FEC

Wash. Post January 20, 1982

Independent Groups Upheld on Private Spending in Presidential Contests

By Fred Barbash
Washington Post Staff Writer

The Supreme Court yesterday upheld the legality of independent expenditures for presidential campaigns, a practice that allows the spending of millions of private dollars in what are supposed to be totally federally financed campaigns.

But the court's action yesterday does not resolve the controversy because it was accomplished by a 4-to-4 vote. Justice Sandra Day O'Connor produced the equally divided court when she disqualified herself from the case without explanation.

The tie vote affirms a lower court ruling striking down a $1,000 ceiling on expenditures by organizations not affiliated with a regular campaign. A three-judge U.S. District Court panel said the limitation violated the free speech rights of the independent organizations. Those independent groups spent $13.7 million in the 1980 elections touting their favorite candidates. About $11 million (mostly for Ronald Reagan) was spent in the general election, where private funds may not be spent by the candidates.

The practice was challenged by the Federal Elections Commission and by Common Cause, which sought enforcement of the $1,000 cap against several conservative organizations, including the Fund for a Conservative Majority and Americans for Change, which is headed by Sen. Harrison H. Schmitt (R-N.M.). Instead of enforcing the law, however, the panel struck it down.

A candidate's decision to forgo private funding, the panel said, "cannot bind his or her supporters outside the official campaign," whose own rights of expression are at stake.

As a result of the ruling, the groups were free to spend whatever they pleased in the 1980 elections. As a result of yesterday's court action, they may also be free to do the same in the 1984 elections because there are no cases currently on the horizon that might produce a clear Supreme Court opinion.

Common Cause yesterday expressed the hope that the $1,000 limit would be enforced by the FEC anyway. "The statute still forbids" the expenditures, Common Cause Chairman Archibald Cox said in a statement. "Common Cause will continue to press for enforcement of the statute and we assume the FEC will do the same."

An FEC spokesman said, however, that the agency was still assessing the Supreme Court action.

The conservatives, meanwhile, were delighted. "We are pleased that the Supreme Court has upheld the ability of individual Americans to participate in campaigns and the ability of all of us to run independent efforts on behalf of candidates," said Robert Heckman, chairman of the Fund for a Conservative Majority.

SUPREME COURT CALENDAR

The Supreme Court will hear oral argument from 10 a.m. to 3 p.m. today on the following cases.

Case No. 80-1285. Brown vs. Hartlage. First Amendment. Is it violated by Kentucky court's voiding of an election? (1 hr.)

Case No. 80-1348. Florida Dept. of State vs. Treasure Salvors. Eleventh Amendment. Does it bar *in rem* admiralty action seeking to recover property owned by state? (1 hr.)

Case No. 80-1925. United Transportation Union vs. Long Island R.R. Co. Railway Labor Act. Does it secure right to strike for employes of state owned railway? (1 hr. 30 min.)

The Fairness Committee
Against Tax Funded Politics

499 South Capitol St., SW
Suite 101A
Washington, D.C. 20003
(202) 554-3828

John Houston
Executive Director

file
FEC

December 20, 1982

Mr. Morton Blackwell
Special Asst. for Public Liaison
Room 134 Old Executive Office Bldg.
17 & Pennsylvania Ave., NW
Washington, D.C. 20500

Dear ~~Mr. Blackwell:~~ Morton

Pursuant to our conversation in the White House on FEC problems in the recent election, this letter was sent to Senator Jepsen. I have not heard what action he has taken, but I plan to follow up on it personally.

You may want to do likewise. Let me know what if any action you decide to take.

Sincerely yours,

John Charles Houston
Executive Director

JCH:pds

Enclosure.

The Fairness Committee
Against Tax Funded Politics

499 South Capitol St., SW
Suite 101A
Washington, D.C. 20003
(202) 554-3828

John Houston
Executive Director

November 1, 1982

Senator Roger W. Jepsen
110 Russell Senate Office Building
Washington, D.C. 20510

Dear Sen. Jepsen:

I am aware of your longstanding concern about the Federal Election Commission, and am specifically interested in the disparity in fines for perceived friends of liberals and perceived enemies of liberals. Enclosed is an article from the Deseret News in Salt Lake City, reporting a $150 fine for a $4347 illegal expenditure by the Utah AFL-CIO pursuant to their efforts to defeat Senator Hatch for re-election.

