California's New Campaign Finance Law: Is Section 85303(c) the Life of the Party?

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California's New Campaign Finance Law: Is Section 85303(c) the Life of the Party?

INTRODUCTION

On June 7, 1988, Californians voted to enact Proposition 73, a reform measure that amended the state's campaign finance law to provide for less expensive, fairer, and more egalitarian elections. California's Fair Political Practices Commission (FPPC) has the responsibility of writing regulations to clarify the new law's ambiguous sections.

Section 85303(c) of Proposition 73 and its corresponding regulations are of particular interest to California's political parties and candidates. This new section is a blessing for the state's political parties, but a curse for the state's political reformers. The section provides a mechanism that can be used to rebuild the influence of California's weak political parties, but it also contains a "soft money" loophole that allows big contributors to circumvent the new contribution limits and violate the spirit of campaign finance reform.

The FPPC properly interpreted Section 85303(c) to allow political parties to raise unlimited funds for certain activities that are important to the health of California's political system. These activities include voter registration drives and get-out-the-vote programs. However, this Comment will argue that the FPPC should take further steps to limit the abuse of this section by closing the "soft money" loophole.

Section One of this Comment will briefly discuss the history of California's state election laws and the problems that gave rise to

1. Proposition 73 was formally titled the "Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act."
2. Section 85303(c): "Nothing in this Chapter shall limit a person's ability to provide financial or other support to one or more political committees or broad based political committees provided the support is used for purposes other than making contributions directly to candidates for elective office."
3. Soft money is a political term of art which refers to the infusion of indirect campaign funds that directly benefit candidates. The money is "soft" because it is either beyond the law's contribution limits or beyond the law's disclosure requirements.
Proposition 73. In Section Two, some basic elements of the new law will be highlighted and compared with parallel provisions in federal law. In Section Three, Section 85303 (c) will be analyzed in light of its impact on the state's political parties. Finally, in Section Four, this Comment will offer suggestions for future FPPC regulations that can be used to limit the danger of "soft money " abuse.

I. HISTORY AND BACKGROUND OF CALIFORNIA CAMPAIGN FINANCE REFORM

A. Introduction

When California voters passed Proposition 73 on June 7, 1988, they also passed Proposition 68, a competing campaign reform measure. Both propositions won by a substantial margin.4 The success of these initiatives reflected the voters' desire to bring reform to the state's campaign finance system. At one time, California was a progressive leader among the states in attempting to check the corrupting influence of money in politics. However, by 1988, California's state campaign finance laws were considered some of the most lax in the nation.5 Before examining section 85303(c) in detail, it is helpful to see where Proposition 73 fits in the historical context of campaign finance reform.

B. Historical Scope: Money and Influence

It was a California legislator who was credited with coining the political axiom, "Money is the mother's milk of politics."6 Proposition 73 was the newest attempt at limiting and monitoring political money, but reform of this type is not a new concept. In fact, it is simply another step in the historical struggle to limit the corrupting influence of accumulated wealth upon government. Money is not a new tool in the world of politics; its influence has been felt in every system and in every generation.7

4. Proposition 73 received a 58% vote for approval and Proposition 68 received a 53% vote for approval.
5. "Until the [June 1988] election, California had one of the most permissive state election laws in the country. There was no prohibition of direct corporate or labor contributions. Not even the most commonplace state provision, such as contribution limits, applied." Alexander, Initiatives in California Muddle Political Finance, Impact: The Public Affairs Council Newsletter, July/Aug. 1988, p.3.
7. The Mosaic Law of ancient Israel contained specific statutes prohibiting the bribery of Hebrew judges and officers; see Deuteronomy 16:19. One author, noting the venal character of ancient Roman political leaders, said, "a little straightforward bribery was no longer accounted dishonest in Rome." See S. Perowne, Death of the Roman Republic 184 (1968).
The Watergate scandal reminded Americans that money still exercised a great influence on the nation's politics. For example, the dairy industry was alleged to have pledged $2 million to President Nixon's re-election campaign in exchange for the administration's support of increase in prices and subsidies for the industry. The U.S. Supreme Court acknowledged this problem when it wrote:

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Money's long history of influence in politics has served to undermine many citizens' faith in the ability of our government to function properly.

C. California's Campaign Finance History

1. Early Reform Efforts

California, at one time, was a leader among the states in campaign finance reform. In 1893, fourteen years before the first federal campaign finance reform laws were enacted, California adopted the Purity of Elections Law. The law required campaign...
“committees” to file reports of contributions and expenditures.\textsuperscript{14} The law also set expenditure limits and prohibited expenditures by persons other than the candidate and the authorized committee.\textsuperscript{16}

The 1893 law was formally repealed\textsuperscript{16} in 1907 when the legislature passed a new law that had expenditure limits and reporting requirements similar to the 1893 law, but lacked the stiffer enforcement provision of the earlier law.\textsuperscript{17} In 1913, another law was passed which attempted to restrict primary expenditures and to impose limited primary reporting requirements.\textsuperscript{18} The 1907 and 1913 laws, along with minor amendments, were codified in 1938 in the California Election Code.\textsuperscript{19} The expenditure limits were deleted in 1949.\textsuperscript{20}

2. Recent Reform Efforts

California continued its attempt to reform its campaign finance system when the legislature enacted the Waxman-Dymally Campaign Disclosure Act,\textsuperscript{21} which emphasized full campaign finance disclosure. The legislature in this Act, declared, “The people have a right to expect from their elected representatives at all levels of government assurances of the utmost in integrity, honesty, and fairness in their dealings.”\textsuperscript{22}

