Campaign Finance Reform*

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I. STATEMENT OF ISSUES

The campaign finance reform session agenda considers the following: (1) the problems posed by the current system of campaign finance, (2) alternative approaches and related legal constraints, and (3) advisable strategies to implement preferred reforms.

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* March 23, 2001. Moderator: Scott Harshbarger, President and CEO, Common Cause. Panelists: Frank Clemente, Director, Public Citizen Congress Watch; Charles Lewis, Executive Director, Center for Public Integrity; Nick Nyhart, Executive Director, Public Campaign; E. Joshua Rosenkranz, Executive Director, Brennan Center for Justice, New York University School of Law.

II. PROBLEMS

A. Campaign Finance and Excessive Influence by Contributors

The problem of campaign finance influence is pervasive at all levels of government. Campaign costs are increasing well above inflation rates. Spending limits rarely apply. Recent state level term limitation measures only exacerbate the importance of money in affected states, as new offices with new constituencies must be won at shorter intervals. Money dictates who runs and often who wins. Great candidates opt out because they cannot possibly raise the amount of money they need to compete or because the very idea of raising the necessary sums offends them. Money buys access and access buys influence. Lobbyists who represent moneyed interests are generally able to block measures against the short-term financial interests of their respective clients. The drive to raise funds distracts officeholders from their official duties.

The written materials presented prior to the conference included several examples of the undue influence of contributions in congressional campaigns as documented by Public Citizen and Common Cause, among other organizations.[1] They also include commentary by Charles Lewis of the Center for Public Integrity, outlining current campaign contribution influence problems in congressional, presidential, and state settings.[2] This is followed by a recent Common Cause report,[3] the table of contents to Common Cause's recent book on money in politics,[4] and opinion pieces on campaign finance problems.[5] Lastly, Public

1. *See, e.g.*, COMMON CAUSE, PARTY SOFT MONEY (1998); PUBLIC CITIZEN, KILLING US SOFTLY: SOFT MONEY'S PHENOMENAL GROWTH AND ITS HARM TO THE PUBLIC (2001) [hereinafter KILLING US SOFTLY], *available at* http://www.citizen.org/documents/killingussoftlyreport.pdf (last visited Feb. 1, 2003); Press Release, Common Cause, Statement of Common Cause President Scott Harshbarger at Paying the Price News Conference (June 15, 2000), http://www.commoncause.org/publications/june00/061500.htm (last visited Feb. 1, 2003).

2. Charles Lewis, Everything I'm Telling You Is Entirely Legal, Remarks at the 22nd Annual Conference of the Council on Governmental Ethics Laws (December 5, 2000), http://www.public-i.org/dtaweb/report.asp?ReportID=141&L1=10&L2=70&L3=15&L4=0&L5=0&State=&Year=2000 (last visited Feb. 1, 2003).

3. Press Release, Common Cause, 89 Percent of House Incumbents in Financially Uncompetitive Races; House Candidates Enjoy Record $526 Million in Campaign Funds Through September 30, According to Common Cause (Nov. 2, 2000) (on file with author).

4. COMMON CAUSE, A REPORTER'S GUIDE TO MONEY IN POLITICS: CAMPAIGN 2000 (2000).

5. PUBLIC CITIZEN, DISCLOSURE LAW PASSED IN 2000 CLOSES CAMPAIGN FINANCE LOOPHOLE (n.d.), *available at* http://www.citizen.org/congress/campaign/legislation/section527/articles.cfm?ID=5315 (last visited Feb. 1, 2003); Scott Harshbarger, *Where Has Democracy Gone? The View from the Shadow Conventions*, WASH. TIMES, Sept. 5, 2000, at A15.

Campaign's *Campaigns and Television* outlines how increasing campaign and media costs exacerbate the problem.[6]

B. Lack of Disclosure

Although disclosure requirements have seemingly proliferated, they may neither be adequate nor enforced. In particular, by avoiding certain words explicitly referring to an election, political players of all sorts can influence elections without revealing their identities. What about contributions received just after the final pre-election report? What about contributions made through independent committees? Is relevant information provided? What does disclosure accomplish?

C. Accuracy and Fairness

Campaigns have become misleading sound bite contests—button pushing, focus group screened ads have little substance. Last minute misleading mailers proliferate. How does this problem tie into campaign finance disparities?[7]

D. Access and Equality

Is it possible to run a visible campaign without private wealth or wealthy friends? To what extent is the one person, one vote ideal distorted by the financial demand of campaigns?

III. ENACTMENT OF THE MCCAIN-FEINGOLD BILL

A. Status

What are the current provisions and status of the McCain-Feingold bill?[8]

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6. PUBLIC CAMPAIGN, CAMPAIGNS AND TELEVISION; DOLLARS VS. DISCOURSE (1999) (on file with author).

7. *See* CHARLES LEWIS, CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE PRESIDENT 2000, at 9–14, 340–42 (2000).

8. *See, e.g.*, COMMON CAUSE, THE HAGEL BILL: A FATALLY FLAWED PROPOSAL (n.d) (on file with author); PUBLIC CITIZEN, KEY PROVISIONS OF THE MCCAIN-FEINGOLD BILL (2001) (on file with author); PUBLIC CITIZEN, MCCAIN-FEINGOLD IMPACTS AND WHAT IT LEAVES UNDONE (2001) (on file with author); PUBLIC CITIZEN, REINFORCING THE RICH: THE CONSEQUENCES OF PROPOSALS TO RAISE THE $1,000 LIMIT ON INDIVIDUAL CONTRIBUTIONS TO FEDERAL CANDIDATES (2001), *available at* http://www.citizen.org/documents/hard$report.pdf (last visited Feb. 1, 2003); U.S. PUBLIC INTEREST RESEARCH GROUP, THE CONSEQUENCES OF RAISING FEDERAL CONTRIBUTION LIMITS (2001),

B. Problems Following the McCain-Feingold Bill

Assuming enactment of the McCain-Feingold bill, what problems will remain?

(1) There will be remaining loopholes regarding soft money.[9] Some proposed amendments to the McCain-Feingold bill would allow soft money with alleged limits. What are the problems here? Which states retain the soft money loophole?
(2) The hard money problem: designated contributions continue to buy influence. To what extent is influence enhanced for organized associations able to arrange enormous hard money financing even with contribution limits?
(3) "Issue ads": Will the proposed amendments to the McCain-Feingold bill resurrect the problem? What about the states?[10]
(4) Self-financing.
(5) Nondisclosure.
(6) Media and campaign costs.

Campaign contribution limits can theoretically disperse dependence and perceived officeholder obligation onto broader populations. However, two problems emerge: (1) if limits are too low, the cost of raising sums can approach revenues obtained, which then makes fundraising and electoral entry difficult and favors special interests able to coordinate maximum contributions; and (2) contribution limits also favor wealthy candidates who are able to finance campaigns from their own private sources.

IV. LEGAL CONSTRAINTS

The three most important U.S. Supreme Court decisions on campaign finance constitutionality are *Buckley v. Valeo*,[11] *Austin v. Michigan*

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available at http://pirg.org/democracy/democracy.asp?id2=5908&id3=CFR& (last visited Feb. 1, 2003); Joan Claybrook, President, Public Citizen, Testimony Regarding "Compelled Speech" and Campaign Finance Reform Before the Senate Committee on Rules and Administration (Apr. 12, 2000), *available at* http://www.citizen.org/congress/campaign/issues/paycheck/articles.cfm?ID=5298 (last visited Feb. 1, 2003).

9. For a discussion of soft money abuse, see, for example, E. Joshua Rosenkranz, Brennan Center for Justice, *Electoral Fraud, Pure and Simple*, WASH. POST, Nov. 3, 2000, at A33, *available at* 2000 WL 25425923.

10. *See, e.g.*, E. Joshua Rosenkranz, *The Devil's in the Details: The Lazio-Clinton Deal Gags Independent Voices: The Important Difference Between Soft Money and Hard Money*, BRENNAN CENTER PRESS CENTER, Oct. 3, 2000, at OP-ED, *at* http://www.brennancenter.org/presscenter/oped_2000_101300.html (last visited Feb. 1, 2003).

11. 424 U.S. 1 (1976) (considering the constitutionality of the Federal Elections Campaign Act).

Chamber of Commerce,[12] and *Nixon v. Shrink Missouri Government PAC*.[13] Constitutional campaign contribution limits have been enacted for federal and many state and local races. However, the courts limit restrictions on contributing to one's own campaign, and other loopholes abound, including soft money transfers and independent expenditures.[14]

Complicating the problem is the constitutional status of issue ads. To what extent can they be regulated consonant with the First Amendment? Can disclosure be required where an ad is an attempt to influence an election, however cloaked? What is the line between "issue advocacy," independent from a candidate's campaign, and "campaign influence advocacy"?[15]

Meanwhile, broad based raising of funds may be impeded by constitutional limitations on forced speech. Hence, "paycheck protection" measures, or constitutionally-based decisions, may impede unions from participating in political campaigns or from lobbying where political contributions come from union dues. What are the implications of an "opt-out" opportunity not to contribute funds used by a union for campaign or lobbying versus a required "opt-in" or necessary affirmation designation of those contributions? Compare the corporate context: corporate spending suffers no such circumscription, vis-à-vis the stockholders whose assets may be similarly devoted.[16] The corporation lobbies and gives to candidates, in states where corporate campaign contributions are allowed, without a required opt in, and even without a permitted opt out. What are the implications of this difference?

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12. 494 U.S. 652 (1990) (examining a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office).

13. 528 U.S. 377 (2000) (considering provisions of Missouri's campaign finance law limiting amounts of contributions to candidates).

14. E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 9–10, 15–21 (1998); E. Joshua Rosenkranz, *Campaign Finance Reform and the Constitution: What's Hot in the Courts*, EXTENSIONS, Spring 1999, *available at* http://www.ou.edu/special/albertctr/cachome.html (last visited Feb. 1, 2003); Memorandum from Common Cause, to the National Governing Board, Supreme Court Decision in Nixon v. Shrink Missouri Government PAC (Feb. 2000) (on file with author).

15. PUBLIC CITIZEN, REGULATION OF PHONY "ISSUE ADS" IS CONSTITUTIONAL (2001), *available at* http://www.citizen.org/congress/campaign/issues/constitution/articles.cfm?ID=5360 (last visited Feb. 1, 2003).

16. E. Joshua Rosenkranz, *Legal Pitfalls of Paycheck Protection*, BRENNAN CENTER, PRESS CENTER, May 27, 1998, *at* http://www.brennancenter.org/presscenter/oped_ 1998_0527.html (last visited Feb. 1, 2003).