The expenditure went for a mailing to raise money illegally from union treasuries. Nowhere in the article does it say how much money was raised illegally from this source, but it is self-evident that a mailing of this amount would have raised a substantial sum of money. Hence a fine of $150 seems wildly inadequate to address the seriousness of the issue. Given the overt intent of the Utah AFL-CIO to violate the law for the explicit purpose of defeating Senator Hatch, this fine seems wildly out of proportion to the violation. Therefore, I am asking you to request the General Accounting Office to investigate the whole structure of fines for violations of law and make comparisons of liberal versus conservative groups and their relative subjects for which fines were levied. This would be an extremely useful document in evaluating the comparatively overt partisanship which has surrounded the FEC since its inception.

Please let me know if I can be of assistance in this matter.

Sincerely yours,

John Charles Houston
Executive Director

JCH:pds

enclosure

DSJ 2/17/83

file FEC

The Pernicious Influence of PACs on Congress

Perspective on Politics

by Norman C. Miller

WASHINGTON—The new Congress is a scandal waiting to happen.

It's a scandal because seldom has a Congress assembled that is so blatantly beholden to interest groups pushing for special legislative favors. And you can be sure that many of those favors will be granted.

For, quite legally, an array of special interest groups, both business and labor, has bought enormous influence in Congress through the campaign contributions of their political-action groups.

In the campaign just passed, PACs contributed $80 million to congressional candidates, a 650% increase in just eight years. Ironically, the upsurge of PAC giving to congressional candidates has been due in part to the Watergate reform that led in 1974 to public financing of presidential elections; the PACs then switched with a vengeance to the congressional arena. Now, PACs virtually own some members of Congress.

In the 98th Congress, according to Common Cause, the average House winner received more than one-third of his or her campaign funds from PACs; over 100 members received more than half their money from PACs. In the Senate, 12 senators raised more than $500,000 each from PACs and another seven senators raised more than $400,000 each.

As Democratic Sen. William Proxmire of Wisconsin observes, "PAC money is not free; it has strings attached."

Common Cause studies show how PAC contributions give interest groups powerful leverage over major congressional committees. For example, the 42 members of the House Energy and Commerce Committee received a total of $4.3 million from PACs of all types, $2.3 million from business PACs and $1.2 million from labor PACs. The committee's chairman, Democrat John Dingell of Michigan, got fully 72% of his 1982 campaign contributions from PACs, with business PACs chipping in the most.

The committee has jurisdiction over energy, environmental, communications, consumer and health legislation. So PACs with vital interests in these fields showered committee members with money. According to Common Cause, seven major industries regulated under the Clean Air Act gave $767,000 to the 42 committee members, energy industry PACs gave nearly $500,000 and PACs with health-legislation interests gave $423,000.

All these interests want something from the House committee, and with that kind of campaign giving they're likely to get it. As GOP Rep. Jim Leach of Iowa says, "It is simply a fact of life that when big money in the form of group contributions enters the political arena, big obligations are entertained."

The last Congress provided ample evidence of the pernicious power of PACs to influence legislation. Perhaps the most egregious example was a 286-133 House vote to kill a Federal Trade Commission rule that would have required used-car dealers to reveal any known defects in cars, seemingly a motherhood issue for consumers. The 286 members voting to kill the FTC rule had received $742,371 in contributions from the car dealers' PAC, according to a study by Congress Watch, a Ralph Nader organization.

Many members of Congress, now comfortable with PACs, don't want to change the system. But some do, and in a recent speech Sen. Thomas Eagleton made a compelling case for reform.

"The current system of financing congressional elections is a national scandal," the Missouri Democrat said. "It virtually forces members of Congress to go around hat in hand, begging for money from Washington-based special interest, political-action committees whose sole purpose for existing is to seek a quid pro quo. We see the degrading spectacle of elected representatives completing detailed questionnaires on their positions on special interest issues, knowing that the monetary reward of PAC support depends on the correct answers."

Sen. Eagleton contended that PACs in effect drive a wedge between members of Congress and the broad public by influencing members to pay special heed to narrow interests. "Surprisingly," he said, "there are comparatively few issues where a member's constituency has a compelling and direct interest. It is far more common for conscientious members to find their constituents divided about an issue. What happens even more often is that an issue has no impact, or a very slight impact, on members of the public, but has a potentially enormous impact on some special interest.

Sen. Eagleton noted correctly that the sharply rising sums PACs are pouring into campaigns have created a sort of arms race among politicians of both parties, with almost everybody scrambling to amass huge war chests. "The escalating campaign costs under the current system, if unchecked, will surely end in no one winning," Sen. Eagleton concluded, but with "a Congress perceived to be mortgaged to special interests and a public whose contempt for the institution is deep-seated and well-justified."

Most reform proposals suggest overall limits on the sums candidates can take from PACs and a shift to partial public financing of campaigns, with small private donations being matched by Treasury funds. Public financing is controversial, but it has worked well in removing fat-cat contributions as an influence in presidential campaigns.