In 1974, California voters approved Proposition 9 by an overwhelming (seventy percent) margin.\textsuperscript{23} This initiative was enacted as the Political Reform Act of 1974.\textsuperscript{24} The Political Reform Act focused on (1) continuing the disclosure requirements;\textsuperscript{26} (2) restricting incumbent spending; (3) public officials’ conflicts of interest;\textsuperscript{26} (4) lobbyist registration;\textsuperscript{27} and (5) the creation of the Fair Political Practices Commission (FPPC) to monitor and enforce

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\noindent L. Rev. 300, 303 (1953).
14. Id.
15. Id.
16. A 1896 case held that the statute did not apply to primary elections. The legislature attempted to correct this problem with the Purity of Primary Elections Law in 1897. However, the California Supreme Court declared the law's provision to be unconstitutional in 1898. Id. at 303-04.
17. Id. at 304-05.
18. Id. at 305.
19. Id.
20. Id.
22. Id. at § 11501(a).
23. H. Alexander, supra note 6, at 231.
\end{flushleft}
the law.\textsuperscript{28} The people declared that "receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited. . . ."\textsuperscript{29}

Although enacted in the same post-Watergate environment that spurred Congress to enact the Federal Election Campaign Act (FECA),\textsuperscript{30} California’s Political Reform Act lacked the federal law’s restraints on contributions and its prohibition against direct corporate and labor union contributions.\textsuperscript{31} California focused on spending limits rather than following the federal example and focusing on contribution limits.\textsuperscript{32}

In 1976, California’s spending limit restrictions were voided as a result of the U.S. Supreme Court’s decision in Buckley v. Valeo.\textsuperscript{33} The Court voided as unconstitutional the FECA’s expenditure limits that did not include a public financing provision.\textsuperscript{34} The Court declared that the FECA’s spending limits represented a substantial restraint on the quantity and diversity of political speech.\textsuperscript{35} The Court did not find this restraint present when the expenditure limits were imposed upon candidates who voluntarily accepted public funds for their campaigns.\textsuperscript{36}

Thus, Buckley voided, by implication, the California Political Reform Act’s spending limits, since the state limits were not part of a voluntary public financing scheme. This left California with a law that had no contribution limits and no expenditure limits. In other words, a big contributor (known as a "fat cat") could give unlimited amounts of money to influence a California state election. The "fat cat's" chosen candidate could spend unlimited amounts to defeat his or her opponents. The fear was that the candidate would then become indebted to the fat cat for a post-election quid pro quo.

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  \item \textsuperscript{28} Cal. Gov't Code §§ 83100-83123 (1989).
  \item \textsuperscript{29} Cal. Gov't Code § 81002(a) (1989).
  \item \textsuperscript{30} Congress approved the Federal Election Campaign Act (FECA) in 1971 which imposed contribution and expenditure limits. The new law also required full disclosure of all contributions and expenditures. However, the FECA was not fully strengthened until 1974 when Congress added extensive amendments. Congress clarified and refined the FECA with amendments in 1976, 1977, and 1979. Perhaps the most important of the 1974 amendments was the creation of the Federal Election Commission, an independent regulatory agency charged with monitoring and enforcing the new campaign finance laws.
  \item \textsuperscript{31} 2 U.S.C. § 441(b) (1986).
  \item \textsuperscript{32} "Contribution" limits focus on how much money a committee can legally receive from a contributor. "Spending" limits focus on how much money a committee can expend to influence a campaign.
  \item \textsuperscript{33} 424 U.S. 1 (1976).
  \item \textsuperscript{34} Id. at 143.
  \item \textsuperscript{35} Id. at 19.
  \item \textsuperscript{36} Id. at 109.
\end{itemize}
3. The Weakness of the Political Parties

The Democratic and Republican party organizations were not the true "power brokers" in California's freewheeling system of unlimited giving and unlimited spending. The parties' traditional functions of raising money and selecting candidates had been taken over by particular groups who were tapped into the flow of millions of dollars of political money. The power vacuum that should have been filled by the political parties was filled by corporations, unions, and leaders in the State Senate and State Assembly.

California's political party system has been considered one of the weakest in the nation. This weakness was attributable in part to the fact that, until recently, California parties were prohibited from endorsing candidates in the primaries.37 Parties were no longer needed to raise funds or to help execute campaigns. Candidates became less dependent on parties and more dependent upon paid campaign specialists. Without pre-primary party support, California candidates looked to special interest groups to raise funds.38

Corporate and union leaders were influential because they could contribute unlimited amounts of money directly from their organization treasuries. They did not have to solicit "voluntary" contributions from their employees or members. By 1984, most states had followed the federal theory and prohibited direct contributions from corporate and labor treasuries. But California allowed unlimited direct corporate and labor union contributions.39 Corporate and union money that could not be contributed in most other states, or contributed in federal elections, still flowed freely in California. With corporations and unions actively involved in the process, candidates did not need to look first to their parties for financial support.