V. OPTIMUM MODELS

Is it possible to fashion an optimum model within constitutional guidelines? One model advocates complete public funding of campaigns, providing a quid pro quo for constitutional spending limits, allowing opt out and allowing candidates to compete without private-interest dependency.[17] However, that option requires some criteria to determine eligibility for funding. Will eligibility be based on prior votes received by a party? Will it be based on a petition concept or maybe a limited number of small contributors to demonstrate threshold support? Can the petition option simply transfer spending into the costs of petition gathering outside of a campaign definition? Will low thresholds allow fringe candidates without real support to receive disproportionate public funds, creating waste, distraction, and demagoguery?

Another option is a public-to-private contribution match. For example, California's proposition 68 in 1988 covered statewide and local legislative races and included: (1) campaign contribution limits of $1000 (somewhat higher for statewide office), (2) spending limits set at close-to-median historical spending for the office, (3) a five-to-one public funding match for all funds raised from contributors giving $250 or less and residing in the represented district, and (4) financing of the system from a voluntary check off from state income tax forms.[18] One would raise the $350,000 to $500,000 spending limit for state assembly races by attracting $250 from 280 to 400 persons.[19] New York City has a four-to-one public match with similar elements, and the city of Los Angeles has a more modest ordinance in effect.

Another option could be refundable tax credits for contributions. Although more limited, it could disperse support to a wider group, lessen dependency on a few, and perhaps constitute the quid pro quo for spending limits. One example is the Arkansas statute providing for tax refunds for contributions of up to fifty dollars.[20]

One commonly suggested reform is free or subsidized television time,

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17. Public Campaign, *Clean Money Campaign Reform*, *at* http://www.publicampaign.org/cleanmoney2.html (last visited Feb. 1, 2003); Public Campaign, *Frequently Asked Questions About Clean Money Campaign Reform*, *at* http://www.publicampaign.org/QA.html (last visited Feb. 1, 2003).

18. Walter Zelman & Ross Johnson, *1988: The Year of Decision for Campaign Finance Reform and California Democracy*, 8 CAL. REG. L. REP. 1 (1988).

19. Proposition 68 passed in 1988, despite substantial advertising against public financing (ads featured candidates wearing KKK robes). However, proposition 73, a competing initiative sold as offering more reform but without public financing, obtained more votes, canceling proposition 68. Proposition 73 was then substantially invalidated by the federal courts, leaving California with no campaign contribution limits for the following twelve years.

20. ARK. CODE ANN. § 7-6-222 (Michie 2000).

which would substantially reduce the cost of most campaigns. If implemented, could this proposal impose some information enhancing features, such as a requirement that no spot be under forty-five seconds in length?[21]

A creative alternative is the "patriot dollar" concept of Yale Law School professor Ackerman, which would allocate $50 to each American adult that the voter could then designate to their chosen candidates.[22]

A final approach, perhaps as a supplement where officeholders have more specific duties, as with local officials or state agency decisionmakers, is the Oaks Initiative model.[23] This mechanism works on a rule of contract theory. For example, a city council member who votes to give a public benefit above a threshold value to a private beneficiary (such as an exclusive trash or cable contract, a tax waiver, or a zoning variance) may not receive any favor from that interest for five years thereafter or until two years after the official leaves office, whichever is longer. The favor prohibition would include gifts, employment, *and* campaign contributions for public office.

Whatever the approach taken, the enforcement of legal standards can be critical. During recent presidential elections, both parties violated the law by evasively obtaining soft money contributions to the political parties over maximum allowable limits—to evade contributor identification. Should we be bringing petitions for writ of mandate to compel enforcement? What self-enforcing provisions should be in our model? How do we treat independent expenditures and issue ads? What about third-party candidates disadvantaged by not qualifying for public funding or television and debate exposure?

VI. THE HOW: TACTICAL QUESTIONS

We are confronted with one of the most difficult challenges of any reform effort—convincing those in power to change the method of election that gave them their offices. How do we succeed?

One approach to ameliorate opposition from general fund spending is

21. *See also* E. Joshua Rosenkranz, *Free TV Speech for Candidates*, THE NATION, June 8, 1998, at 33.

22. BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE (2002).

23. For a copy of an Oaks initiative, see The Foundation for Taxpayer & Consumer Rights, *Oaks Proposal*, http://www.consumerwatchdog.org/citizen/rp/ (last visited Feb. 1, 2003).

to designate a special, nongeneral fund to finance public financing. However, we are left with determining the possible sources. Another approach is to designate a preset portion of the general fund. The advantage of a designated percentage could be psychological. In fact, less than one-half of one percent of general fund monies in most states would be sufficient, which would allow the pitch: "Let's spend slightly less than one-half of one percent to make sure the rest is spent on the merits. Let's make our state ninety-nine and forty-four one hundredths pure!"

We also need to consider how to continue to interest the media and which leverage points are available here.[24]

Some states have initiative options. What needs to be determined is whether the alternatives are feasible, how much money needs to be raised, the identity of the likely opponents, and the opponents' prospects for success.

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VII. BACKGROUND ON PANELISTS

Scott Harshbarger was elected by the National Governing Board of Common Cause to the post of president and chief executive officer in the summer of 1999. Common Cause, founded by John Gardner, has been recognized as one of America's most effective grassroots citizens' lobbies for over thirty years.

Prior to joining Common Cause, Harshbarger served two terms as Massachusetts Attorney General (from 1991 to 1999) after eight years as District Attorney of Middlesex County, where he won national recognition for his work in crime prevention, civil rights enforcement, elder protection, and prosecution of white-collar crime and public corruption.

Elected president of the National Association of Attorneys General in 1996, Harshbarger was one of the nation's first to sue the tobacco industry to help recover smoking-related health care costs and to successfully regulate handguns. He was the Democratic nominee for governor of Massachusetts in 1998 and is a visiting professor at Harvard Law School, teaching a course entitled "Government Lawyer: Role of Ethics and Public Policy."

Frank Clemente has served as director of Public Citizen's Congress Watch since November 1996. For the two years prior, Clemente was a political consultant, playing a leading role in high profile efforts to defeat

24. *See* Memorandum from Common Cause, to the National Governing Board, Partnership with Alliance for Better Campaigns (Feb. 2000) (on file with author).

two "Contract with America" proposals that would have eliminated consumer protections against defective products and securities swindlers. President Clinton vetoed both bills, the Product Liability Reform Act[25] and the Private Securities Litigation Reform Act.[26]

As senior policy advisor to the House Committee on Government Operations (renamed the Committee on Government Reform and Oversight in 1995) under the chairmanship of Representative John Conyers, Jr., he oversaw legislation on national health care reform, the environment and regulatory policy, budget process reforms, and reinventing government.

He has been involved in numerous election campaigns and served as issues director for Jesse Jackson's 1988 presidential campaign and campaign manager for Representative Conyers's 1994 re-election. Clemente also founded the national "Jobs with Peace Campaign," which lobbied Congress to transfer funds from military to domestic programs and placed scores of referenda on local ballots through which voters demanded a shift in spending priorities. Clemente has appeared in numerous media outlets, including the major network news shows, CNN and MSNBC talk shows, NPR, the *New York Times*, the *Washington Post*, the *Wall Street Journal*, and many other print publications.

Charles Lewis is the founder and executive director of the Center for Public Integrity, a nonprofit and nonpartisan research organization in Washington, D.C. that concentrates on ethics and public service issues. The Center is unique in that it does not advocate legislation, but rather focuses on public service journalism—investigative reporting about campaign finance and other public interest issues.

Since the Center began operation in May 1990, Lewis has written or cowritten several of its more than 100 investigative reports. In 1998, he was awarded a MacArthur Fellowship by the John D. and Catherine T. MacArthur Foundation. He is the principal author of the Center's books: *The Buying of the President 2000*,[27] *The Buying of the Congress*,[28] and *The Buying of the President*.[29]

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25. Product Liability Reform Act, H.R. 956, 104th Cong. (1996) (vetoed May 2, 1996).
26. Private Securities Litigation Reform Act, H.R. 1058, 104th Cong. (1995) (vetoed Dec. 19, 1995).
27. CHARLES LEWIS, CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE PRESIDENT 2000 (2000).
28. CHARLES LEWIS, CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE CONGRESS (1998).
29. CHARLES LEWIS, CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE PRESIDENT (1996).

In 1997 Lewis and the Center launched a new project, the International Consortium of Investigative Journalists (ICIJ), an unprecedented network of the world's premiere investigative reporters. ICIJ extends the Center's style of enterprise journalism globally by focusing on issues that transcend nation-state borders.

For eleven years, Lewis did investigative reporting at ABC and CBS News, most recently as a producer for *60 Minutes*. His stories twice received Emmy nominations in the outstanding investigative reporting category by the National Academy of Television Arts and Sciences.

Nick Nyhart is a cofounder and the current executive director of Public Campaign, a four-year-old national organization dedicated to winning comprehensive clean money campaign finance reform. As Public Campaign's field director from 1997 to 1998, Nyhart worked extensively with reformers in Arizona and Massachusetts to win full public financing ballot initiatives in 1998.

For the previous five years, Nyhart directed a six-state project organizing campaign finance for Northeast Action. The project's work with money and politics activists across the Northeast has put the region in the national spotlight with its cutting edge reform measures. A former community organizer, Nyhart is a twenty-year veteran of grassroots issues and electoral coalition politics. He has offices in Hartford, Connecticut and Washington, D.C.

E. Joshua Rosenkranz, a founder of the Brennan Center for Justice, litigates and publishes extensively on campaign finance and election law. The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. It is dedicated to developing and implementing an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. The Brennan Center's campaign finance work has included cases from California to Maine, including the landmark U.S. Supreme Court case, *Nixon v. Shrink Missouri Government PAC*.[30]

Rosenkranz clerked for Supreme Court Justice William J. Brennan, Jr. from 1987 to 1988, as well as then-Judge Antonin Scalia and Judge Stephen F. Williams of the U.S. Court of Appeals for the District of Columbia Circuit from 1986 to 1987. Following his clerkships, Rosenkranz founded, and for eight years ran (from 1988 to 1996), New York City's acclaimed Office of the Appellate Defender. In that capacity, he personally argued over 100 appeals and was the attorney of record in more than 1500 other appeals. In 1996, *The American Lawyer* named Rosenkranz one of the nation's forty-five leading public sector lawyers under the age of forty-five.

30. 528 U.S. 377 (2000).

VIII. PANEL DISCUSSION[31]

ROBERT FELLMETH:

This Session covers campaign finance. We know it has grown as a source of corruptive influence across all three branches of government. We know about soft money and that the McCain-Feingold Bill is now being considered in the Congress; so, our session today is most timely. We also know that at the state level there are also serious problems.