And as GOP Sen. Charles McC. Mathias of Maryland says, "No one should be so naive or so foolish as to think that the public isn't already paying" a price in terms of odious legislation under the current system.

Evening

We've managed to put this into the draft remarks for the Pres. at:

1. CPAC speech Friday night
2. Remarks to Conservative W.H. Reception 2/22

What is this? ↑

Problem is that he has said very tough things in the past only to cave when it is presented as the only way to save something else which he wants even more.

I submitted about 400 names.

150 have responded..

Weren't you, Connie et al invited?

Connie was not invited either. (NO)

She was not. Afterall she is one of their appointees - has not dumped on AR - and I'm told Bell et all have praised the commission.

Well, Well stand by for news on this.

Atwater's name cropped up in connection with this meeting.

I'm going to find out if he monkeyed with my list and roast him for it if so.

I must be able to get invites out today.

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

TO: Morton DATE: 12/2/82

FROM: Joyce

- ☐ APPROVAL
- ☐ AS REQUESTED
- ☐ CONCURRENCE
- ☐ CORRECTION
- ☐ FILING
- ☐ FULL REPORT
- ☐ HANDLE DIRECT
- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____
- ☐ IMMEDIATE ACTION
- ☐ INITIALS
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ PER OUR CONVERSATION
- ☐ PER TELEPHONE CONVERSATION
- ☐ RECOMMENDATION
- ☐ SEE ME
- ☐ SIGNATURE
- ☐ YOUR COMMENT
- ☐ YOUR INFORMATION
- ☐

REMARKS:

Attached is a copy of AO 1982-50 which you requested.

I am also enclosing a copy of the Dissenting Opinion which I wrote for Joan. She has not yet signed it; so don't pass it around as a fait accompli. (I just hope she will sign it! It is longer than she likes.)

If you don't have a clear idea of how I felt about the whole matter after you read the dissent I wrote. . . ! (And I've toned it down from my original draft!)

GPO 923-906

FEC

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 19, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1982-50

Mr. Jon L. Shebel
6400 Jamaica Court
Tallahassee, Florida 32308

RECEIVED
OFFICE OF THE
COMMISSION SECRETARY
82 NOV 19 P12:15

Dear Mr. Shebel:

This responds to your letters of August 11, 1982 and September 22, 1982, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to the formation and operation of an organization which would sponsor breakfast or luncheon sessions with members of Congress.

Your letter of August 11th states that you along with a group of other individuals have previously made individual campaign contributions to Congressional candidates who are members of the "Florida Congressional Delegation." You and these other individuals now desire to establish a "Breakfast and Lunch Club" in Washington, D.C. You add that you would personally register a trade name for the Club and print stationery for it under the name of the Florida Breakfast and Lunch Bunch ("BLB"). Other individuals would be invited by you to attend a breakfast or luncheon session with one of their Florida Congressmen or Senators. At such an event the Congressman or Senator would be provided the opportunity to speak to the individuals who are present; and at the close of the breakfast or lunch, those individuals who desire to make a campaign contribution would have an opportunity to do so. Your letter of September 22, explains that anyone interested in hearing the featured speaker for a BLB sponsored event would be welcome to attend and that there would be no requirement that a contribution be made by the attendee. Any contribution made at the event would be presented individually, and there would be no pooling of individual contributions for presentment to the featured speaker/candidate.

The cost of registering the BLB trade name and printing its stationery would be paid by you. In addition, you would pay the initial cost of each breakfast or lunch from your personal account, and subsequently invoice those persons who choose to attend for the cost of their own meal. You note that while the featured speaker's meal would be paid for, the speaker will not be paid a fee for attending the lunch. You will select the members of Congress who are invited to attend and speak at a BLB function. Finally, you state that there will be no membership fee imposed on those persons invited to attend a BLB sponsored event, and that BLB will not maintain any bank account nor collect any funds in its own name. You ask whether the described activity is permissible under the Act.

While the formation and operation of BLB is permitted under the Act, your request raises the issue of whether BLB is a political committee for purposes of the Act's registration and reporting requirements, as well as the contribution limitations.

The term "political committee" is defined to mean "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)(A). The definitions of "contribution" and "expenditure" indicate that "the purpose of influencing any election for Federal office" must be present if the making of any gift, loan, advance, purchase, or payment is to be considered as either a contribution or expenditure. 2 U.S.C. §431(8), (9).