The corporate and union contributions were often given directly to the caucus leaders and committee chairmen in the State Assembly and State Senate. These legislators were usually incumbent candidates in safe seats who used their money surplus to elect other Assembly and Senate members loyal to them. These legislative leaders controlled the flow of political money to potential candidates, and therefore controlled the candidate selection

process, a role traditionally left to the party organizations. Proposition 73 was in part a response to the perceived danger of having a system in which Legislature leaders exercised too much control on the electoral process.\textsuperscript{41}

In passing Proposition 9 in 1974, the people of California declared that “[C]osts of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions.”\textsuperscript{42}

4. The Need for Further Reform

Although California had once been a leader in tough campaign reform, by 1988 it was considered one of the most permissive states. California’s lack of contribution limits or spending limits may have been the main reason why California legislative elections were among the most expensive in the nation.\textsuperscript{43} By 1988, lawmakers, lobbyists, and public interest groups were looking for a solution to California’s campaign finance problem, which had manifested itself in skyrocketing campaign costs and the inordinate legislative influence of well-funded special interest groups.

II. California’s 1988 Campaign Finance Reform Initiatives

A. The Provisions of Proposition 73 are Implemented

In 1988, California voters were offered potential solutions to the state’s campaign financing problem. They were given two choices to reform the state’s campaign finance laws. Propositions 68 and 73 were both designed to correct some of the perceived abuses in the system.\textsuperscript{44} Proposition 73 was more limited in scope than Proposition 68 and, therefore, received greater support among politi-

\textsuperscript{40}Assembly and Senate leaders were influential in party decision making, but they often were not true “leaders” of the parties because they sacrificed party unity to build their own cadre of loyalists. For example, an Assembly “turf war” over a key leadership post (e.g. Speaker of the Assembly) would involve two warring Assembly leaders of the same party giving money to opposing candidates of the same party in a district’s primary. If eventually elected, the primary winner advanced to Sacramento already indebted to the legislative baron who gave him money.

\textsuperscript{41}Alexander & Fay, supra note 38.

\textsuperscript{42}CAL. GOV’T CODE § 81001(c) (1989).

\textsuperscript{43}Id.

\textsuperscript{44}Proposition 68 was designed to set limits on contributions and expenditures; allow for partial public financing; ban the transfers between candidates; prohibit off-year fundraising; and put a total limit on the amount of honoraria and gifts candidates could receive.
cal office holders of both major parties. The proposition was authored by Assemblyman Ross Johnson (Republican), State Senator Joseph Montoya (Democrat), and State Senator Quentin Kopp (Independent). 46

Both initiatives were approved by the voters. Since Proposition 73 received more votes than Proposition 68, the provisions of Proposition 73 should control in situations of conflict. 46 The FPPC has ruled that Proposition 73 voided all but a few administrative and disclosure elements of Proposition 68. 47

B. In Many Ways, Proposition 73 Paralleled the Federal Election Campaign Act

Proposition 73 was a significant victory for California’s campaign finance reformers because the new law adopted the federal scheme of imposing limits on contributions to candidates, committees, and political parties. 48 Although Proposition 73 only applies to state and local candidates, and the FECA only applies to federal candidates, the two laws are parallel in many ways.

For example, federal law limits contributions from a “person” to a candidate to $1,000 per election. 49 Proposition 73 limits contributions from a “person” to a candidate of $1,000 per fiscal year. While the FECA prohibits all contributions from corporations and labor organizations to federal candidates, 50 the new California law allows corporations and labor organizations to contribute as “persons” to state and local candidates. 51

Under the FECA, a “person” can give up to $20,000 per year to a national party committee and $5,000 per year to any other political committee. 52 Under Proposition 73, a “person” can give up to $2,500 per fiscal year to a political party committee, broad based political committee, or political party committee. 53

Federal law allows political committees to give candidates $1,000 per election and “multi-candidate political committees” to

45. Johnson represents the 64th assembly district (Orange County). Montoya represented the 26th senatorial district (Los Angeles County). Kopp represents the 8th senatorial district (San Francisco).
46. CAL. CONST. art. 2, § 10(b).
48. Proposition 73 does not prevent local jurisdictions from setting contribution limits lower than those required under state law. See CAL. GOV’T CODE § 85101 (1989).
50. 2 U.S.C. § 441b(a) (1986).
52. 2 U.S.C. §§ 441a(a)(1)(B); 441a(a)(1)(C) (1986).
give candidates $5,000 per election. Under Proposition 73, a political committee with at least two contributors can give $2,500 to a candidate per fiscal year. A "broad based political committee" can give $5,000 to a candidate per fiscal year.

Under federal law, a national political party can contribute up to $5,000 directly to its candidates, and can also make "coordinated expenditures" on behalf of that candidate based upon a sliding scale indexed to the cost of living and the voting age population. Under Proposition 73, political parties may not give more than $5,000 per fiscal year in direct contributions to a candidate.

Proposition 73 also limits the amount of honoraria an elected officeholder can receive from a single source; prohibits transfers between candidate controlled committees; and prohibits state and local elected officials from spending public funds on newsletters and mass mailings. It also prohibits public financing and, therefore, spending limits. Proposition 73 and those elements of Proposition 68 not in conflict were codified at Title 9, Chapter 5, of the California Government Code.

