speakers. Senator Feingold noted, during his remarks, the work CED had undertaken to promote serious campaign finance reform and stated that "when the history of [campaign finance reform] is written, . . . it will be the CED response to Mitch McConnell that will have won the day." Later that week, the Senate failed to enact the McCain-Feingold legislation, but the congressional champions of campaign finance reform in both parties vowed to continue their efforts to enact legislation.

103. Id.
104. See, e.g., 145 CONG. REC. S12601 (daily ed. Oct. 14, 1999) (statement of Sen. John McCain). Senator McCain has made the case that the large amounts of soft money pouring into campaigns have corrupted the legislative process. "Those [special interests who give large amounts of soft money] enjoy greater influence here than the working men and women who cannot buy our attention but are sometimes affected adversely by the laws we pass. To me that seems to be a good working definition of the impairment of our integrity which, as I noted, is Webster's definition of 'corruption.'"

Id.; see also Edward A. Kangas, Editorial, Ending the Shakedown, WASH. POST, Apr. 3, 2000, at A17.


Congress did enact, however, a modest campaign finance reform proposal in July 2000. In response to the widely documented abuse created by proliferating “Section 527 organizations,” both houses of Congress swiftly enacted legislation to curb the use by third-party organizations of so-called independent expenditures as ways to provide candidate-specific advertising. President Clinton signed this legislation on July 1, 2000.

VI. CONCLUSION

Although campaign finance reform legislation at the federal level has been stalled in recent years, there have been significant reforms at the state and even local levels. CED’s effort to engage the American business community in supporting reform has resulted in a growing number of endorsements as well as additional major corporations announcing that they are ceasing to give “soft” money contributions to the two major political parties.

The CED report makes it clear that the endorsing business leaders are not opposed to money in politics. In fact, were the CED recommendations to be enacted today, there would probably be more, not less, money in American politics. The issue, of course, is how that money is raised. Additionally, unlike some other single-issue reform groups, CED does not favor full public financing, but rather the two-to-one partial public funding described above. The CED reforms would ensure that adequate funding is provided to the political parties: individuals would be able to contribute up to $25,000 per election cycle to political parties, an amount in addition to the proposed aggregate $25,000 cap in the CED proposal. There is a consensus among the CED endorsers that strong,


111. See generally, e.g., New York City, N.Y. Local Law No. 8 (Feb. 29, 1988) (establishing the New York City Campaign Finance Program); Maine Clear Election Act, ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (West 2000). The people of Maine approved the law via the November 1996 Maine Ballot, and it is in effect for the first time this election year.


113. CED REPORT, supra note 15, at 1-2.

114. See id. at 36.

115. See id. at 35.
well-financed political parties strengthen, rather than weaken, our democratic political institutions.

The advent of CED in the campaign finance reform debate raises the question of why businesses give “soft” money in the first place. The fact that “soft” money contributions are expected to double in the 2000 election cycle suggests that at least some in business believe that the money is a good investment, but an investment in what? “Soft” money contributions go directly to the political parties and reflect amounts that are over and above whatever lobbying expenses a company may undertake. Thus, it is quite likely that the only plausible explanation for “soft” money contributions is that they ensure access. This explanation, however, is one which virtually no “soft” money providers are willing to make on the record.

In a rare moment of candor, however, one Fortune 500 Washington, D.C. lobbyist admitted to National Journal reporter Burt Solomon that some companies give “soft” money: “Basically, [for] protection. . . . If you decline to give, you’re taking a risk of legislative retribution. . . . Companies are scared that on some critical issue, they’ll get hosed. It’ll happen quickly, in the dead of night.”1 This statement speaks for itself and makes clear what Senator McConnell intended to convey in his handwritten note to several CED trustees. This lobbyist’s frankness is to be applauded, notwithstanding that the explanation presents a sad commentary on the current state of our political system. In a country where our elected representatives serve the people, it is troublesome when there is a perception that access to our representatives depends on the willingness of individuals, companies, and labor unions to ante up campaign contributions.

The bipartisan calls for campaign finance reform are growing,1 and we can expect them to continue unabated until the politicians finally understand that the people are, indeed, serious about changing the way money enters our political system. The fact that a growing number of business leaders and university presidents are challenging the system and urging

117 See, e.g., Committee for Economic Development, Endorsers of the CED Campaign Finance Reform Proposal (visited Oct. 11, 2000) <http://www.ced.org/projects/endorsers.htm>. CED now has 244 endorsers of its reform recommendations. See id. Many of the endorsers are CEOs of leading corporations as well as university presidents. See id.; see also Viveca Novak, Dialing Back the Dollars, TIME, Sept. 6, 1999, at 42-44. (reporting on Congress’s attempt to reform campaign finance); Editorial, Revolt of the Business Class, N.Y. TIMES, May 3, 2000, at A26 (discussing the “recent rebellion” among wealthy businesses tired of being hit up by Democrats and Republicans for campaign donations).
reform is a new and important development. As more and more suppliers of "soft" money abandon their current practices, the momentum for reform will continue to grow. CED is proud to be a leader in that effort.