How do we reconcile the need for elected official integrity with the First Amendment right of candidates, contributors, and independent committees? What is the optimum model? What are achievable models? What are the prospects? How do we get there?

Luckily for us, we are privileged to have five of the nation's leading experts on campaign finance here on our stage to share their thoughts and insights with all of us. In addition to the panelists whose resumes are summarized above, we are also joined by Dave Vladeck, who will be taking questions from the audience and prioritizing them so that during our question and answer period Scott can review them and pose them to the panelists as appropriate.

For those of you who do not know Dave, he is the director of the Public Citizen litigation group. He has been with the litigation group for over twenty years, first as staff and, since 1992, as its director. He has handled a broad range of litigation, including First Amendment, health and safety, civil rights, and open government cases. He has litigated a number of cases before the United States Supreme Court, over forty cases before the court of appeals, and has testified before Congress on First Amendment issues. He teaches at Georgetown University Law Center, often as an adjunct, and I think he was a full-time visiting professor in 1999–2000, as I recall. He is a professor and academic, a scholar and litigator, and we are very lucky to have him here.

SCOTT HARSHBARGER:

Thank you very much, Bob. I am somewhat new to campaign finance reform, on a national level. I served as an elected official in Massachusetts, where we always had some form of reform in gestation. The state has a progressive, liberal legislature and the Clean Elections

31. This Part has been edited to remove the minor cadences of speech that appear awkward in writing and to identify significant sources when first referred to by the speakers.

Law passed by the people in 1998.[32] Many of my progressive, liberal democratic friends are now doing everything they can to avoid enacting and implementing those reforms, more out of concern for contested elections and challenges and less over the question of the large money influence that we face at the national level.

As the Senate engages in a discussion of the McCain-Feingold bill, the discussion sometimes rises to Jeffersonian levels, but more often leaves us wondering whether our representatives are protecting their own offices and their own campaign and funding advantage, rather than advancing the public interest. The question we need to pose is: What about this issue makes natural allies sworn enemies? Why is it that groups that have worked together in coalition on a whole range of social, economic, and justice issues find themselves at loggerheads in discussing how we finance our campaigns? How is it that we have these incredible gaps? Is it a question of constitutional right? Is it social inequity? What's going on here? Why is this so hard to understand? Or is this really about incumbency and asking people to change the laws which serve to their advantage? Is it that the majority of legislators are lawyers? Is it no accident that the only self-regulating profession in Massachusetts, and many states, is the legal profession? So is this really unusual? Can we expect a group used to self-regulation to make changes to their common detriment in order to serve a larger good? How do we persuade such people to alter the rules of the game when they are its current product?

In other words, is campaign finance reform a symptom of a larger issue about our democracy, which I think many of us believe? Or, is it just another interest struggle—trying to decide public policy on the merits, as opposed to special interest determination? Thirty years ago, John Gardner founded Common Cause, believing that the only group not organized in Washington, D.C was the people. His goal was to mobilize people to re-engage in their democracy to create a new source of power.

Now we know how to identify a problem. We know enough not to give it to a lawyer; we give it to somebody who is not "J.D. impaired," because the challenge here is to lay out what the issue is or might be. Chuck Lewis, as you know from much of his work on money and politics and corruption, is a national expert. Many related issues have been framed by his Center for Public Integrity over the years. We are going to start here with Chuck, laying out the problem from his perspective.

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32. The Massachusetts Clean Election Law, MASS. GEN. LAWS ANN. ch. 55A, § 1–18 (West Supp. 2002).

CHARLES LEWIS:

Thanks, Scott. It is difficult to sum up a huge subject like this—including half a million words we have written in ten years—in ten minutes or less. But my job is to set forth the problem. One of my favorite quotes is from James Madison: "If men were angels, no government would be necessary."[33] We know that men and women are not angels, and politicians are certainly not angels, and the political campaign industry may be the least regulated industry in the U.S. today. We have not had a law at the federal level for more than twenty years; its practitioners do not want to be regulated. No one likes regulating himself or herself.

I think all the discussion really has to do with how you address that inherent self-interest conflict problem. It is the nub of everything; folks do not want to be regulated, and there are special interests aligned with them who do not want to be regulated, and that is why no one has moved successfully to regulate them for twenty-five years at the federal level. But we have been particularly deep in the muck here in recent years. It is grim, looking at the recent last-minute presidential pardon of an international fugitive after more than a million dollars passed from his kind offices. In recent years, we have the drug traffic dealers and arms dealers who met with the President because they gave money, and the Air Force One special trips and overnight stays in the Lincoln bedroom. There are the 1500 who gave $26 million in 103 coffees in the White House (which Mr. Clinton referred to as "nonfundraising events"), we have Al Gore attending the Buddhist monastery fundraiser and referring to it as "community outreach," and then Tom Daschle going up to the top of George Washington's head at Mount Rushmore—taking donors to an area that is actually illegal and off-limits. We have Bob Dole taking folks on midnight tours of the capitol and George W. Bush having sixty donors or more sleeping overnight in the Governor's mansion in Texas. Bush is the first President to raise $100 million from private sources and the first major presidential candidate not to abide by the post-Watergate laws. Even though it was the first time we have seen that in U.S. history, it was a one-day story. He raised $37 million in his first four months—more than $300,000 a day. You do not raise money like that from backyard bake sales and barbecues. Fourteen of Bush's top twenty-five career patrons are from the gas industry; his top patron is

33. The Federalist No. 55, at 160 (James Madison) (Roy P. Fairfield ed., 1981).

Enron, which has given him and his party at least $2 million, probably more. And yes, as California knows to its detriment, he has made decisions in Texas and Washington state that are friendly to Enron. Recently, we have seen decisions from carbon-dioxide emissions standards for the mining industry, help for the credit card industry, and a bankruptcy bill where the industry got what it wanted and gave eighty percent of its money to one party and a particular President to get that result. In some polls, as many as ninety-five percent of the American people believe that the policy was bought and sold. So we have the perception of a pay-to-play process.

A few years ago, I was in the unenviable situation of putting out a book about Congress on the same day as the Ken Starr report on Monica Lewinsky surfaced; I hate when that happens. But we had thirty-six researchers, writers, and editors who worked for a year and a half, who looked at things the average American cares about, and then examined what their employees serving in Congress did about those issues. I will just mention two or three. There is this conceit enunciated by politicians that money just buys access, not influence, and that such access buying does not affect our lives—it is irrelevant and immaterial. Of course, that's a crock.

We looked at food safety. Nine thousand people die a year from bad food and millions more get sick. What did Congress do on food safety in ten years? Nothing. Not a single bill went to the floor of the House or Senate. Members of Congress received $41 million from the meat packers and other food interests.

We were told that cable deregulation, the Telecom Act of 1996,[34] would bring cable rates down; yet, they went up fifteen to twenty percent, and, yes, Congress got $15 to $20 million dollars from that unfettered monopoly.

Tobacco—cigarettes in particular—causes cancer and other diseases. More than 400,000 people die every year just in this country, and we still have policies to insure tobacco, to export tobacco, and to protect our growers from imports; and, yes, the industry gave $30 million in the last ten years. I could go on and on and on.

SCOTT HARSHBARGER:

You could go back to Upton Sinclair, go through our history, and that is one of the comments that we face all the time. Whether you are in North Carolina or in the U.S. Senate: "We make these decisions on their merits. We have to have money to get through this. Plus, it's all fairly open. It's all on the front page. This has always gone on. And if you

34. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 U.S.C. and 47 U.S.C.).

really could show it, why aren't people being indicted?" Why don't bribery and corruption statutes suffice? This is the appearance. But life is not all about appearances. It may be good for books and stories, but why is this different? Why should anyone believe them when they tell us that it really does not affect policy?

CHARLES LEWIS:

Well, one of the problems you have in this whole discussion is disingenuousness by politicians. No one ever acknowledges the effect of money on policy, and so journalists and the public are caught in this cat-and-mouse game of trying to catch them, and it gets beside the point. The other problem about prosecution is—this is a dangerous thing to say in a legal setting—politicians and lawyers write the laws so that they won't be enforced frequently. The Justice Department is not terribly inclined to take on the people who give them their funding. Think of the last time we have seen a bribery or corruption or conflict of interest case involving a member of Congress. Not a morals issue; I am talking about a campaign contribution as a source of improper influence. We haven't, of course.

There are significant issues. One is that the amount of money is completely out of control. It went up almost fifty percent just in the last four years—to $3 billion in 2000 from $2.02 billion dollars in 1996. I am no economist, but I do not think inflation went up that much. Outside interest groups spent $150 million in 1996—today nearly $500 million. I think that this was the first election in which party and outside money exceeded what the candidates spent themselves. The candidates are becoming bit players in their own dramas; there is something very strange here when the money is overwhelming even the candidates. Of course, they are quite complacent.

Who gives money? Ninety-six percent of the American people do not give a dime to any politician. A check for $1000 or more comes from one-tenth of one percent. Donors are basically middle-aged white males. Of course, we are talking about corporations, labor unions, and wealthy individuals; so, there is a narrow sliver of our society sponsoring our politicians.

The news media is also becoming rich from this process. In the 2000 election, there was half as much political coverage as in 1996; in 1996 there was half as much as 1992. A candidate cannot be heard today in terms of free media, because the news media does not cover it;

meanwhile, the media received about $1 billion from ads. In 1981, it received $80 million. It has become a major source of revenue. And they also spent $11 million to kill campaign finance reform.

The money is out of control, and the amounts of money are fairly astonishing. The time the candidates spend trying to raise it is off the charts. The accountability for the money is also a problem, obviously. There are a lot of secret groups; even with the new "527 law,"[35] it is fairly easy to hide money, particularly going into the states. Archibald Cox, the famous lawyer, says that today we have more secrecy, money, and corruption in the process than any time in U.S. history, including the Watergate era.

SCOTT HARSHBARGER:

The next question is for Josh. What are the legal and constitutional constraints that are preventing us from dealing with all of this? Is it a lack of will power? Are we failing to mobilize? Before Josh comments, does anybody else want to add a quick hit on the problem? Frank?

FRANK CLEMENTE:

I would add one thing—it is not just the campaign money. In fact, if you add up that money and you compare it to how much is spent on lobbying, especially by industries and trade associations, campaign contributions are about ten percent of what they spend on the entire system, and that is the entire system that we can count. The drug industry, for instance, gives about $10 to $15 million to federal candidates and parties every two-year election cycle, but it spends $80 to $100 million lobbying Congress. That does not even count television ads. I do not know whether folks saw the "Citizens for Better Medicare" ads that have run across the country in the last period, but that was another $50 million on top. After that are all of their "astroturf" grassroots campaigns. So the campaign money is just part of the system; it is a much bigger system of special interest influence.