C. The Role of the Fair Political Practice Commission

California's Fair Political Practice Commission has primary responsibility for the impartial and effective administration and implementation of the election laws codified in Title 9 of the California Government Code. The Commission has the authority to adopt, amend, and rescind rules and regulations to carry out the purposes and provisions of this title. This includes the authority to issue regulations that define terms in the statute. In this respect, the FPPC has the same function with regard to state law as the Federal Election Commission (FEC) does to federal election laws. In 1989, after receiving many requests for guidance from

54. 2 U.S.C. §§ 441a(a)(1)(A); 441a(a)(2)(A); and § 441a(a)(4) (1986).
55. CAL. GOV'T CODE § 85303(b) (1989).
57. 2 U.S.C. § 441a(d) (1986).
58. CAL. GOV'T CODE § 85303 (b) (1989).
61. CAL. GOV'T CODE §§ 82041.5; 89001 (1989).
63. The U.S. Supreme Court ruled that expenditure limits without public financing were unconstitutional. Therefore, supporters of Proposition 73 defeated expenditure limits by defeating public financing. Buckley v. Valeo, 424 U.S. 1, 143 (1976).
64. CAL. GOV'T CODE § 83111 (1989).
66. See, 2 CAL. CODE OF REGS §§ 18202-18249.
68. For example, see the following FPPC Request for Advice Letters: Letter to Ken
the public, the FPPC enacted regulations designed to clarify the ambiguous portions of section 85303(c).69

III. INTERPRETING PROPOSITION 73'S SECTION 85303(C)

A. Introduction

Proposition 73 significantly departs from prior California law by establishing a limit ($2,500 per fiscal year) on the amount of money a person can contribute to a state political committee or state political party. However, the new law also includes an exception to this limit. The initiative's section 85303(c) reads, "Nothing in this Chapter shall limit a person’s ability to provide financial or other support to one or more political committees or broad based political committees provided the support is used for purposes other than making contributions directly to candidates for elective office." [Emphasis added.]

Section 85303(c) does not specifically mention political parties. However, the FPPC has interpreted this section to include political party organizations that receive at least $1,000.00 in contributions in a calendar year.70 The political party becomes a "political committee" when it receives contributions from two or more persons and makes contributions to candidates.71 It becomes a "broad based political committee" when it has been in existence for more than six months, received contributions from one hundred or more persons, and makes contributions to five or more candidates.72 For example, the Republican and Democratic parties each have state central committees that are broad based political committees.

In interpreting the impact of Section 85303(c) on political party committees, the FPPC was faced with some difficult questions. First, if a person gives 85303(c) "financial or other support" to a political party committee, has that person made a "contribution" to that committee? If it is a contribution, is it restricted by the law’s contribution limits? Secondly, in what ways can a party

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69. See 2 CAL. CODE OF REGS. §§ 18215 (as amended), 18531 (as amended), 18535; and 18539.

70. The Political Reform Act contains no definition of "political party." However, Government Code section 82013(a) defines "committee" as any combination of persons who receive contributions totalling $1,000 or more in a calendar year. Since political parties receive this threshold amount of contributions, they are committees for purposes of the Political Reform Act. FPPC Initial Statement of Reasons re Adoption of 2 Cal. Code of Regs. Sec. 18539.

71. CAL. GOV'T CODE § 85102 (c).

72. CAL. GOV'T CODE § 85102 (d).
committee spend the 85303(c) funds? In other words, what are "purposes other than making contributions directly to candidates"?

B. Interpreting "Financial or Other Support"

1. Are Section 85303(c) Funds Contributions?

What is the legal status of money given to a political committee under section 85303(c)? California Government Code section 82015 defines a "contribution," in part, as "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes."\(^73\) In other words, money given for a "political purpose" that is not exchanged for fair consideration (such as payment for a voter mailing list) is a contribution to the recipient. A "political purpose" includes "influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure."\(^74\)

The "Analysis by the Legislative Analyst" published in the California 1988 primary ballot pamphlet\(^76\) explained that:

The personal contribution limits only apply to financial or other support provided to a political committee or broad-based political committee if the support is used for making contributions directly to a candidate. The contribution limits do not apply if the contributions are used by the committee for other purposes, such as administrative costs.

This analysis reflects, in a limited way, part of the "intent" behind section 85303(c). Based upon this analysis, and the definitions in place before the enactment of Proposition 73, the FPPC determined that section 85303(c) payments to political committees were "contributions" that were not governed by the section 85302 contribution limits.\(^76\)

The FPPC decision to consider 85303(c) funds as contributions"\(^77\) was probably aimed more at defending the state's disclos-

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74. 2 CAL. CODE OF REGS. § 18215(a)(1).
75. CALIFORNIA BALLOT PAMPHLET, Primary Election June 7, 1988, at 14.
76. 2 CAL. CODE OF REGS. § 18535 (a).
77. There are at least three ways to argue that Proposition 73 was never intended to include Section 85303(c) funds within the definition of "contributions." First, if the drafters had meant to use the word "contribution," then there would be no logical reason for including section 85303(c) in the initiative. The words "Nothing in this chapter shall limit a person's ability to provide . . ." specifically distinguishes the money given under section
ure rules than its new contribution limits. Proposition 73 was incorporated into the existing Title 9 of the California Government Code. One of the purposes of Title 9 is to insure that "[r]eceipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."78 In the absence of specific legislative language to the contrary, it is reasonable to infer that Proposition 73's provisions are within the letter and spirit of this purpose. Therefore, the section 85303(c) funds should be reportable as "contributions" by political party committees pursuant to section 84211.79

2. Hard Money Contributions and Soft Money Contributions

The FPPC decision to define section 85303(c) funds as contributions had the actual effect of creating two distinctly different types of "contributions" to political party committees.80 Now California political party committees can raise and spend "hard money" contributions and "soft money" contributions. Soft money is a political term of art that refers to the infusion of indirect campaign funds that actually benefit candidates. The money is "soft" because it is either beyond the scope of legal disclosure requirements or because it need not be counted against contribution limits.81 Soft money is not money raised or spent illegally; it is money that complies with the letter of the law but violates the

85303(c) from money given under the rest of the provision of the chapter entitled "Limitations on Contributions."