In determining whether payments made for an event, sponsored by a group and involving the active participation of a candidate for Federal office, are expenditures or contributions under the Act, the Commission has considered the nature and purposes of the event. The Commission has stated in such cases that so long as the event does not involve (i) the solicitation of political contributions, or (ii) the express advocacy of a candidate's election or defeat, then the event would not be viewed as a campaign event for the purpose of influencing a Federal election. If an event is not conducted and financed for an election influencing purpose, payment of costs would not represent contributions to the candidate who is present. Advisory Opinion 1978-4 (testimonial dinner for Member of Congress); Advisory Opinion 1980-89 (reception incident to duties as Federal officeholder); Advisory Opinion 1981-26 (social occasion involving Member of Congress); and Advisory Opinion 1981-37 (participation of a Congressman in a television forum).

The participants in a BLB event will have been apprised before the event that they will have an opportunity to make a contribution to the featured candidate/speaker. The

communication of this information to participants in a BLB event is tantamount to the making of a solicitation. See, e.g., Advisory Opinion 1977-25, copy enclosed. In view of the aforementioned advisory opinions, therefore, the making of such a solicitation by you or BLB would cause the event to be characterized as a campaign event whether the solicitation is made in the invitation to attend, at the breakfast or lunch itself, or in any discussion by participants in connection with the organization of either BLB or a particular BLB event. Payments to finance such a campaign event would be viewed as being made for the purpose of influencing a Federal election and would be expenditures by BLB since BLB is the named sponsor or host of the event. A corresponding contribution in-kind to the featured candidate by BLB would also result. 11 CFR 100.7(a)(1)(iii). The same result would follow if the event included any communication expressly advocating any Federal candidate's election or defeat.

If BLB's expenditures or contributions are in excess of $1,000 in a calendar year, then BLB would be a political committee under the Act. As such BLB would be subject to the Act's disclosure requirements, as well as its contribution prohibitions and limitations. See 2 U.S.C. §431(4), §432, §433, §434, and §§441a, 441b, 441c, and 441e. In particular, BLB would be required to establish a separate bank account to be used to finance BLB campaign events. See, 2 U.S.C. §432(h) and 11 CFR Parts 102 and 103.

In the event that BLB attains political committee status, the expenses you incur for BLB's general operation-- for example, stationery, printing, invitations, mailings, etc.-- would be contributions by you to BLB. 11 CFR 100.7(a)(1)(iii). Moreover, amounts paid by individuals for the meal furnished at any BLB event that qualified as a campaign or political event, would be contributions to BLB whether paid to you, to BLB, or to the commercial vendor where the event is held. 11 CFR 100.7(a)(2).

It is important to note that the mere fact that BLB might become a political committee under these circumstances in no way precludes BLB from undertaking to sponsor the described events. BLB is free to sponsor the described events without attaining political committee status provided such events do not include solicitations for contributions. If BLB is not a political committee, it would not be required to register and file reports with the Commission.

The Commission expresses no opinion as to the applicability, if any, of House or Senate Rules to the situation described in your request since those issues are outside its jurisdiction.

This constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely yours,

Frank P. Reiche

Frank P. Reiche
Chairman for the
Federal Election Commission

Enclosures (AOs 1977-25, 1978-4, 1981-26, 1981-37, and 1980-89)

Draft

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DISSENTING OPINION
OF
COMMISSIONER JOAN D. AIKENS
TO
ADVISORY OPINION 1982-50

> The participants in a BLB event will have been apprised before the event that they will have an opportunity to make a contribution to the featured candidate/speaker. The communication of this information to participants in a BLB event is tantamount to the making of a solicitation. . . .therefore, the making of such a solicitation by you or BLB would cause the event to be characterized as a campaign event whether the solicitation is made in the invitation to attend, at the breakfast or lunch itself, or in any discussion by participants in connection with the organization of either BLB or a particular BLB event.[1/]

The foregoing is quoted from Advisory Opinion 1982-50 adopted by a 4-1[2/] vote at the Commission's meeting of November 18, 1982 and it is this language which is the basis for my dissent.

Although the Commission has held that if an event involves the solicitation of political contributions or expressly advocates the election or defeat of a clearly identified candidate, the event would be a campaign event and would trigger political committee status of the host organization if more than $1,000 was spent, I do not believe that the Breakfast and Lunch Bunch (BLB) has met either standard. There doesn't appear to be any evidence of express advocacy in the BLB request and indeed the Opinion does not suggest that BLB would be advocating the election or defeat of any of its guest speakers. However, Advisory Opinion 1982-50 does state BLB is making a solicitation on behalf of its featured speaker by apprising participants that they would have an opportunity to make a political contribution. I do not believe that this kind of a communication constitutes a solicitation; therefore I must dissent from the majority view as adopted in Advisory Opinion 1982-50. I believe it to be an unwarranted, insuperable assault on the guaranteed First Amendment rights of those individuals who may choose to participate in the Breakfast and Lunch Bunch.