35. Pub. L. No. 106-230, 114 Stat. 477 (codified as amended at 26 U.S.C. § 527 (2000)).

NICK NYHART:

We can look at the problem of undue influence on elected officials, how they vote, what their views are. But there is another aspect: who decides to run for office anymore? Massachusetts, which enacted public financing several years ago,[36] ranks forty-ninth among the states in the proportion of seats that have a contested race. Seventy percent of legislative seats in Massachusetts do not have opposition. When you get to the ballot on election day, seventy out of each one hundred people face a ballot where there is only one candidate. So it shapes who runs for office as well.

SCOTT HARSHBARGER:

That is right. Senator Feingold is always making the point that twenty years ago he could actually think about growing up, running for Senate, being a U.S. Senator. Now he tells college students that if they are not wealthy and not willing to raise money all the time, they cannot grow up to be a U.S. Senator.

E. JOSHUA ROSENKRANZ:

I was actually going to comment on what Nick just said about electoral competition, and it is precisely the point you just made, Scott. The only people that run are people who can actually conceive of and stomach the idea of being on a constant treadmill of fundraising or the Jon Corzines of the world, who have the unlimited funds to run for office.

SCOTT HARSHBARGER:

Obviously, there are other issues this group can talk about. But I want to now switch because one of the realities in this world is the constraint of constitutional and legal issues. These issues need to be understood. We have the First Amendment issue, with the American Civil Liberties Union on the other side of many of these points. Josh, you have done more work in this area; what are we dealing with here? In the materials we listed several cases, but talk to us particularly about *Buckley v. Vallejo*.[37] It did not, in my legal history, stand out with *Brown v. Board*

36. The Massachusetts Clean Election Law, MASS. GEN. LAWS ANN. ch. 55A, § 1–18 (West Supp. 2002).
37. 424 U.S. 1 (1976).

of Education[38] or *Miranda.*[39] (I am dating myself; I apologize.) But why is this case influencing the way we discuss this topic?

E. JOSHUA ROSENKRANZ:

I am the one who is most J.D. impaired, which is why I was chosen to answer that question. *Buckley* is the tree that sits in the middle of the ball field. Everyone has to play around it, and when you hit the tree, it is an automatic out. To understand *Buckley*, you have to have a sense of its source. It emerged out of the 1974 post-Watergate reforms, which did four important things. First, they limited contributions, that is, the money that goes directly into the pockets of candidates. Second, they limited spending of three sorts, the spending that a Jon Corzine might take out of his own pocket and spend in support of his own election or defeat, the spending that a Hillary Clinton might engage in from the small contributions given to her campaign, and spending by everyday people or groups in support of or against a candidate. The third thing these reforms did was to require disclosure of contributions and of spending related to elections. And then, finally, in the presidential arena they provided for public financing of candidates in return for limits on spending. What *Buckley* did, when it came down in 1976, was to take a very fine-tuned congressional scheme and rip it to shreds. It upheld the contribution limits, it upheld the disclosure, it upheld the spending limits connected to public financing and public financing itself, but it struck the other spending limits. It struck the limits on independent spending of groups or individuals, it struck the limits on a Jon Corzine spending his own money, and it struck the limits on the spending of campaigns from money raised from others.

SCOTT HARSHBARGER:

Is there a total barrier to Congress going back and trying to fix it at this point? Why has that case sat now for all these years as the barrier when Congress supposedly could have tried to fix it? Or, did it hold that money is speech? Did it really say that?

E. JOSHUA ROSENKRANZ:

Well, let me answer the first question first. When the Supreme Court pronounces that the Constitution prohibits *X*, Congress cannot go back

38. 347 U.S. 483 (1954) (holding that separate but equal was inherently unequal under the Equal Protection Clause of the Fourteenth Amendment).

39. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that statements obtained from defendants during police interrogation, without full warning of constitutional rights, were inadmissible as having been obtained in violation of the Fifth Amendment privilege against self-incrimination).

and do *X*. It can do almost-*X*, and try and finagle around the margins, but the best reading of *Buckley* is that the Supreme Court said Congress cannot limit spending, period. I have written a book that takes other tacks, suggesting that the Supreme Court did not exactly say that; maybe the Supreme Court said that Congress cannot limit spending in order to prevent corruption, but perhaps Congress can limit spending for other reasons.[40]

But to answer the second question, Scott, *Buckley* is often characterized as a case that stands for the proposition that "money equals speech." I have always thought of that as a lampoon of what the Supreme Court actually said. You always hear the Mitch McConnells of the world lampooning *Buckley* in that way. What *Buckley* actually said was something that is more reasonable. It said that it takes money to speak. It takes money to buy a ream of paper. Any attempt to control the flow of money into politics necessarily calls into play the First Amendment. It does not mean that the First Amendment always trumps regulation or the reason that the legislature might have for regulating, but it means that we have got to balance the reasons for the regulation against the impact on speech.

SCOTT HARSHBARGER:

So from your view then, when we ask the question: "Is there any chance the Supreme Court will reconsider the case?" is it your view that there is a way to deal with some of the issues we have talked about that is constitutional, that is within *Buckley?* Is it your view that *Buckley* is just often used by people politically? Has it taken on a life of its own here?

E. JOSHUA ROSENKRANZ:

Yes to all of those things. First, there is no question that Congress can engage in some meaningful reform, notwithstanding *Buckley*. But the truth is, *Buckley* has become a major obstacle. I described it as a tree in the ball field; it has evolved into something that is more like the trees in the *Wizard of Oz*, that will catch fly balls that are flying over it—or the thing that ate Manhattan, a mutant monstrosity. *Buckley* has come to stand for all kinds of things that the *Buckley* Court never intended. It has

40. E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (1998).

been known to chew up reforms and spit them out into little pieces. And ultimately, my answer to the question that you started with, Scott, is yes; I think *Buckley* will be revisited by the Supreme Court. There are six members of the Court who are already on record for the proposition that *Buckley* is fundamentally flawed in one major respect, and that is its distinction between contributions, on the one hand, and spending, on the other hand. Four justices say Congress should be allowed to regulate both, and two say Congress should be allowed to regulate neither. So *Buckley* sort of teeters as this rotting tree just waiting for the next strong wind to blow it over. The only question is whether it falls on top of us or on top of Mitch McConnell.

SCOTT HARSHBARGER:

Is there a possible equal protection claim? Any chance with the Supreme Court in light of *Bush v. Gore*?[41] Does that have any relevance?

E. JOSHUA ROSENKRANZ:

Great question! We have agonized about whether we can take *Bush v. Gore* and shove it somewhere where it belongs. On this particular issue—

SCOTT HARSHBARGER:

We are independent, nonpartisan groups up here, just in case—

E. JOSHUA ROSENKRANZ:

The answer is that *Bush v. Gore* could be pushed in all kinds of directions. I do not see a great legal argument for using *Bush v. Gore* to leverage the overruling of *Buckley* or to change the campaign finance laws. The Supreme Court quite emphatically in *Buckley* rejected an argument that campaign finance limits, like spending limits, are permitted in order to equalize.

SCOTT HARSHBARGER:

Take us back then, as we go to this issue. We talk to Senator McCain about the McCain-Feingold bill, and we hear a lot about Senator Mitch McConnell, who, for those of you who have not been following this, is one of the leading opponents of reform. McConnell often speaks very eloquently in constitutional (First Amendment) terms about this issue. He has taken the position, at least until the recent *Shrink* case,[42] that the

41. 531 U.S. 98 (2000).
42. Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000).

Supreme Court was going to strike down any kind of regulation, inevitably permitting unregulated soft money. Hence, wealthy individuals, unions, and corporations may give effectively beyond the legal limit as a speech right, and you certainly cannot deal with issue ads, and that *Buckley* just stops all that. Is that true?

E. JOSHUA ROSENKRANZ:

No. Mitch McConnell is quite eloquent on the First Amendment, but he is about as wrong as he is eloquent. And, as an aside, this is a guy who never met a First Amendment violation he didn't like until campaign finance reform came along. There is a whole lot that can be done by way of regulating the flow of money into politics that would not violate *Buckley*; I already said that. Scott asked about soft money and issue advocacy; let's start with soft money.

The Federal Election Campaign Act,[43] the 1974 reform that we already spoke about, limits contributions that candidates raise for their own campaigns. Soft money is a complete end run around those limits. Soft money is truckloads full of money that come from the very corporations and unions that are absolutely barred from giving to candidates, as well as from wealthy individuals. The soft money is raised by candidates, funneled into the political parties, and the output is, lo and behold, political ads that are about the candidates. They do not advocate the election or defeat of candidates explicitly; instead, they talk about what a dirt bag candidate *X* is and allow you to draw your own conclusion on whether to vote for him or not. So can soft money be limited constitutionally? The answer is, and this is close to a no-brainer in constitutional law, yes. Since 1907 it has been permissible to limit political contributions by corporations; since the 1940s unions have been prohibited from contributing money in electoral politics, and since 1974 (with *Buckley* in 1976 upholding it) limits have been upheld on wealthy individuals contributing to political parties.

SCOTT HARSHBARGER:

To move just a bit on this, I guess the question I want to ask is this: has public financing ever been challenged legally? Does it face the same legal and constitutional barriers? And, what about the mandatory spending limits issue? And, let me throw in a third one: the National

43. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431–55 (2000), *amended by* Pub. L. No. 93-443, 88 Stat. 1263 (1974)).

Voters Rights Institute litigating the question of the "wealth primaries." The question is: does the Constitution get in the way of soft money control? Is it a barrier to other types of financing regulation?

NICK NYHART:

I think it affects public financing around the edges. One area where clean money reform was challenged involves the proposal to provide matching funds if an opponent spends over the legal limit. The ACLU made the argument that if matching funds are provided to a publicly financed candidate when his or her opponent spends over a specified limit, that would tamp down speech, because why would someone spend additional money on themselves if they knew it was going to be publicly matched for his or her opponent? But courts have decided that although candidates may have the right to speak, they do not have the right to unanswered speech. There are constitutional questions that arise. One of the things that we propose concerns issue advocacy. Rather than regulating it, we would instead match it. So instead of raising questions about tamping down speech, it is actually publicly matched for the other side. Speech is not limited; it is enriched by facilitating competition—the chance to answer.