Secondly, the drafters of Proposition 73 used the word "contribution" or "contributions" twenty-nine other times in the text of the initiative. For example, the word "contribution" even appears in section 85303(e); i.e., "for purposes other than making contributions directly to candidates . . ." [emphasis added]. If the drafters of the proposition had wanted to use the word "contribution", they certainly had it within their vocabulary. The one use of the phrase "financial or other support" stands in marked contrast to the twenty-nine uses of the word "contribution(s)."

Thirdly, it is not beyond the scope of the campaign finance law to specifically delineate certain types of financial support as "non-contributions." For example, in Section 82015 the first $500 spent by an occupant of a home for a fundraising event held in that home is specifically excepted from the definition of "contribution." That section also states that volunteer personal services or payments of a volunteer's own travel expenses are not contributions.

78. CAL. GOV'T CODE § 81002(a).
79. CAL. GOV'T CODE § 84211 requires that itemized information (e.g. name, address, occupation) about contributors above $100 (cumulative) be provided on the committee's campaign finance reports.
80. 2 CAL. CODE OF REGS. § 18535 codifies the distinction between a contribution that is subject to the 85302 limit of $2,500 per fiscal year and a contribution that is not subject to that limit. In other words, one type of contribution is limited and the other type of contribution is unlimited.
81. For an overview of "soft money" practices, see generally E. DREW, POLITICS AND MONEY 12-19 (1983).
spirit of the law. In this respect, the use of soft money is more a loophole in the law than a violation of the law. Soft money stands in contrast with "hard money" that is fully disclosed and fully limited by election laws. 82

The "hard money contributions" are governed by Section 85302 and are collected in amounts of $2,500.00 or less per fiscal year. 83 The party committees turn around and disperse this hard money to their candidates at election time in the form of direct contributions. Political party committees that qualify as statutory "political committees" can distribute up to $2,500.00 in hard money to candidates each fiscal year. "Broad based political committees", like the Republican and Democratic state central committees, can distribute up to $5,000.00 in hard money to candidates per fiscal year. 84

The "soft money contributions" are governed by section 85303(c) and are collected by party committees in unlimited amounts. Party committees can spend unlimited amounts of this soft money for any type of legal activity other than to make contributions directly to candidates. In other words, there are no limits on the amount of soft money that can come in to, or go out from, a political party committee. The only restriction is that the money must be raised and spent "for purposes other than making contributions directly to candidates for elective office." What are these "purposes"?

C. Interpreting "Purposes Other Than Making Contributions Directly": Permitted and Prohibited Uses

1. Clearly Prohibited Uses of Section 85303(c) Funds

There are certain activities that are clearly not permissible uses of section 85303(c) funds. For example, the section prohibits a party committee from using section 85303(c) funds for direct contributions to candidates for elective office. Direct contributions would include payments of money given without an exchange of fair consideration; the forgiveness of a loan; the payment of a can-

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82. The term "hard money" is a political term of art that refers to political funds that must be reported and must not exceed a specified legal limit. For example, a direct, permissible contribution to a candidate's committee would be considered hard money.

83. CAL. GOV'T CODE § 85302: "No person shall make and no . . . . political party shall solicit or accept, any contribution or loan from a person which would cause the total amount contributed or loaned by that person to the same . . . . political party to exceed two thousand five hundred dollars ($2,500) in any fiscal year to make contributions to candidates for elective office."

84. 2 CAL. CODE OF REGS. § 18539 (a)(1) explicitly applies the law's contribution limits to the state central committees of parties (such as the Republicans and Democrats) that qualify for participation in state primaries.
candidate's loan to a third person; an expenditure made at the candidate's behest; or transfer of valuable goods and services at less than fair market value.\textsuperscript{85}

Since section 85301 limits the amount of money a person can give a candidate to $1,000 in a fiscal year, the contribution limits would be vitiated if that same persons could give more than $1,000 to a political party committee that would then directly contribute those same funds to the candidate. Although it may be clear what a party committee cannot do with section 85303(c) funds, it is not so clear what they can do with those funds.  

2. Clearly Permitted Uses of Section 85303(c) Funds

Although it is easier to determine what is not a permitted use under section 85303(c) than what is a permitted use, it is clear that 85303(c) funds can be used for the party's administrative costs.\textsuperscript{86} The party's administrative costs include its salaries, overhead, building maintenance, and fundraising costs. These are ongoing day-to-day operations for parties that continue regardless of the activities or inactivities of candidates. The administration of a party committee provides no direct contribution to a candidate, unless the party donates or gives the candidate the benefit of those services. For example, the party's administrative costs would include compiling lists of registered voters. The money used by the party to compile those lists would not be used for making "direct contributions" to candidates unless those lists were later turned over to the candidate for his or her personal use.

The party's facility maintenance costs involve the physical maintenance of its headquarters and other facilities. Section 85303(c) allows contributors to give unlimited amounts of money to maintain a state party's headquarters. The party's physical building would not be a direct contribution to a candidate, unless it used that building to make an in-kind contribution to that candidate in the form of free rent.

This parallels the federal law, which allows contributors to give unlimited amounts of money to a national party committee to "defray any cost incurred for construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for federal office." These "office buildings funds" are not considered federal "contributions" and they are not subject to federal \textit{contribution}.


