RESOLVED, That the American Bar Association opposes the solicitation and use in Presidential and Congressional election campaigns of contributions of "soft money," i.e., contributions to political party committees in unlimited amounts by corporations, labor organizations, and individuals; and supports efforts in Congress, and before the Federal Election Commission, to prohibit such contributions.
So-called "soft money" contributions are contributions unlimited in amount made by corporations, labor organizations, or wealthy individuals to political party committees involved in national elections for President and Congress. "Soft money" contributions are often made in amounts of $100,000 to $250,000 or more. They totaled more than $250,000,000 in the 1996 national elections. They are not subject to the restrictions of the Federal Election Campaign Act (FECA), which prohibits all campaign contributions to candidates by corporations and by labor organizations, and limits individuals' contributions to candidates to $1,000 for the general election and $1,000 for the primary elections. It also allows PACs to contribute $5,000 per election to candidates. The contributions which are allowed by FECA are so-called "hard money" (or "hard dollars"). As explained by the FEC, the distinction between "soft money" and "hard" is as follows:

"Generally, the term 'soft money' refers to funds that are prohibited under the Federal Election Campaign Act, 2 U.S.C. 431 et seq. [FECA], either because they come from a prohibited source, see 2 U.S.C. 441b, 441c and 441e, or because the amount exceeds the contribution limits in 2 U.S.C. 441a. Conversely, the term 'hard dollars' refers to funds that are permissible under the FECA because they come from permissible sources and do not exceed applicable contribution limits." 62 Federal Register 33040 (June 18, 1997).

A more pithy definition of "soft money" has been given by a leading nationally syndicated columnist, David Broder: "'soft money' [is] the huge donations to the political parties from corporations, unions and wealthy individuals that figured in most of the 1996 campaign scandals." The Washington Post, May 20, 1998, p. A25.

Recommendation

This recommendation to ban "soft money" contributions in federal election campaigns is the same Resolution that was before the House at the 1998 Midyear Meeting; after debate, and late in the day, the House voted to refer it to the Standing Committee on Election Law for further study.

One result of the referral by the Midyear Meeting has been the ABA's silence during the debates of the last several months of this Congressional session on the principal campaign finance reform issue: banning "soft money." A majority of the Senate has voted in support of proposed legislation to ban "soft money," but this majority was less than the 60 Senators required to end the opponents' successful filibuster which blocked final Senate action on the bill. As of this writing (May 20), the House is about to begin debate on the "soft money" issue, after a discharge petition generated the momentum needed to compel the House leadership to allow the issue to reach the Floor. Final passage of campaign reform legislation prior to the ABA Annual Meeting now seems unlikely, so ABA support for legislation and
FEC rulemaking to ban "soft money" would still be timely.

A second result of the referral to the Standing Committee on Election Law has been to give the House the benefit of the Standing Committee's analysis of the law on "soft money." The Standing Committee's recommendation on the issue is included as one part of its proposed omnibus resolution and accompanying report to the House. (See Report No. 113.) The language in the text of the Standing Committees recommendation appears to support a prohibition on the use of "soft money" for "federal election purposes," and in that regard is similar to the instant Resolution. However, the Standing Committee's accompanying report, to which Members are respectfully referred, may appear to undercut the language of that recommendation, since the Report indicates that the Recommendation is intended to allow the continued use of "soft money" in numerous ways that would further the objectives of the national political parties. While it is only the language of the Recommendation, not the Report, which would be voted on as ABA policy, the Report language could well be invoked by "soft money" supporters to argue that the ABA at least tolerates the use of "soft money" - which by definition includes large contributions from corporations and corporate officers whose business activities are potentially affected by federal governmental actions - for purposes that would affect the outcome of federal elections, such as party "get out the vote" drives in Presidential election years. That approach would plainly leave national political committees with an incentive to continue their practice of soliciting corporations for such "soft money" contributions, as they did so notably in the 1996 election cycle.

The instant Recommendation, unlike that of the Standing Committee on Election Law, would put the ABA on record as opposing the solicitation (as well as the use) of "soft money" contributions from corporations, labor organizations, and wealthy individuals, including individual corporate officers. It is the solicitation even more than the expenditure of such monies which has given rise to the allegations that have caused the greatest public concern in the investigations of the 1996 national campaigns. There is at least the appearance of impropriety in solicitations made from White House premises for "soft money" contributions from corporations potentially affected by governmental actions, or in the sale to such corporations by a party's national political committee of $250,000 "season tickets" for its activities. And there is a sense of national chagrin at the use of the Lincoln bedroom as a perk for generous contributors of "soft money."

The ABA should, therefore, oppose the solicitation as well as the use of "soft money" contributions in federal election campaigns. The House should welcome the recommendation of the Standing Committee on Election Law that "soft money" not be used for federal election purposes, but should adopt the instant Resolution, in preference to the "soft money" position proposed by the Standing Committee, because (1) this Resolution would prohibit the solicitation as well as the use of "soft money" contributions by national political party committees, and (2) this Resolution is not encumbered by Report language that may encourage the political parties to continue seeking "soft money" contributions.