E. JOSHUA ROSENKRANZ:

Let me try an angle on that and then yet another issue that you asked about, but we didn't get to. In public financing, as I already said, *Buckley* upheld this deal in the presidential elections where you give a candidate what is now $73 million for the general election in return for their promise not to raise any other money for the presidential election. So it is a spending limit and it is an absolute ban on raising money. We now know how completely that has fallen apart. But that was upheld in concept. So the real constitutional question there has become: can a deal be too sweet? Voluntary limits are permissible, but can the pie be sweetened so much that it becomes essentially not voluntary? So far, I think correctly, the courts have answered this question in a way that upholds these voluntary schemes.

The other important constitutional issue that is very much at stake in the debate in Congress right now and across the United States in the various states has to do with the question of campaign ads that do not use certain magic words like "vote for," "vote against," "elect," or "defeat"—what I would call "sham issue ads." They waddle, quack, and smell like campaign ads, but the people who sponsor them, including political parties in the soft money context, pretend they are unaware of the election: "Oh my God, there's an election going on out there? I didn't realize there was an election; I was just advertising to the public

about this very important issue, the issue of what a dirt bag candidate Jones is, right in the heat of an election." That is a very, very difficult set of constitutional issues that I can address later on.

SCOTT HARSHBARGER:

Let me segue a bit, because I want to refer all of you to this: the issue ad versus campaign ad distinction. One of the interesting things that I learned a year and a half ago is that these are campaign ads masquerading as issue ads. Nobody is trying to limit or ban free speech here, we are trying to regulate campaign ads. As I make my way to Frank, I want him to comment in the context of the pending McCain-Feingold bill.

But first, back to Chuck for one preliminary question: how did the name "soft money" arise? And do you see it as a particularly corrupting form of money? A lot of people are confining themselves to the issue of soft money, but we all know hard money constitutes most of the money in the system.

CHARLES LEWIS:

The first part is difficult. I am not quite sure, but I should know that. It is the idea that it is soft and squishy, and we will never be able to figure out where it was spent because it moves around.

SCOTT HARSHBARGER:

That'll do, even if that is not the right reason.

CHARLES LEWIS:

But there is no question that many of the abuses in the 1996 presidential campaign (easily the most controversial campaign since Watergate in terms of scandal) were soft money related. There is no question. But if we look at the absolute number amount, of the $3 billion spent at the federal level, soft money is really only one-sixth of the total. So a mistake one could make is to think that this McCain-Feingold legislation is a panacea that will solve all the problems of corruption in government. It absolutely, positively will not. And that should be made clear to everyone.

SCOTT HARSHBARGER:

So let me make the segue to Frank. Public Citizen and Frank have

been major advocates of campaign reform, including what occurred this year. This includes a real effort by various coalition partners to try to hang together and add groups like Campaign for Tobacco-Free Kids and environmental groups, consumer groups, and business groups to create a much broader coalition, a bipartisan coalition. And Common Cause's position has been that this is just one step; this is incremental. We are, ultimately, all about supporting free television time, public financing down the line, and other reforms. Having said that, though, the McCain-Feingold bill is what we have here in Congress now. Frank, we really ought to try to give people a quick thumbnail sketch of the McCain-Feingold bill. Why is this now pending, and what is so controversial about it?

FRANK CLEMENTE:

Thanks. Senators McCain and Feingold had a bill back in 1995 that was a partial public financing bill—it had some free television time in there, and it dealt with the soft money question, greater disclosure, and issue ads. Over the years, it has morphed into a relatively incremental approach to campaign finance reform. I actually believe that soft money is the most central problem we are dealing with right now in the campaign finance reform debate. It may only be one-sixth of the money, but if you set aside all the contributions that come in $200 amounts or less, which are quite substantial—you take that away—soft money becomes very concentrated. It becomes very significant in terms of how the debate is determined in Washington, D.C. It is the reason we did an analysis, that is in your packet, called *Killing Us Softly*.[44] What we looked at are major industries that have important things before Congress—the tobacco industry, the gambling industry, the oil industry, the energy-utility companies, and insurance companies. What you have seen since 1992, is that they were spending virtually nothing in terms of soft money then; and now all of them are either spending forty to fifty percent of their campaign contributions in the form of soft money. In some industries, it is up as high as sixty to sixty-five percent. So what was it Willie Sutton said: "Follow the money," or something like that?

SCOTT HARSHBARGER:

Why do you rob banks? Because that is where the money is.

FRANK CLEMENTE:

Okay. So it tells you that if the industry has decided that is where they want to put their dough, the indication is, obviously, that they are getting

44. KILLING US SOFTLY, *supra* note 1.

a lot of bang for the buck. And the reason this is so important is, the folks who are raising that soft money—Trent Lott, Mitch McConnell, Dick Gephardt, Tom Daschle—are the people who sit at the pinnacle; and it is the President as well, of course. They are the folks who sit at the pinnacle and determine the legislative agenda, whether a bill gets considered or not, and what its final content will be. So through the soft money loophole, rather than spending through their PACs—spreading $5000 to $10,000 contributions around to 400 members of the U.S. House—they are able to concentrate from $100,000 up to $3 to $4 million on those leaders. Those leaders are able to determine much more of the outcome of these battles.

There are two fundamental things being debated that are the underpinnings of the McCain-Feingold Bill, and both are up for grabs right now. One is this soft money ban and the ban is achieved in three ways. It addresses the national political parties, including the Republican National Committee and the Democratic National Committee, and their parallel committees in the Senate and House, respectively—six national party committees. This bill bans them from collecting and spending any of that soft money.

Second, it also bans the state political parties from spending the money on federal candidates. The reason that is important is because most of the money that is being spent on issue ads and "get out the vote" and voter registration is being spent through the state parties. A donor of a candidate or a party leader is saying "give this $50,000 check to the state party" or they are sending it through transfers from the national party. And these state parties are operating according to state law, so it is whatever the state law is out there. So if a state law says a PAC can give soft money, well, then a PAC is free to give $100,000 in soft money.

Third, under the McCain-Feingold bill, federal office holders are prohibited from raising this soft money, from telling somebody, "write this check," the way Alan Cranston did when he told Charles Keating, the S&L swindler, to write an $850,000 check to the Democratic party. So that is prohibited under this bill.

Now, there is one other thing to think about in the context of public financing. Gore and Bush made a bargain with the American population. And that was that they would run for President, and in exchange for getting $67 million apiece in public money for the election campaign, they were not going to take any private money to help them get elected. Well, guess what? Their two committees combined raised $260 million,

about 100% more than they got in public financing. And why did those two committees take that? So they can run more on issue ads on behalf of those two candidates than those two candidates actually spent on their own behalf directly. So that is what we are dealing with.

And the loophole is, as Josh explained before, and I just want to reiterate, corporations, unions, and individuals are able to funnel this money for candidates legally, but it should be illegal.

SCOTT HARSHBARGER:

Chuck calls it legal corruption, right? Legal bribery?

FRANK CLEMENTE:

They are able to write these large checks even though they have been prohibited for decades from doing it and even though individuals have been prohibited from sending to a political party more than $20,000 a year. They are free, through this backdoor loophole, to give and to go above limits. It is legalized bribery, a soft money laundering machine, to be able to write these very large checks. And that is why it is such a central part of the debate.

The other part of the McCain-Feingold Bill that is critical in dealing with the issue ads question is that this bill will not regulate spending on ads that expressly advocate whether somebody should be elected or somebody should be defeated. What it is attempting to do is regulate the ads, as Josh said, that sound like issue ads, but really are not issue ads. The interesting thing that is going on is that ninety-six percent of the ads the candidates themselves put on television are not saying, "vote for me" or "vote against the other guy." They are saying, "I'm a good guy." They actually sound just like issue ads. They poll better with the population; they get a better reading from the public.

And so, what the debate is over right now concerns what is called the "Snowe-Jeffords" amendment in the McCain-Feingold bill. And what we have tried to do there is to carve out what is called a "bright line test." We think the Supreme Court will take a sympathetic view of such a bright line test. The bill provides that in the sixty days before a general election, when things are hot and heavy (people are putting their ads up and the voters are most concentrated on what is going on), we are going to prohibit a corporation and a union from spending money to put an ad on television or on cable or on the radio that mentions any particular candidate and says, "this guy's a good guy," or "this guy's a hasty fellow." That is all we are trying to do with this bright line test. We think that it would be constitutional for the reason that Josh gave before, the Supreme Court has upheld the bans on corporations and unions spending money to influence campaigns and giving money directly to

the parties, giving money directly to the candidates to influence elections.

SCOTT HARSHBARGER:

That is an excellent description of this issue. What is likely to be the outcome of this debate? This tries to deal with the things that people are concerned about: campaign costs, ads, and huge amounts of money being collected. What do you see to be the thing that will have to be given up? We talked quickly about the individual contribution limit increase. What do you see to be the fundamental objection to this? The former President of the United States, Bill Clinton, was most eloquent in expressing his objections to the current campaign finance system. He ran for office, pledging campaign finance reform. He was given a chance to sign campaign finance reform and did not. The Democrats walked in 1993 and 1994. Now, Democrats have said: "we are for this all the way." It might pass. But our biggest problem is with Democrats in trying to deal with this. What are the two biggest hurdles? And give us a five second prediction.

FRANK CLEMENTE:

It is fear. These folks want to stay elected, they want to maintain their incumbent status, and they certainly do not want to introduce anything into the system that could jeopardize that. And after all, they are now sitting there in Congress, some of them have been there for twenty or thirty or, I guess in the case of Strom Thurmond, fifty years or so, right? And so, they do not want to give up that status. Also, this money is the lifeblood of politics. Without money, representatives do not have the ability to get their message out, to communicate their position, and to ensure that they get reelected. And so, without the dough, they face the fear of the unknown. They just do not want to meet that challenge.

SCOTT HARSHBARGER:

Does this pass or not?

FRANK CLEMENTE:

Well, yes. A bill passes the Senate; I've always felt the bill passes the Senate.

I want to say one thing about issue ads that I think is extremely important. They have to do with not just corporations and unions,

because this is where Mitch McConnell is just messing up, turning the American people's heads around. He calls this an anti-free-speech bill. I think you can see from historic law that the corporations and unions should not be engaged in electioneering activities. But we are agreeing that individuals should be engaged in electioneering activities. The issue ad provision that is now in the bill would allow nonprofit groups, § 501(c)(4) organizations, to run issue ads. That means the NRA, the Christian Coalition, it means the Sierra Club. And it also allows individuals as well. But it would allow those organizations to run issue ads, provided they did not accept contributions from corporations and unions to pay for those ads. And if they accepted contributions from individuals, if you received $1000 toward a $10,000 media buy, you would have to disclose who was funding these things.