[1/] Advisory Opinion 1982-50, approved November 18, 1982.

[2/] Commissioners Harris, McDonald, McGarry, and Reiche voting for; Commissioner Aikens against; Commissioner Elliott absent.

The argument may be propounded that the following portion of the Opinion ameliorates this assault on the First Amendment rights of these individuals:

> It is important to note that the mere fact that BLB might become a political committee under these circumstances in no way precludes BLB from undertaking to sponsor the described events. BLB is free to sponsor the described events without attaining political committee status provided such events do not include solicitations for contributions. If BLB is not a political committee, it would not be required to register and file reports with the Commission.

I found the argument without merit when it was advanced. During the subsequent passage of time, it has grown no more persuasive.

Inasmuch as this Dissenting Opinion will become a permanent part of Advisory Opinion 1982-50, I will not reiterate herein the factual circumstances upon which that opinion was rendered. For the most part, they are set out in the preamble of the Opinion itself. However, I do believe that it is necessary to place in the more widely publicized record of the Opinion a portion of the original request part of which is not reiterated in the Opinion:

> Let me emphasize again there is no pooling of funds. Each individual who chooses attends the breakfast or lunch and presents a check to the congressional delegate. Each individual is responsible for paying for his own lunch. The decision to contribute or not lies with each individual.
>
> Acknowledging the value of the time of the congressional delegates, this method was suggested in order to allow as many individuals as possible to meet and speak with the Congressman and Senators. This suggested format would result in no loss of the individuality of the contributors.[3/]

Although my views are well known regarding the so-called nexus which some of my colleagues see between a casual remark, e.g., "We have a PAC," and an action which I would deem to more nearly fit the dictionary defini-

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[3/] Advisory Opinion Request dated August 11, 1982, from Mr. Jon L. Shebel, enumerated as 1982-50 by the Federal Election Commission.

nition of the term "solicitation"[4/] e.g., "The ABC-PAC needs your support. All contributions, large or small are needed! Please send your contributions to the ABC-PAC, #1 Freedom Street, Anywhere, USA." In light of the holding contained in Advisory Opinion 1982-50, I am constrained to repeat them.

Does apprising participants before (or after) an event that they will have an opportunity to make a contribution to the featured speaker constitute a solicitation? The Office of General Counsel believes it does. A majority of my colleagues believe it does. They have held this view and have so stated in a number of previous Opinions.[5/] I have held the opposite view and shall continue to voice my dissent regarding this position for as long as I am a member of this Commission. Furthermore, in the circumstances presented to the Commission by this request, could BLB preclude the possibility that individuals hearing the speaker would be so moved that they would give a contribution to the speaker and by so doing catapult BLB into political committee status? This reminds me of Advisory Opinion 1978-83 wherein the Commission told the Construction Equipment Political Action Committee to devise what I termed a "non-conspicuous" sign.

The majority position is predicated on a colloquy between Senators Allen, Cannon and Packwood, a part of which is quoted in Advisory Opinion 1976-27:

> The solicitation process includes asking persons to purchase tickets to fundraisers and providing persons with information about a fundraising activity. The Congressional debate on what in fact constitutes a solicitation is somewhat limited. It is clear, however, from a discussion among Senators Allen, Cannon and Packwood that informing persons of a fundraising activity is

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[4/] Solicit. 1. to seek for by entreaty, earnest or respectful request, formal application, etc.: He solicited aid from the minister. 2. to entreat or petition for something or for someone to do something; urge; importune: to solicit the committee for funds; to solicit support for a housing bill. 3. to seek to influence or incite to action, esp. unlawful or wrong action. 4. to accost or lure (someone) with immoral intentions, as by or on behalf of a prostitute. 5. to make a petition or request, as for something desired. 6. to solicit orders or trade, as for a business house.

Solicitation. 1. act of soliciting. 2. entreaty, urging, or importunity; a petition or request. The Random House Dictionary of the English Language, unabridged edition, (1973).

[5/] Advisory Opinion 1976-27; Advisory Opinion 1978-83.

considered a solicitation. Portions of that discussion, which concerned what constituted a solicitation under 2 U.S.C. §441b(b)(4)(B), are as follows:

MR. ALLEN: When they announce setting up the fund, obviously, that is a solicitation right there.

* * * * * * * * * * *

MR. PACKWOOD: * * * The union sends out a mailing, the corporation does, and says, "Please join our political action committee," that would fit as one of the two solicitations they are entitled to make in a year.