For almost a century, since 1907, our federal election laws have prohibited corporations from contributing to federal election campaigns. We should not permit that long-established principle to be undermined or circumvented by tolerating large "soft money" contributions.
contributions from corporations, their officers, or other entities or individuals. The increasing size and concentration of corporate entities makes it especially important to adhere to that principle now.

Nor does the First Amendment, which is fundamental to our democratic political process, preclude a ban on “soft money” contributions. 126 scholars of First Amendment jurisprudence have joined in a statement to Senators McCain and Feingold that, “To prevent corruption, and the appearance of corruption,” such a ban would be constitutional. Their statement is attached as an Appendix to this Report.

Respectfully submitted,

Robert L. Weinberg
as a D.C. Bar Delegate
and on behalf of the Bar Association of the District of Columbia
Dear Senators McCain and Feingold:

We are academics who have studied and written about the First Amendment to the United States Constitution. We submit this letter to respond to a series of recent public challenges to two components of S.25, the McCain-Feingold bill. Critics have argued that it is unconstitutional to close the so-called "soft money loophole" by placing restrictions on the source and amount of campaign contributions to political parties. Critics have also argued that it is unconstitutional to offer candidates benefits, such as reduced broadcasting rates, in return for their commitment to cap campaign spending. We are deeply committed to the principles underlying the First Amendment and believe strongly in preserving free speech and expression in our society, especially in the realm of politics. We are not all of the same mind on how best to address the problems of money and politics; indeed, we do not all agree on the constitutionality of various provisions of the McCain-Feingold bill itself. Nor are we endorsing every aspect of the bill's soft money and voluntary spending limits provisions. We all agree, however, that the current debate on the merits of campaign finance reform is being sidetracked by the argument that the Constitution stands in the way of a ban on unlimited contributions to political parties and a voluntary spending limits scheme based on offering inducements such as reduced media time.

I. Limits on Enormous Campaign Contributions to Political Parties from Corporations, Labor Unions, and Wealthy Contributors Are Constitutional.

To prevent corruption and the appearance of corruption, federal law imposes limits on the source and amount of money that can be given to candidates and political parties "in connection with" federal elections. The money raised under these strictures is commonly referred to as "hard money." Since 1907, federal law has prohibited corporations from making hard money...
contributions to candidates or political parties. See 2 U.S.C. § 441b(a) (current codification). In 1947, that ban was extended to prohibit union contributions as well. Id. Individuals, too, are subject to restrictions in their giving of money to influence federal elections. The Federal Election Campaign Act ("FECA") limits an individual's contributions to (1) $1,000 per election to a federal candidate; (2) $20,000 per year to national political party committees; and (3) $5,000 per year to any other political committee, such as a PAC or a state political party committee. 2 U.S.C. § 441a(a)(1). Individuals are also subject to a $25,000 annual limit on the total of all such contributions. Id. § 441a(a)(3).

The soft money loophole was created not by Congress, but by a Federal Election Commission ("FEC") ruling in 1978 that opened a seemingly modest door to allow non-regulated contributions to political parties, so long as the money was used for grassroots campaign activity, such as registering voters and get-out-the-vote efforts. These unregulated contributions are known as "soft money" to distinguish them from the hard money raised under FECA's strict limits. In the years since the FEC's ruling, this modest opening has turned into an enormous loophole that threatens the integrity of the regulatory system. In the last presidential elections, soft money contributions soared to the unprecedented figure of $263 million. It was not merely the total amount of soft money contributions that was unprecedented, but the size of the contributions as well, with donors being asked to give amounts of $100,000, $250,000 or more to gain preferred access to federal officials. Moreover, the soft money raised is, for the most part, not being spent to bolster grassroots organizing. Rather, the funds are often solicited by federal candidates and used for media advertising clearly directed to influence federal elections. In sum, soft money has become an end run around the campaign contribution limits, creating a corrupt system in which monied interests appear to buy access to, and inappropriate influence with, elected officials.

The McCain-Feingold bill would ban soft money contributions to national political parties, by requiring that all contributions to national parties be subject to FECA's hard money restrictions. The bill also would bar federal officeholders and candidates for such offices from soliciting, receiving, or spending soft money and would prohibit state and local political parties from spending soft money during a federal election year for any activity that might affect a federal election (with exceptions for specified activities that are less likely to impact on federal elections).

We believe that such restrictions are constitutional. The soft money loophole has raised the specter of corruption stemming from large contributions (and those from prohibited sources) that led Congress to enact the federal contribution limits in the first place. In Buckley v. Valeo, the Supreme Court held that the government has a compelling interest in combating the appearance and reality of corruption, an interest that justifies restricting large campaign contributions in federal elections. 424 U.S. 1, 23-29 (1976). Significantly, the Court upheld the $25,000 annual limit on an individual's total contributions in connection with federal elections. Id. at 26-29, 38. In later cases, the Court rejected the argument that corporations have a right to
use their general treasury funds to influence elections. See, e.g., \textit{Austin v. Michigan Chamber of Commerce}, 494 U.S. 652 (1990). Under \textit{Buckley} and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections.