Now remember, we are not curbing legitimate issue ads—issue ads that say there is an important vote coming up and to call your Congressperson and tell them to vote the right way on this. We are talking about before an election, during a narrow period of time, about sixty days before the general election. Using Brennan Center data, in the last election only 250 ads out of 51,500 ads that were run during that sixty-day period before the general election were true issue ads. In other words, ads that advocated a position relevant to a bill that was before Congress, concerning legislation or public policy. Everything else was an ad that you and I would look at and would interpret as a campaign ad, because the issue portrayed was not even before Congress.

SCOTT HARSHBARGER:

What is the prediction?

FRANK CLEMENTE:

My prediction is that the bill passes, it passes with the McCain-Feingold soft money ban intact, it passes with the issue ad provision intact. There will be both—amendments will be offered to substitute a bill that is a total Swiss cheese approach to soft money, and they will try to strip out the issue ad provision. I do not think either will be successful.

There are a lot of other things in the bill, some of which we may not like.

SCOTT HARSHBARGER:

Right. Now let me make a segue here to Nick, because one of the things that I think Nick and Public Campaign have done incredibly well is to simplify this issue. Because one of the biggest problems in talking about hard money, soft money, issue ads, and so forth is that people's

eyes glaze over. This is really very difficult. How do we get people to get fired up to go into the streets for the McCain-Feingold bill? Where do they get engaged? How do they become relevant? Public Campaign has done an exceptional job at trying to figure out how you might mount a campaign and get people involved at the state level. And it has focused on public financing as a solution. And Nick, what I think would be helpful would be if you would talk about how your campaigns work and whether they have been successful.

NICK NYHART:

The starting point on the public financing systems, the full public financing systems that we call, "clean money," is that rather than taking the current hodgepodge of laws and trying to fix them, we said: "let's start from scratch." We start with one given limitation, and that is the way the constitution has been interpreted. But within that rubric we would build a campaign finance system from scratch. And I think two values jump out in that approach. One is accountability. We want candidates and elected officials to be accountable to the voters in their district. And that is sort of a basic principle of representative democracy. And the second is equity. We want different kinds of people to be able to run for office and have an equal chance to present their cases to the voters.

So with those two values in mind, how would you build this from scratch? And the system that a lot of people developed over a number of years was a clean money campaign reform. It works this way: candidates who qualify for the system receive public financing—enough to run a competitive campaign. But they get that support in return for two promises. The first is that they are only going to spend the money that they are given publicly, so they have a spending limit. And, second and related, because they make that promise, they are in effect saying they will take no private money. So those are the two basic conditions to receive the funding.

Candidates qualify for the system on the basis of gathering a fixed number of very small qualifying contributions. In our model bill, it is $5 contributions. Candidates need 1000 to run for Congress. Where the law has actually gone into effect, in Maine for instance, it is 2500 of these $5 contributions to run for governor. Candidates who make that threshold get a lump sum to run their primary. If they survive the primary, they get another sum that qualifies them for the general.

There is another important facet of this, too. If we are running against each other and I am a billionaire and Josh is running with public financing, as soon as I begin to spend more than his amount, he gets matching funds. So there is a trigger that goes into effect to yield matching funds where a competitor spends beyond the limit. He does not get the matching funds without any ceiling if I spend all my billions—he doesn't get matched forever. But he gets up to a high enough level that, in practice, he remains competitive. A candidate does not need the most money to win, you do not need Steve Forbes's money to beat Steve Forbes, but you need Bob Dole's money to beat Steve Forbes. So candidates receive up to a certain point.

In addition, if all of a sudden my good friend here, Scott, runs independent expenditures against Josh, Josh receives matching funds again, to answer back and maintain some parity in the political debate without having to turn back to donors who can then later hold him accountable. So that introduces some competitive equity, and it means that people are accountable to voters and not to their donors.

SCOTT HARSHBARGER:

So the theory is to invest public funds in the candidates, as opposed to private folks investing.

NICK NYHART:

That's right.

SCOTT HARSHBARGER:

What is the theory here? Is it that public financing makes candidates more responsible to the public interest or is it more designed to get more people to run and to create more competitive elections?

NICK NYHART:

I think both are benefits. There is a handout on the tables outside entitled, "*A Waitress in the House*."[45] It is the story in a Connecticut weekly paper about a candidate from Maine who came down and testified for the legislature there. She was a single mother and a waitress. She never could have run for office if she had to raise money from the lobbyists in Augusta, but she ran, and she won, and she is now in the House. Again, people like that cannot run for office under our current system. So its purpose is to get more and different kinds of people to run for office.

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45. Dan Levine, *A Waitress in the House*, VALLEY ADVOCATE, Mar. 1, 2001, *at* http://old.valleyadvocate.com/valarchive.phtml (last visited Feb. 1, 2003).

Look at Maine. The people there approved a public finance system in 1996, effective in 2000. Seventeen of the thirty-five sitting state senators now owe nothing to any lobbyist or any other special interest because they had to take none of that money for their campaigns. So it is nearly a majority in the state senate.

SCOTT HARSHBARGER:

Let me ask this: people often say that the public does not really care about this. Senator McConnell and others say this, and in polls campaign finance reform does not come in as a high priority. Are you seeing any evidence that the public will support this effort more than they support reform in other areas?

NICK NYHART:

Actually, in Maine the system is partially financed by check-offs on their state income tax. And this check-off is getting the highest rate of any of those offered on the form. This is ranked the highest. I think campaign reform is broadly popular. The question has always been: how do you motivate enough people to work on the issue or focus on the issue to make a difference? In some of the campaigns, the initiatives not only got a good vote, but they were able to motivate large numbers of volunteers to work for them. In Massachusetts, for instance, I think the largest political organization on election day, outside of the two parties, was Massachusetts Citizens for Clean Elections.

SCOTT HARSHBARGER:

This is often given as the evidence to support Chuck's position that public finance is the way we separate our public officials from these kind of apparently corrupt influences. Does this win every place you go? Last year we thought this was going to be the solution; it looked like it was winning in several states, but it has not always been successful. Why?

NICK NYHART:

We have been on the ballot five times with a public finance system, and we won three times. We had our first losses in the last election when we lost in Oregon and Missouri. We have lost in routs and we have won in routs. The interesting thing is that we took the same policy, and when we polled it in those three states it registered about the same.

We took the exact ballot language, and it came up about the same, too. So the difference was not in the public popularity prior to when the campaign began, it really had to do with the kind of coalitions people put together, the way the message got out to people, and the strength of the opposition.

SCOTT HARSHBARGER:

David, I am sure you have a stack of questions here, and I think that we have plenty more we can cover, but let's try to respond to the written questions you have been collecting from the audience and the Internet.

DAVE VLADECK:

You have done a great job in provoking the audience's interest, and I have tried to prioritize these questions to cover some ground that perhaps you intended to cover, but for time constraints. The first question I would like to ask is principally addressed to Frank and Chuck. Reform opponents often say that McCain-Feingold will weaken the parties. Has the surge in soft money giving to the parties and party leaders accreted power to them to determine the course of legislation, and would a soft money ban in fact *enhance* the legislative process by weakening the grip of party leaders?

FRANK CLEMENTE:

I am not sure how much I care about the parties. What I care about is our democracy and soft money has certainly weakened our democracy. That is where our focus ought to be and less on the structure of the parties. Until eight years ago there really was not very much soft money in the system, and the parties seemed to do pretty fine. All of a sudden, these huge amounts of tens of millions of dollars have now come into the system; and, frankly, all it means is that the parties are that much more beholden to the interests that are providing them with that money and that they get further and further away from the interests of the vast majority of the population. So I am willing to take that crap shoot. I actually think that it will make the parties better and stronger. They have become almost like bloodsuckers, in terms of these interest groups in Washington, D.C., and it will force them to be much more dependent on the membership of their party. The Democratic party is worse than the Republican party. The Republican party has many more small donors, many more active donors in their party than do the Democrats, and that is a fundamental problem for the Democratic party. It needs to address it by having programs that connect better to the voter.

DAVE VLADECK:

Chuck?

CHARLES LEWIS:

Just in a sentence, the parties are probably the most powerful lobbying mechanisms in Washington, D.C., because no one looks at them as lobbyists. In the 1996 election Don Fowler of the Democratic party and Haley Barber of the Republican party were both lobbyists *while* they were chairmen of the parties. And they had strategy meetings with legislative groups. So they are getting hundreds of millions of dollars to the parties, and they are orchestrating legislative strategy, and I completely agree with Frank that they have become completely untethered to the public.

SCOTT HARSHBARGER:

Does the McCain-Feingold bill deal with that? Which way do you think it cuts?

CHARLES LEWIS:

I think it deals with it in terms of cutting off a lot of that money. We still have an unregulated issue with party chairmen and their personal finances and other issues about their activities, but we will cut off their major source from these large contributions that are extraordinary.

E. JOSHUA ROSENKRANZ:

Scott, I just want to make a different point. I think the question of party strength, when it comes to the flow of soft money, is a complete red herring. There is a real fallacy, I think, in equating massive amounts of money flowing into parties with party strength. I do not oppose political parties. Strong political parties are a fundamental part of our democracy, but we have to define what we mean by strong parties. Traditionally, strong parties are parties in which massive amounts of voters are mobilized at the grassroots or parties that can pass their agenda. To say that funneling money in huge amounts into political parties is the equivalent of party strength is like saying that eating an enormous amount of fat saturated french fries is the measure of a strong body.

NICK NYHART:

We also get asked this question about the full public financing systems we put into place. I think the best answer came from a woman who was a multiterm incumbent in Maine who ran under this system with public financing, and her opponent ran under the system, too. So, they were equal on money. She said that in the old days if she had a tight race, she simply made another round of fundraising phone calls so she could put out more mail. That is how they communicate with voters in her district. Now she needs to get more out of her district, more out of her volunteers. So we see a shift there. You want to talk about a healthy party? For her to win now, she has to activate a community organization, as opposed to activating a network of donors. So the question is whether a party is a group of people who are active in civic life or a bunch of donors?

DAVE VLADECK:

Let me read the next question, and then I want to expand it a little. It is principally directed at Josh, as follows: does the fact that not all persons have enough money to spend in the political process violate equal protection principles? Now what I would like you to expand on is this: how is campaign finance reform going to help encourage people to become challengers? We all know the power of incumbency; will the McCain-Feingold bill make any inroad at all into the stranglehold incumbents tend to hold on the electoral process?

E. JOSHUA ROSENKRANZ:

Wow.

DAVE VLADECK:

And you have about two minutes.

SCOTT HARSHBARGER:

Why don't you just write the question yourself, David? I mean, don't pretend somebody else asked that question.

DAVE VLADECK:

I have some of those too.

E. JOSHUA ROSENKRANZ:

Okay, equal protection. There are two ways to look at it. And I wasn't clear on what the question was asking. One is about whether all voters are equal in a world in which some have a lot more money than others.