MR. CANNON: If it is sent out in writing in accordance with this provision of the Act, that certainly would constitute one of the two solicitations. 122 Cong. Record S4155 (daily ed. March 24, 1976.)6/

(Emphasis added)

To place the above quoted colloquy in a better perspective, however, let us turn to precisely what the Senators were discussing. Senator Packwood explained it in these terms, "But this is a trustee account. We are designing this, really, for a different purpose than our normal political committee."7/ It is obvious that the type of solicitation about which the Congress was speaking was a very special, limited one. They understood that. Their comments were not intended to reach ALL solicitations or ALL political committees -- and they so stated!

Minutes PRIOR TO the colloquy quoted in AO 1976-27, this discourse took place:

MR. PACKWOOD: Is the Senator from Alabama asking or talking about the initial solicitation by the corporation using corporate funds of its shareholders, saying that we want to set up a separate fund, please contribute to it? Is the

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6/Advisory Opinion 1976-27, dated September 2, 1976.

7/122 Cong. Record S4154 (daily ed. March 24, 1976).

> Senator suggesting the shareholder, just because of that initial instance, might have a course of action against them?
>
> MR. ALLEN: I suggest that possibility and, right at that point would that be one of the two solicitations permitted, when they announce the setting up of a separate fund?
>
> MR. PACKWOOD: No. The setting up of the fund is permissible under present law. The setting up of (the) fund is not a solicitation for (a) contribution to the fund.[8/]
>
> (Emphasis added)

Assuming, arguendo, that the Congress had intended the mere notification of the existence of a political committee to constitute a solicitation for support of that committee, is a "solicitation" of the type contemplated by the requestor of 1982-50 in and of itself unlawful? For an answer to that question, let us turn to the Supreme Court and the case Thomas v. Collins, 323 U.S. 516 (1944) which involved the appellant, Thomas, who was president of the United Auto Workers union and a vice president of the C.I.O. Under Texas law, "All labor union organizers operating in the State of Texas shall be required to file with the Secretary of State before soliciting any members for his organization. . . ."[9/] Mr. Thomas was arrested, jailed and fined because he made the following remarks in a speech which he gave:

> . . .as Vice President of the C.I.O. and as a union man, I earnestly ask those of you who are not now members of the Oil Workers International Union to join now. I solicit you to become a member of the union of your fellow workers and thereby join hands with labor throughout this country in all industries. . . .[10/]

I don't believe anyone could argue that his remarks were anything other than a very clear solicitation and the Court's decision turned on that act of solicitation. The Court held, "A requirement that one register before making a public speech to enlist support for a lawful movement is incompatible with the guaranties of the First Amendment."[11/]

The State of Texas, too, had its ameliorating language noting in its pleadings that Mr. Thomas was free to "laud unionism" and not run afoul of the Texas Statute. The Court was unpersuaded and observed:

[8/] Ibid., S4155.

[9/] House Bill No. 100, c. 104, General and Special Laws of Texas, Regular Session, 48th Legislature (1943), section 5.

[10/] Thomas v. Collins, 323 U.S. 516, (1944), fn. 4.

[11/] Thomas, Syllabus.

> How one might 'laud unionism,' as the State and the State Supreme Court concede Thomas was free to do, yet in these circumstances not imply an invitation, is hard to conceive. This is the nub of the case. . . .The feat would be incredible for a national leader, addressing such a meeting, lauding unions and their principles, urging adherence to union philosophy, not also and thereby to suggest attachment to the union by becoming a member.
>
> Furthermore, whether the words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inferences may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. . . .
>
> . . . . . .
>
> If therefore use of the word or language equivalent in meaning was illegal here, it was so only because the statute and the order forbade the particular speaker to utter it. When legislation or its application can confine labor leaders on such occasions to innocuous and abstract discussion of the virtues of trade unions and so becloud even them with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end. . . .
>
> . . . . . .
>
> 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. . . .Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

. . . . . .

> . . .When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection.12/ (Citations omitted.)

In the civil enforcement action brought in the Eastern District of New York by the Federal Election Commission, Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F2d 45 (CA-2 1980) (Kaufman, Chief Judge, concurring), the Commission was admonished:

> If speakers are not granted wide latitude to disseminate information without government interference, they will 'steer far wider of the unlawful zone.' . . . This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled, or sterilized. (Citations omitted.)

In Advisory Opinion Request 1982-50, the "Breakfast and Lunch Bunch" format was chosen ". . .in order to allow as many individuals as possible to meet and speak with the Congressman and Senators," and the requestor has stated, "The decision to contribute or not lies with each individual," this would not seem to me to trigger establishment of a political committee.