\textsuperscript{86} The "Analysis by the Legislative Analyst" published in the June 7, 1988 California 1988 Primary Ballot Pamphlet stated that the contribution limits do not apply if the contributions received are used by a political committee for administrative costs.
limits. However, these funds are subject to federal disclosure requirements.87

If party organizations are not allowed to use section 85303(c) funds for legitimate administrative and maintenance expenses, this would have a chilling effect on the constitutional rights of association of the political parties and their members. The U.S. Supreme Court recently held in Eu v. San Francisco County Democratic Central Committee that “a State cannot justify regulating a party’s internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair.”88

D. Interpreting “Purposes Other Than Making Contributions Directly”: Potential Gray Area Uses of Section 85303(c) Funds

1. Introduction

As previously noted, a party committee can not use section 85303(c) funds to directly contribute to candidates. A party committee can use those funds for its administration costs. However, between these two black and white extremes lies a considerable gray area. This gray area will contract or expand as the FPPC defines “purposes other than making contributions directly to candidates for elective office.”

There are at least three important political party activities that fall into this gray area: (1) voter registration efforts; (2) get-out-the-vote efforts; and (3) generic pro-party advertisements.89 A candidate is not likely to be successful unless he or she has some system in place for finding and turning out sympathetic voters on election day.

Voter registration efforts are used by political parties to build up their potential base of supporters by seeking out and registering likely partisan voters. Before a citizen will vote for a Republican or Democratic candidate, that citizen must be registered. People overwhelmingly go to the polls once registered. The Census Bureau reported that, in 1984, eighty-eight percent of registrants reported voting.90

Get-out-the-vote efforts include contacting potential partisan

87. 11 C.F.R. § 100.7(b)(12) (1988).
89. 2 CAL. CODE OF REGS. § 18215 (d) states that “voter registration activities or activities encouraging or assisting persons to vote” that do not specifically name the candidate (or opposing candidate) are not “contributions” to that candidate. Since these activities are not contributions to candidates, they may be funded by 85303(c) funds.
90. Piven & Cloward, National Voter Registration Reform: How It Might be Won, XXI PS: Political Science and Politics, No. 4 (Fall 1988), at 869.
registered voters and reminding them of polling times and places. Party committees have also set up ride pools to help their voters get to the polls. Party committees also are involved in getting their likely voters absentee ballots if necessary. 91

Generic pro-party advertisements include newspaper, radio, and television ads that are partisan but do not mention specific candidates. For example, a Democratic pro-party ad might use the phrase “Vote Democratic” but it would not include the name or likeness of any specific Democratic candidate. Although no candidate is mentioned in these ads, parties logically assume that someone who is motivated to vote pro-party will vote for all, or most of the party’s candidates. 92

These activities are important political weapons that directly benefit candidates, yet they are not “direct” contributions to candidates, and therefore are not restricted by the contribution limits. If the party spends its soft money on these fundamental activities, the candidate is free to deploy his or her resources in other campaign activities. In that sense, the party’s soft money displaces the candidate’s hard money, and the overall effect is a significant net gain for the candidate who received a valuable service without spending a dime. It is debatable whether this is beneficial or detrimental to the state’s political system.

Should the FPPC adopt a “party building theory” or a “soft money loophole theory” in interpreting the phrase “purposes other than making contributions directly to candidates for elective office”? Supporters of the party building theory will interpret this phrase narrowly, allowing all support that is not a direct contribution to the candidate. This will allow political parties to spend funds in ways that will increase their political power, and thereby decrease the power of corporations, unions, and legislative leaders. Supporters of the soft money loophole theory will interpret this

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91. Targeting absentee ballot votes can be a critical aspect of a California election. Traditionally, absentee ballots were used by people unable to make it to the polls on Election Day, either because they were out of town or ill. But in the late 1970s, during the Administration of Democratic Gov. Edmund G. Brown, Jr., legislation passed that enabled California’s registered voters to use absentee ballots for any reason, including simple convenience.

In 1982, this legislation played a key role in a major election for the first time when Republican George Deukmejian defeated Democrat Tom Bradley in an extremely tight gubernatorial race. Bradley received the most votes among those who went to the polls on Election Day, but because Republican campaign strategists sent hundreds of thousands of absentee ballot applications to voters throughout the state, Deukmejian won the race.


phrase broadly, in order to prevent the 85303(c) exception from undercutting the contribution limits. This will prevent fat cats, party leaders, and candidates from working together to circumvent the spirit of Proposition 73's contribution limits.

2. The Party Building Theory

The "party building theory" is based on the following premise: an increase in the influence of political parties improves our electoral system by decreasing the influence of narrow special interests. If section 85303(c) is allowed to produce healthier political parties in California, it will actually diminish the role of private monied interests in our electoral process. Supporters of the party building theory believe it is better for a candidate to be dependent upon a political party that represent a broad spectrum of voters than upon corporations, unions, or legislative leaders that represent narrow special interests.

This will benefit the system because parties pick candidates based on a wide range of issues, as opposed to corporations and unions who pick candidates based upon narrow economic interests or legislative leaders who pick candidates based upon personal loyalty. Political parties serve as intermediary organizations that are responsive to a broad coalition of interests instead of narrow special interests. A candidate who wins a major party nomination must represent a broader base of support than a candidate who is funded by a specific narrow special interest group.