DAVE VLADECK:

I think it is really the Corzine problem—only the wealthy can run, and it is the argument that Boniface and others have made, that the electoral process, the financing process, screens out anybody but the wealthy.

E. JOSHUA ROSENKRANZ:

All right. So let's focus on candidates. The Supreme Court quite emphatically said in *Buckley* that the notion of diminishing the voice of some in order to enhance the relative voice of others is antithetical to the First Amendment. Now, I have always wondered what First Amendment the Supreme Court had in mind. Think about any contest in which the goal is to educate the audience about the decision they are about to make. Think about the Congress, think about the Supreme Court of the United States. You always have Robert's Rules of Order. Those rules don't equalize, but they prevent one voice from so overpowering others that it is not worth speaking at all. In the campaign finance context, I would not talk so much about sheer political equality. Candidates will always be unequal in all kinds of ways. Incumbents are unequal, that is, they have an advantage in terms of name recognition. I would talk about diminishing massive concentrated power and balance. The second half of your question?

DAVID VLADECK:

Challengers. What is all of this discussion going to achieve if there is really no ability for challengers to do better?

E. JOSHUA ROSENKRANZ:

First, let me step away from the McCain-Feingold debate, because I think it is a much more important question in the overall campaign finance reform debate. I think one of the most important purposes of the campaign finance reform is to enhance competition. It is a very difficult thing to get people who hold public office to pass reforms that are going to make them more likely to be challenged. But there are all kinds of ways of fashioning rules, including public financing (which I think is the most important), to give challengers a leg up. There are all kinds of reforms that I think will never pass—that I would love to see on the table, such as lifting contribution limits for challengers so that there can be a Eugene McCarthy actually able to run a viable campaign with his first three contributors, for example.

FRANK CLEMENTE:

I look at the McCain-Feingold bill as sort of a tourniquet that can be attached to some important part of a body in order to shut off the flow of blood. It is not going to deal with the question of enhancing the ability of challengers to run for office. I do not think that I could make that argument. It fundamentally deals with these large contributions which the parties are using to spend to influence the process. It is not going to help the individual candidate. That is a hard money related problem, which public financing attempts to deal with.

SCOTT HARSHBARGER:

At the town hall forums that occurred over the last six weeks, many questions were asked of Senators McCain and Feingold, and of all of us, by citizens. And one of the questions was: "Isn't this going to cut off resources, actually?" If soft money is banned, that means an independent candidate, a third-party candidate, cannot get the money to challenge. And one answer people need to take seriously is that most of these interest groups are not going to give huge amounts of money to third-party candidates or independent candidates to challenge incumbents. This money goes to people in power by definition. It does not go to Republicans or Democrats; it goes to people in power in Washington, D.C. to preserve a power base.

Turning to public finance, beyond soft money control, our biggest challenge is finding the money candidates do need. That is why proposals for free television time and matching resources of some kind are so popular. You give something on the plus side for people to give up something (unlimited spending right or high contribution limits), but they get something in return. So I do not think it is about the challengers. I just think that it is naive to believe that people who are independent (unless they are independently wealthy) get a lot of soft or hard money in order to become challengers. We know that only fourteen out of 430 congressional seats were competitively challenged at all last year. And in most states the numbers of truly competitive races in the private and soft money environment are very, very low.

DAVID VLADECK:

The next question is directed to the entire panel. The civil rights bar and the academic community are increasingly advancing the view that the current system of financing is so heavily skewed to White constituents as to constitute a civil rights issue. And this is really directed to the campaign finance community. The question suggests that the campaign finance reform community and its advocates are

overwhelming White. What are you doing to expand the circle, especially to Asians, Hispanics, and other minority communities?

SCOTT HARSHBARGER:

I think that this is one of the greatest problems that the reform community faces, not just in campaign finance reform. We have to find a way to broaden our message, vision, inclusiveness, and diversity. Now that all sounds right—the words we are using—but one of the best things that is occurring has been coalition building among natural allies, whether it is labor or civil rights groups, because it offers something in return. The hardest problem I saw when I came to Washington, D.C. (I don't mean to sound like the rube from Massachusetts), was the absolute belief by almost every civil rights or progressive group that they had to have this money or they couldn't compete. The system had become so skewed that you had to buy into the system. And actually, the allegation is that finally, now that we are getting power, the reform movement is trying to take that away. That is a sad predicament. It is the same issue we used to face in Roxbury, a poor and high minority neighborhood in Boston, Massachusetts, as to crime in the inner city. We encountered the view that we had to sacrifice our civil rights in order to get good police protection. I always thought that was one of the saddest commentaries on our system of equal justice, including my role as a prosecutor, that we could not find a way to give people equal access and equal protection by maybe adding more resources.

I think that is one of best things that the public financing, state based coalitions and voluntary resources offer us. We are not going to succeed in reforming the system until we make it far more inclusive in terms of those trying to change the system.

NICK NYHART:

It also depends how the issue is talked about and how the laws are shaped. An organization called the Fanny Lou Hamer Project is composed mostly of African-American community activists from around the country who work on campaign finance reform. And, in the words of Dr. Gwen Patton, a veteran civil rights activist who is sort of a mentor to many of the people involved in this, "Getting private money out of politics is the unfinished business of the voting rights

movement."[46] And when we look at the image of the campaign finance movement and the image of the civil rights movement, they seem like they are on different planets. But groups like the Fanny Lou Hamer Project are bridging them. They have developed what they are now calling the Fanny Lou Hamer standard for judging proposals for campaign finance reform, and the standard is fairly simple. It says, take a woman like Fanny Lou Hamer, who was relatively poor—in terms of formal education, an uneducated woman from the South—but she had a huge impact on our country through her political leadership in the early and mid-1960s. They said a person like that ought to be able to run for office on a level playing field, regardless of the wealth they can pull together of their own or from other people. So let's look at how any proposal for campaign finance reform would treat a person like Fanny Lou Hamer. And I think if we begin to apply those standards and advocate for those standards, campaign finance reform can build a bridge to natural allies, including the civil rights community.

SCOTT HARSHBARGER:

Each person can comment if you want a minute.

CHARLES LEWIS:

I agree with the question. The reform community itself could be more diverse, there is no question about it. Every one of the groups has probably made some progress in diversity, and all of us could make more. I noticed that when *The Buying of the President 2000* came out and I went on a book tour. The biggest response was from black radio stations; it was just so interesting to me. It struck a chord, and I was fascinated by the energy that I sensed. And it gets to the coalition issue and the alliances. My group is an investigative reporting group, we are not technically reformers, we do not advocate legislation. But this is the first year I have even seen groups talk to each other. So that is progress, and maybe someday various groups, from civil rights to the environment, will all recognize that the fundamental issue is power and how it is dispensed in this country.

E. JOSHUA ROSENKRANZ:

I think it is important to keep two things in mind when talking about race and civil rights. The first is that so much of the rhetoric—even at this table—has been about recruiting them to our cause. That is the wrong message, I think. I hear so often in civil rights groups: if you

46. Public Campaign, *Clean Money Campaign Reform*, *at* http://www.publicampaign.org/cleanmoney.html (last visited Feb. 1, 2003).

want us on board for campaign finance reform, take on some of our issues and join forces with us. I think that is a very important message. Second, we should understand another source of skepticism, that campaign finance reform is a dressed up way of screwing minority candidates through state contribution limits. For example, a ban on contributions from people who are noncitizens is a nonstarter in communities of color. We have to be very conscious of putting into our package of reforms such elements that are nonstarters for communities of color.

FRANK CLEMENTE:

Just two comments. First, the Congressional Black Caucus is one of the most difficult natural constituencies to get on board with the Shays-Mehan bill (the House companion bill to the Senate's McCain-Feingold bill). They did not want to support the legislation. Their theory was that soft money to the parties is an important source of "get out the vote" and voter registration money for their constituencies. Their feeling has been that such money would dry up. Hence, it would deprive them of resources to mobilize voters around election time.

To me, it is not just a question of diversity around race, it is the larger constituency in general. Having worked on this for a number of years in Washington, D.C., the real true blue folks who care about this are the campaign reform groups, and more and more other organizations are getting a little more involved, like tobacco control groups and other public health groups. But it is very clear that many constituencies are being harmed by these large contributions, by the ability of the special interests to dictate policy, and I have always been confused by it. Partly, the problem is with priorities. Is such reform a first order of business or a second order of business? Other commitments are more immediate. For me, the goal has always been not necessarily to have them engaging in our fight, but infusing it into their battle, whether it is over tobacco control issues or the prescription drug debate or the debate over the Patients' Bill of Rights. The role of special interests in determining the outcome of those issues is critical, but it is difficult to convince advocacy groups to prioritize changing the long range rules of the game applicable to all of them when they have in front of them immediate substantive issues affecting their constituency.

SCOTT HARSHBARGER:

Okay, we are going to try to be brief, including even me. But I want to offer one example. The Greenlining Institute in San Francisco is a wonderful example of what I hope we are trying to do. They are trying to make campaign funding a civil rights issue because they believe it is a barrier to equal justice. John Gamboa is very eloquent on the point. He has seen dramatic changes demographically in elected officials. He has not seen dramatic changes in the resulting public policy. Therefore, something more is going on here, and he reflects the view that Chuck has, that I think we all need to have, about fundamental reform of the system. And that is why we need everybody involved.

DAVID VLADECK:

Let's move back to the McCain-Feingold bill. There were a number of questions which I am going to combine and direct to Frank. First, is there a killer amendment that you can envision being added to the McCain-Feingold bill that would cause you to withdraw your support, and, to the extent that the carrot of a soft money ban is being tied to a stick of raising campaign finance limits to $2000 or $3000, do you think that would be a fair trade off given your concerns about hard money?

SCOTT HARSHBARGER:

The individual limit, right?

DAVID VLADECK:

The individual limit.

SCOTT HARSHBARGER:

So why don't you take one shot, I'll add to that, and then we will go from there.

FRANK CLEMENTE:

I want to know who asked that very tough question. My boss is out here in the audience; Joan, what should I say?

SCOTT HARSHBARGER:

Did Joan Claybrook ask this question? Let's get this clear right now.

FRANK CLEMENTE:

This is the $64 million question.

SCOTT HARSHBARGER:

She would have asked it of me, first, though, Frank. Don't worry.

FRANK CLEMENTE:

The reason I answered my telephone before was because I thought it was somebody calling about this, because right now the Democrats are scrambling to figure out how to deal with this hard money question.

SCOTT HARSHBARGER:

One minute. What is the answer here? What is the answer?