Moreover, Congress has the power to regulate the source of the money used for expenditures by state and local parties during federal election years when such expenditures are used to influence federal elections. The power of Congress to regulate federal elections to prevent fraud and corruption includes the power to regulate conduct which, although directed at state or local elections, also has an impact on federal races. During a federal election year, a state or local political party's voter registration or get-out-the-vote drive will have an effect on federal elections. Accordingly, Congress may require that during a federal election year state and local parties' expenditures for such activities be made from funds raised in compliance with FECA so as not to undermine the limits therein.

Any suggestion that the recent Supreme Court decision in \textit{Colorado Republican Federal Campaign Committee v. FEC}, 116 S. Ct. 2309 (1996), casts doubt on the constitutionality of a soft money ban is flatly wrong. \textit{Colorado Republican} did not address the constitutionality of banning soft money contributions, but rather the expenditures by political parties of hard money, that is, money raised in accordance with FECA's limits. Indeed, the Court noted that it "could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." \textit{Id.} at 2316.

In fact, the most relevant Supreme Court decision is not \textit{Colorado Republican}, but \textit{Austin v. Michigan Chamber of Commerce}, in which the Supreme Court held that corporations can be walled off from the electoral process by forbidding both contributions and independent expenditures from general corporate treasuries. 494 U.S. at 657-61. Surely, the law cannot be that Congress has the power to prevent corporations from giving money directly to a candidate, or from expending money on behalf of a candidate, but lacks the power to prevent them from pouring unlimited funds into a candidate's political party in order to buy preferred access to him after the election.

Accordingly, closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting.
II. Efforts to Persuade Candidates to Limit Campaign Spending Voluntarily by Providing Them with Inducements Like Free Television Time Are Constitutional.

The McCain-Feingold bill would also invite candidates to limit campaign spending in return for free broadcast time and reduced broadcast and mailing rates. In Buckley, the Court explicitly declared that "Congress ... may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 56 n.65. The Court explained: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." 1d.

That was exactly the Buckley Court's approach when it upheld the constitutionality of the campaign subsidies to Presidential candidates in return for a promise to limit campaign spending. At the time, the subsidy to Presidential nominees was $20 million, in return for which Presidential candidates agreed to cap expenditures at that amount and raise no private funds at all. The subsidy is now worth over $60 million and no Presidential nominee of a major party has ever turned down the subsidy.

In effect, the critics argue that virtually any inducement offered to a candidate to persuade her to limit campaign spending is unconstitutional as a form of indirect "coercion." But the Buckley Court clearly distinguished between inducements designed to elicit a voluntary decision to limit spending and coercive mandates that impose involuntary spending ceilings. If giving a Presidential candidate a $60 million subsidy is a constitutional inducement, surely providing free television time and reduced postal rates falls into the same category of acceptable inducement. The lesson from Buckley is that merely because a deal is too good to pass up does not render it unconstitutionally "coercive."

Respectfully submitted,

Ronald Dworkin
Professor of Jurisprudence and Fellow of University College at Oxford University; Frank H. Sommer Professor of Law New York University School of Law

Burt Neuborne
John Norton Pomeroy Professor of Law Legal Director, Brennan Center for Justice New York University School of Law
Scholars Affirming the Constitutionality of McCain-Feingold Bill's Soft Money Ban and Incentives to Restrain Campaign Spending

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Friday, September 19, 1997
Friday, September 19, 1997

REMAINDER OF THE LIST OF SIGNATORIES IS OMITTED DUE TO PAGE LIMITATION
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GENERAL INFORMATION FORM

Submitting Entity: The Bar Association of the District of Columbia
and Robert L. Weinberg, a Delegate of The District of Columbia Bar

Submitted by: Robert L. Weinberg

1. Summary of Recommendation:
   Supports the principle that so-called “soft money” contributions should be prohibited
   in federal election campaigns.

2. Approval by submitting entity:
   Submission is by both an individual member of the House of Delegates and the Bar
   Association of the District of Columbia, which circulated the proposal to its members

3. Has this or a similar recommendation been submitted to the House or Board
   previously?
   Yes. It was submitted to the House at the 1998 Midyear Meeting; the House voted to
   refer it to the Standing Committee on Election Law for further study.

4. What existing Association policies are relevant to this recommendation and how would
   they be affected by its adoption?
   Existing ABA policy, adopted 8/75, supports contribution and expenditure limits for
   federal election campaigns. This existing policy would not be changed by adoption of
   this recommendation, which deals with a problem that has arisen since 8/75.

5. What urgency exists which requires action at this meeting of the House?
   The question of banning “soft money” is pending before the Congress in this session.

   See no. 5.

7. Cost to the Association.
   None

   None

9. Referrals.
   Standing Committee on Election Law. See 3 above.

10. Contact Person. (Prior to the meeting.)
    Robert L. Weinberg
    5171 N. 37th Road
    Arlington, VA 22207-1825
    (703) 534 3919
    fax: (703) 241-7504
11. **Contact Person** (Who will present the report to the House.)

12. **Contact Person Regarding Amendments to this Recommendation.**
    Same as 10.