In Storer v. Brown, the United States Supreme Court upheld a California ballot requirement as constitutional and commented, "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government." By expanding the role of parties to raise and spend funds, candidates will be less dependent upon special interest group funds and more dependent upon the party organization.

94. In this sense, party committees are viewed as a means of winnowing out radical or individualistic candidates who do not possess the attributes of a person who can appeal to the diverse sub-groups within the Democratic or Republican parties.
96. Id. at 736.
97. "[T]he [California] parties are under a deadline of sorts to prove rather rapidly that they can raise the money and form the kind of organization necessary to undertake these §85303(c) type political activities, before other political-action committees completely circumvent the party. . . . In politics, money is the determinant of credibility as a political force." M. Simon, Political Parties Muscle Up, CALIFORNIA JOURNAL (Apr. 1989) 156, 159.
The benefits that section 85303(c) can play in strengthening California's parties was summarized in a January 3, 1989 article by Dr. Herbert Alexander, a political science professor at the University of Southern California, and James S. Fay, a political science professor at California State University, Hayward.

[B]ecause Proposition 73 imposes even greater limits on other actors in the political arena, there may be some hope for strengthening the parties... candidates will have to seek money from a broader base and thus may be forced to look to the parties not only for a modicum of direct aid but, more important, for indirect assistance.

This indirect assistance... may even work to promote the long-term vitality of parties... Prop. 73, though constraining contributions to candidates, fails to prevent individuals or groups from making unlimited contributions to political parties for indirect expenditures. Hence parties, in bank accounts separated from those supporting candidates, can collect unlimited sums from individuals and PACs for uses that indirectly benefit candidates.

For example, they can finance voter registration and turnout drives, phone banks and institutional advertising... Both parties engage in some of these activities now, but they will be able to do far more if legislative leaders and major campaign contributors decide that they can retain their influence only if the parties increase theirs through such donations.98

Advocates of stronger state parties would look forward to using section 85303(c) funds to help party candidates. Stronger parties would have more influence over who is chosen as a candidate and who wins elections. Although stronger parties would not lead to truly independent candidates, it would be an improvement to have candidates dependent on groups that represents a broad range of interests, as opposed to the narrow interests of particular groups.

Thus far, the FPPC appears to have adopted the party building theory. In December of 1989, it enacted regulations that placed certain party-sponsored voter registration and get-out-the-vote activities clearly within the protection of section 85303(c). As long as these activities do not specifically name the candidate (or his or her opponent), they are not considered contributions99 and therefore are not subject to the contribution limits.100 Generic property ads are not specifically mentioned in these regulations, but they would likely be permissible if utilized as part of a get-out-the-vote drive.

99. 2 CAL. CODE OF REGS. § 18215(d).
100. 2 CAL. CODE OF REGS. § 18535.
3. The Soft Money Loophole Theory

The soft money loophole theory is based on the belief that all political money that benefits candidates, directly or indirectly, should be within the regulatory scope of the campaign finance laws. If there is a clear paper trail between contributor and candidate, then the public can make an informed decision as to the credibility and independence of that candidate. Supporters of this theory see section 85303(c) as a loophole because funds are not restricted by any contribution limits. Therefore, to the extent this soft money actually enters campaigns and influences elections, it vitiates the new contribution limitations and violates the spirit of Proposition 73.

a. Federal Soft Money

This concept can be understood by examining a federal soft money loophole that exists in a presidential election. When a major party presidential candidate accepts public funds for his general election campaign, he is prohibited from taking private contributions for general campaign expenses. However, a private contributor can still move federal "soft money" into the candidate's campaign by donating money to a state party organization that organizes on behalf of the presidential candidate and spends the money (outside the scope of federal law) for activities that benefit the candidate, including certain voter registration and get-out-the-vote activities. These activities directly benefit the presidential candidate because the candidate's campaign team need not spend its money or time identifying and contacting sympathetic voters. The party committee can use federal soft money to accomplish this task and the presidential campaign can spend its hard money in other ways. This money is "soft" because contributions of this nature to state party committees are not subject to federal disclosure or contribution limits. This is the case even though the contribution may or may not be subject to state contribution and disclosure limits.

101. The argument is that campaign finance laws are hinged on two key requirements: adequate disclosure of political money and limitations on the movement of that money. If soft money is not reported or not limited, it is anathema to the essence of the campaign laws.

102. 11 C.F.R. § 100.7(b)(17) (1988).

103. Since these expenses are not contributions under federal law, they are not limited by the federal contribution limits.
b. California’s New Soft Money Loophole

Under the pre-Proposition 73 laws, political operatives did not need a soft money loophole since the state imposed no contribution limits whatsoever. In one sense, the entire law was a loophole in comparison to federal law, which prohibited certain contributions in federal elections. However, now that California has tightened up its contribution restrictions, political operatives will likely exploit section 85303(c) to raise and spend soft money on activities that directly benefit the candidate without being “direct” contributions.

For example, if a special interest group wanted to support a pet legislator, it could only contribute $5,000 per fiscal year directly to his or her campaign. However, that same group could give $200,000 to the candidate’s political party.\(^\text{104}\) That party could then spend\(^\text{105}\) the $200,000 in that candidate’s district for those generic pro-party activities.\(^\text{106}\) A candidate for the legislature would have a significant advantage over an opponent if his political party identified and registered likely party voters. Consequently, the candidate would have this increase of potential support without spending any of his or her own campaign funds.