FRANK CLEMENTE:

I cannot speak for the reform community. For Public Citizen, the fight is over whether or not to increase the hard money limit, the amount that an individual can contribute to a candidate. It is now $1000 for an election, and if we add the primary and the general, that is $2000 in the cycle. The typical proposal has been to increase that amount of money to $3000 so an individual will be able to give $6000 in a cycle, not $2000. And if it is a husband and wife, maybe they could give $12,000. That is a killer amendment from Public Citizen's point of view in terms of withdrawing support for the bill. The question was, what would I agree to?

SCOTT HARSHBARGER:

Nick, I know you want—

NICK NYHART:

I think the opposition wants to split the reform community, which is arrayed along a spectrum. There are people from the business community who are in support of the soft money ban and who think increasing contribution limits is a healthy thing to do for the system. And then there are people—where's Wendy? Would a $1001 limit cause PIRG to get off?[47] Yes? Okay. And we are probably pretty close to where the PIRGs are on that, and it is just a question of strategy. The Hagle bill would say it is legal to have soft money, and so there is a

47. Referring to the U.S. Public Interest Research Group (USPIRG), directed by Wendy Wendlandt, an umbrella association of state public interest research groups founded by college students in numerous states.

group of people who want to be against that. We think the current limits are probably too high anyway, so actually increasing them is anathema for us and others within the reform community.

SCOTT HARSHBARGER:

This has been one of the great lessons of my time: nothing changes in reform coalitions regardless of the topic. And having gone through the tobacco settlement and those negotiations with Matt Meyers, the gun control issues, and their various groups, I felt right at home when I came to the campaign finance reform. Although people could agree on ninety-eight percent of things, a couple of things could divide us, and if we were really good, we could just blow ourselves up without Mitch McConnell having to do anything! If this bill passes this time, it will be because the reform community has made a valiant effort to try to stay together and work as hard as they can to try to find common ground. And I think it is making a huge difference in terms of how people are assessing this, that they expected to be able to divide this community much more easily. We are all committed, whether we agree or not, to staying in conversation with each other about these topics. Common Cause's position has been that we oppose the individual increases. At the end of the day though, we want to look at the total package. Banning soft money and the sham issue ads is very, very important. Most believe that two-thirds of the senators would raise this limit in a heartbeat to $3000 if given a choice. They view that as being nothing more than $1000 or less in 1974 terms, given inflation since the limit was enacted. You all have been in coalitions, you all have been in these kinds of fights. I think this time there has been a real effort to stay together, and I am glad we are a part of it. And we have a lot of other things to take on, whether or not it happens with the McCain-Feingold Bill. And we have a lot more elements of reform, and I appreciate that. But it is going to be very tough. This is going to be a tough one, but we will see.

FRANK CLEMENTE:

If I could just add, you folks [addressing the California audience] are probably in the most strategic position of any state in the country to affect this outcome. Your senator, Diane Feinstein, is the Democrat trying to promote the limit increase to $3000. So 150 phone calls into her office Monday morning would make a substantial difference in the outcome of that debate.

SCOTT HARSHBARGER:

Or, go to AmericansforReform.org and register your views right now. Senators are thinking about this issue—it is on their minds for a change, and I think it is very important to get into it.

FRANK CLEMENTE:

The switchboard number is (202) 224-3121. Ask for Senator Feinstein's office. I am telling you, she is the person who is trying to cut the deal on this increase to $3000.

SCOTT HARSHBARGER:

David, keep going here.

DAVID VLADECK:

Well, for anyone who does not remember, just ask Joan; she knows these phone numbers by heart. One concern, and I think that Josh is probably the best to answer this, is that the approaches to campaign finance reform have perhaps harmful implications. For example, legal services programs? That is, is there a correlation here where, if money is not speech in politics, what about for the Legal Services Corporation?

E. JOSHUA ROSENKRANZ:

You're right, I guess I am the right person to ask because we are litigating both campaign finance cases and just won the case in the Supreme Court about efforts to limit legal services by lawyers who accept federal funds. There is a connection. First, I would qualify the question. Again, this is not about whether money is speech; it is about efforts to limit political influence—bought and paid for by money. I see two connections. One is that in general, the ability to give money to organizations, or the ability of organizations to spend money, may be protected speech. It is only in the electoral context that the Supreme Court has carved out this exception and said that elections involve such compelling state interests that a special set of rules can apply. Government may restrict the flow of money into or out of related entities. So elections are already cordoned off by the Supreme Court. And I do not fear that there is a big danger that tinkering with those rules in the electoral context will affect the ability of other nonprofits to speak about all kinds of issues.

The second connection is complicated, but I can state it very simply. It has to do with the public financing issue. If, for example, government cannot buy up rights by giving money to legal services attorneys in return for a promise that they do not litigate certain kinds of cases or take up certain kinds of positions, why then is it permissible for the government to give a big chunk of money to candidates in return for their promise not to spend as they are entitled to under the First

Amendment beyond a certain limit. And that is a really tough set of positions to reconcile. I believe I can, but I would need more time.[48]

SCOTT HARSHBARGER:

There are many more questions. We want to do a quick five-minute wrap here with each person getting a chance to do a minute. I want to do a minute at the end.

I do want to say on that issue, though, I hope people take it very seriously. Mr. Nader reminded us at lunchtime about the obligation of the members of the bar to work for equal justice. We are pleased that the Legal Services Corporation is now actually able to do again what it was created to do because the rest of the bar was not. With that, Frank, then I am going to go to Josh, Nick, and Chuck for a one-minute wrap here.

FRANK CLEMENTE:

Just a couple of things to look for next week, because we have a good civics lesson taking place in Washington, D.C. on the McCain-Feingold bill. There will be a big fight over what is called the Severability amendment; that is, an amendment to change what is in the bill right now. Right now the McCain-Feingold bill is drafted like most bills are drafted—if one of the provisions of the bill were to be struck down, everything else would still stand and still be applicable. The Republicans are trying to change this part of the bill so that if any piece of the legislation is declared unconstitutional, the entire bill falls. It is an important debate, and the removal of this standard severability clause tied into why they are trying to attach some nasty and obviously unconstitutional amendments to it. That is a backdoor, poison pill way to kill legislation.

E. JOSHUA ROSENKRANZ:

Because I am the one designated as the constitutional person, I'll wrap up with a note on the Constitution. Whenever I talk about free speech and the Constitution or efforts to control the flow of money in politics, I always feel that I have to go back to first principles. Really, to the first words of the Constitution, which are: "We, the People." We, the people,

48. The limitations enacted by Congress to prohibit attorneys for the poor from challenging the constitutionality of Congressional enactments, bringing a class action remedy, and so forth, may raise issues of due process for litigants, the integrity of the judicial branch, which depends upon the advocacy before it to fulfill its constitutional function to check the legislative and executive branches, and the fiduciary duty of an attorney to a client. These and other issues may distinguish the legal services limitations as involving impermissible restraints separate and apart from the First Amendment.

are the ones who ratified the Constitution as a charter of our own government. It was we the people—not the business corporations, unions, and other nonindividuals—who now have the ability to spend enormous amounts of money to buy access and influence. And I think it is important to bear that context in mind when we talk about what it is that this same Constitution governs as we try to wrestle back into the control to the people of the single most important element of our self-government—our elections.

NICK NYHART:

I have been designated to talk about what we can win that is bigger than what is on the plate now, so let me just say that there has never been a better time to work on campaign finance reform. We have seen a steady increase in what it costs to run for office, which disenfranchises people from the political system. The present political situation with the Republican trifecta in Washington, D.C. is going to mean that the policy benefits, the policy payoffs for donors, are going to be more clear. We have already seen what has being whipped through in the first forty or so days of the Bush Administration; it is the contributors' agenda. We need to make a stink about that. As the economy tightens, people are going to be angry, there are going to be more losers than there are winners in the economy over the next two years, and people are going to be ready to be properly agitated, as Jim Hightower[49] was saying earlier. To take advantage of that, we need to build much broader reform coalitions. We need to treat this as an issue not about process, but about power.

And finally, reformers need to take up the electoral tools that so many other movements or interest groups have used in the past.

CHARLES LEWIS:

In terms of the drama unfolding, the one thing we have not talked about is President George W. Bush, the so-called reformer with results, who never reformed anything relevant to this subject. The last person in the U.S. to veto campaign finance legislation was his father, in 1992. The last person to sign campaign finance legislation was an unelected Republican, Gerald Ford.

49. Former Agriculture Commissioner of the State of Texas, current radio journalist, and consumer advocate.

SCOTT HARSHBARGER:

What is the lesson there?

CHARLES LEWIS:

The lesson is that George W. Bush has a very interesting predicament. He does not want to look like a hack. And if something emerges out of the Congress, he has a dilemma about which way to go, but I am not holding my breath.

One hundred million Americans do not vote in this country. One out of four Americans have trust in government; back in the 1960s, it was three out of four. We have the lowest trust anyone has ever seen in this country. And to me this is the preeminent issue of our time. We must ask if we still have a legitimate government that we care about, trust, and believe in? And if all of this goes and it is so much wind and nothing happens, when most Americans see their politicians as corrupt and the political and incumbent class does nothing, we are at a very, very interesting impasse and a profound moment in our political history.

SCOTT HARSHBARGER:

You have probably all heard Bill Moyers speak very eloquently on this topic, and one of the things that he (and Derek Bok) points out is that the great danger in our democracy is not external threats, but the erosion from within by the lack of participation by people in it. And Moyers uses the example that a democracy is in great peril when somebody's civic worth is measured by their net worth. It is his belief that that is where we are now and that is why the reforms are so important.

The second point is why for me, and I think for everybody here, this is about a much broader issue. Campaign finance reform is, I think, an example of the problem, not the problem. I think this is about reclaiming democracy. I think it is about who owns the government, and I think to do that you have to re-engage people in our democracy, including young people and others who have been totally alienated and feel that it does not matter at all if they participate. And that is a radical change; it is a very dangerous situation. But the flip of that is that it means we have to do something positive, that we cannot just be against things, and that is why we have to figure out how you re-engage people; how do we re-engage? How do we, in a democracy, claim that public policy is set by those we elect, and yet, if we don't participate in the elective process, we should not be surprised what comes out of that. So we have to create, once again, a very broad citizen movement, and that is what this is all about for me.

I want to thank our panelists for a tremendous presentation, but also please look at the materials. Understand that everybody here would be very glad to speak to your group, to reach out to you, to give you more information. Everybody who had questions and did not have them answered, if they can be posted or given to us, we will make every effort that we can to respond, and other people who want to post later on comments, suggestions to any of us individually or collectively, we would be very glad to receive them; and, again, we thank you very much for giving us this chance.