Thus, section 85303(c) serves as a loophole in which this special interest group could donate unlimited campaign funds to directly influence an election. Even if the 85303(c) funds were donated “independent” of the candidate, the candidate is likely to learn of, and respect, the special interest group that infused the party with financial strength at a critical juncture in the campaign. The big $200,000 soft money contributor is in a position to gain undue political influence with the “indirect” beneficiary of his largess.

The mere fact that the party committee has become an intermediary does not necessarily remove the danger of the $200,000 being exchanged for a *quid pro quo*. The contribution limits are designed to reduce the danger of a candidate being indebted to a wealthy special interest. This soft money loophole violates the spirit of the contribution limits.

\(^{104}\) 2 CAL. CODE OF REGS. § 18535 (a).

\(^{105}\) 2 CAL. CODE OF REGS. § 18535 (a)(3) and (d).

\(^{106}\) One restriction would be that these pro-party expenditures could not identify the candidate or opposing candidate by name.
IV. CLOSING THE SOFT MONEY LOOPHOLE: A PROPOSAL FOR FUTURE FPPC REGULATIONS

A. The Benefits of Party Power

Political power and political money go hand in hand. They rise together and fall together. The party building theory tells us that the ascendancy of political party power includes a corresponding decrease in the influence of corporations, unions, and legislative leaders. The FPPC should follow this theory, but it should not ignore the dangers highlighted by the soft money loophole theory. The key to blending these approaches focuses on severing the unhealthy connection between the big giver and the candidate through a redefinition of the word “contribution.”

B. Closing the Loophole by Redefining “Contribution”

The FPPC has recently redefined the word “contribution” to include voter registration and get-out-the-vote activities that identify a specific candidate (or the opposing candidate) by name.107 This is a positive step in closing the soft money loophole, since 85303 (c) funds now cannot be used for candidate-specific activities.

The FPPC allows this because it believes these generic party activities are “politically neutral” and of “only questionable benefit to any specific candidate.”108 The FPPC is wrong. The activities may be “candidate-neutral” in appearance but they are “candidate-friendly” in substance. These activities are not of “questionable benefit” to the candidates, they are greatly beneficial. Voters motivated to vote Republican by these party expenditures are likely to vote for the Republican candidate. A candidate need not be named in a party communication in order to benefit.

Although the FPPC ruled that party committees cannot use 85303(c) funds for candidate-specific expenditures, the loophole remains open. The FPPC should go further and prohibit a party committee from accepting candidate-specific contributions. Currently, in order to “make” an 85303(c) contribution in excess of the 85302 limits, a contributor needs only to give notice109 that the money is to be used “for purposes other than to make contributions to candidates for elective office.”110 There is nothing

107. See the recently amended 2 CAL. CODE OF REGS. § 18215 et seq.
109. 2 CAL. CODE OF REGS. § 18535 (c)(2).
110. The political party can meet the notice requirement by including a statement in the initial solicitation that “a specified portion of the contribution will be used for purposes
prohibiting that contributor from directing the party to use those funds to make candidate-neutral expenditures for voter registration, get-out-the-vote, and generic ads in that specific legislative district.

The FPPC should redefine the term "contribution" to include money given to a political party that is earmarked by the giver to be spent by the party for a specific candidate or district. This would mean that a party that spends earmarked funds in the targeted race will be making a contribution to the targeted candidate. Since 85303(c) funds cannot be used to make contributions, the party will not be able to receive earmarked funds under 85303(c). The party could still receive earmarked funds from contributors under Section 85302, but only in amounts of $2,500.00 or less per fiscal year limit.

This scheme would prohibit the party from serving as a simple conduit between fat cat and candidate. The danger of a candidate trading a favor for a soft money contribution is diminished because the direct connection between the contributor and the candidate is cut off and diffused by the party organization.

This redefinition of the word contribution follows the party building theory in that it does not prohibit the party from receiving unlimited non-earmarked 85303(c) funds. Contributors who truly want to enhance the influence of the political parties can still make unlimited non-earmarked 85303(c) contributions and those funds can be distributed statewide. This redefinition also is in harmony with the soft money loophole theory because it eliminates the opportunity for a big contributor to use 85303(c) as a means of channeling soft money around the contribution limits to a candidate in exchange for a quid pro quo.

**Conclusion**

The California reformers who initiated Proposition 73 and the California reformers who voted for it should be commended for improving the state's campaign finance laws. If Section 85303(c) leads to a rise in the power of the political parties, the state's electoral system will benefit. Political parties should be allowed to spend unlimited amounts of money in their attempts to persuade citizens to participate in our democracy. The state's public policy should be to encourage programs that increase voter participation, not to discourage such programs.

However, section 85303(c) still presents contributors with an

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other than to make contributions to candidates for elective office. 2 CAL. CODE OF REGS. § 18535 (c)(1).
opportunity to circumvent the newly enacted contribution limits. Attempting to control the flow of campaign money is similar to attempting to control the flow of a mountain river; at one point you may block its path, but it will merely keep moving and groove a new path to its goal. Political operatives have been resourceful and ingenious in finding ways to get around laws and regulations. As long as mortal men and women are influenced by the power that flows with money, there will be other men and women who will find creative ways to raise and distribute that money in an attempt to influence our governing process.

The FPPC can close the soft money loophole by prohibiting the receipt and expenditure of certain earmarked funds in excess of the contribution limits. However, the FPPC should not become so concerned with potential soft money abuses that it restricts the use of section 85303(c) funds for other party building activities. These activities will enhance, not hurt, the integrity of California’s electoral process.

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