In my view, there is only one answer which should have been given by the Commission in response to the request of Mr. Jon L. Shebel and that is:

> The Commission expresses no opinion on the matters set out in your letter of August 11, 1982 and the supplement thereto of September 22, 1982 as they do not present issues which come within the jurisdiction of this Commission.

December 2, 1982

Joan D. Aikens,
Commissioner

12/ Thomas, 535-538.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

G. Kill Olson
12/23/82

December 20, 1982

Mr. Morton C. Blackwell,
Special Assistant to the President for
Public Affairs
THE WHITE HOUSE
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Morton:

Enclosed is a copy of the Dissenting Opinion which you and I have discussed.

Have a very merry Christmas and a wonderful New Year!

Best personal regards.

Sincerely yours,

Joyce

Joyce E. Thomann,
Administrative Assistant to
Commissioner Joan D. Aikens

jet

1 Enclosure a/s

THE WHITE HOUSE
WASHINGTON

FYI copies sent to

Paul Weyrich
Terry Dolan
Howard Phillips
Alan Ryskind
John Lofton

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 8, 1982

The White House has asked the Federal Election Commission to reply to your recent letter to President Reagan regarding the Communist Party being exempt from the disclosure requirements of the Federal Election Campaign Act of 1971, as amended.

In the opinion of Federal District Judge Gagliardi in the case of Federal Election Commission vs. Hall-Tyner Election Campaign Committee, et al, the judge found that members of the Communist Party might be the subject of criminal investigation by other government agencies. The judge felt that disclosure of the names of contributors to the Party's candidate for President could be a violation of these individuals' right against self-incrimination and right of free association. As a result of this determination, the Communist Party would neither have to disclose nor keep records of campaign contributors. The United States Court of Appeals for the Second Circuit recently affirmed the District Court decision. Because the Commission disagrees with the decision, Supreme Court review of the case has been requested.

I trust that this information is responsive to your concerns. Please do not hesitate to contact me if you need further information or assistance.

Sincerely,

Mark J. Davis, Director
Congressional, Legislative
& Intergovernmental Affairs

U.S. SUBMARINE VETERANS
WORLD WAR II

37 Morton Blackwell

Come to the National Conventions

PAST NATIONAL PRESIDENT

7 May 1982.

080402

The President,
The White House,
Washington, D.C. 20525.

Dear Sir:

I am sitting here reading it, but I don't believe it is happening.

The headline:"COMMUNIST ENTITLED TO SECRECY."

This is a finding of the 2nd Circuit Court of Appeals in Manhattan.

What is our country coming to? The Democrats and the Republicans must, by law, report any contributions made to their campaign coffers, but the Communists, a party designed to plot the overthrow of our system, is not required to make such reports.

Apparently this is another off shot of our treatment of the many foreigners who come to our shores, blessed by our democracy, but unwilling to abide by the same laws which govern you and me. We give them freedom of speech, and the tax payers bear the tremendous burden of fund expenditures to provided them with bi-lingual education.

When will this kid glove handling of all of these types of people, the illegal Mexicans, the Boat People from Vietnam, the Cuban exiles, and all of the other foreigners, who take advantage of our kindnesses and plot to take over our country, cease.

I welcome them all, if they believe in what we all believe in, are treated as we have been treated, and pay the price we have to pay. My God, My Country, My Family must be the banner we all subscribe to, and I believe this subscription results in equality for all men.

Very Truly Yours,
Joe McGrievy.
Joe McGrievy.

P.S. I subscribe to all the plans you have for the betterment of our society,Prayer in Schools, Defense Spending, Freeze in Social Security payment increases and others .

7525 University Ave.,
La Mesa, Ca., 92041

Save Coupons for College

DEDICATED TO OUR SHIPMATES WHO SACRIFICED THEIR LIVES IN U.S. SUBMARINES DURING WORLD WAR II

ID # 080402

DG

PL005-05

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

PL BH AC

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 821015

Name of Correspondent: Joe McGuigan

☐ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: protests the ruling of the 2nd Circuit Court of Appeals of Manhattan, which ruled that the Communist party is not required to report contributions

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)		Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
PL/BHAC		ORIGINATOR CJ	821020			11
		Referral Note:				
DOJ / PANG 633-4668		R CJ	821028	Could be	C	821061 CJ
		Referral Note:	handled by FEC.			
FEC		R CJ	821061		A	821060 CJ
		Referral Note:				
			11			11
		Referral Note:				
			11			11
		Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

3012

THE WHITE HOUSE OFFICE

REFERRAL

MAY 28, 1982

TO: DEPARTMENT OF JUSTICE

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

DESCRIPTION OF INCOMING:

ID: 080402

MEDIA: LETTER, DATED MAY 7, 1982

TO: PRESIDENT REAGAN

FROM: MR. JOE MCGRIEVY
7525 UNIVERSITY AVENUE
LA MESA CA 92041

SUBJECT: PROTESTS THE RULING OF THE 2ND CIRCUIT COURT OF APPEALS OF MANHATTAN, WHICH THAT THE COMMUNIST PARTY IS NOT REQUIRED TO REPORT CONTRIBUTIONS

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

U.S. Department of Justice

Office of Legal Policy

June 1, 1982

Executive Secretariat:

Re: 82-05-28-3002

I spoke with the mail referral unit at the White House this morning regarding the above correspondence from Joe McGrievy regarding the recent decision in the 2nd Circuit. Because the Federal Election Commission brought the suit, I suggested that the mail be routed to them. The Referral Unit agreed and requested the orginal correspondence and worksheets returned to them.

PLP

Presley Pang
633-4608

Sally Kelley:
The above is self-explanatory.
M. L. Newman
6/2/82
DOJ

THE WHITE HOUSE OFFICE

REFERRAL

JUNE 7, 1982

TO: AGENCY REFERRAL FEDERAL ELECTION COMMISSION

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

DESCRIPTION OF INCOMING:

ID: 080402

MEDIA: LETTER, DATED MAY 7, 1982

TO: PRESIDENT REAGAN

FROM: MR. JOE MCGRIEVY
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LA MESA CA 92041

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RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release December 17, 1981

The President today announced the recess appointment of the following three persons to be Members of the Federal Election Commission:

Joan D. Aikens, nominated on November 24, 1981.
She would succeed Vernon W. Thomson.

Lee Ann Elliott, nominated on November 24, 1981.
She would succeed Joan D. Aikens.

Danny Lee McDonald, nominated on December 14, 1981.
He would succeed Robert O. Tiernan.

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THE NEW YORK TIMES, WEDNESDAY, FEBRUARY 17, 1982

Elections Unit's Tasks: Udall and Lance Cases

Associated Press and United Press International

Representative Morris K. Udall, above, and Bert Lance.

By PHIL GAILEY
Special to The New York Times

WASHINGTON, Feb. 16 — Bert Lance, the resilient Georgia banker driven from Washington under a cloud almost five years ago, is living in the sunshine of prosperity again. He has regained control of his old bank in Calhoun, Ga., gone into the Texas Ruby chili business and is considering running for Governor.

The former budget director of the Carter Administration, who was acquitted of Federal charges concerning his banking practices, has bested the Federal "powercrats," as he calls them, on every front except one: The Federal Election Commission, which locked its jaws on his political cuffs in early 1977, won't let go.

Representative Morris K. Udall, Democrat of Arizona, can sympathize with Mr. Lance. Mr. Udall, one of the sponsors of the legislation creating the commission, has not yet been able to close the books on his 1976 Presidential campaign.

The Lance and Udall cases illustrate why the commission, established in 1975 to take the cigar smoke and backroom deals out of politics, gets less respect, at least from politicians, than Rodney Dangerfield.

Overdrafts at His Bank at Issue

Even as Mr. Lance considers another race for Governor, the commission is still investigating his unsuccessful bid for Georgia's highest office in 1974, a year before the commission came into being. The commission does not normally get into state campaigns, but did so in Mr. Lance's case on the basis of a 1977 report by the Comptroller of the Currency. The report raised questions about campaign overdrafts covered by Mr. Lance's bank, the First National Bank of Calhoun.

"I've never seen anything like it," said Mr. Lance in a telephone interview. "I don't want no special treatment, but I'm getting sick and tired of this especial treatment they're giving me. Mine is the only state campaign they've ever pounced on."

Mr. Lance is not letting his troubles get him down. Last year he moved into a new hilltop mansion that suggests he still has fond memories of Washington. The house is flamboyantly two-faced, reproducing the White House on one side and Mount Vernon on the other.

Representative Udall, on the other hand, is worrying about how to reimburse the Government $43,000 that the commission estimates are the campaign expenses for which he has been unable to provide receipts. One fund-raising suggestion he is considering: a roast of the Federal Election Commission.

"From an auditing viewpoint," said Ed Coyle, who served as Mr. Udall's campaign staff director, "the commission is almost impossible to deal with. Over the years they brought in three or four different auditors and each time we had to start over. The problem is how do you track down a college volunteer who spent $47 to make copies of some newspaper clips and didn't think to get a receipt. We were nickeled and dimed to death in these audits."

Officials at the commission point out, and correctly, that court challenges and a lack of cooperation by the politicians account for some of the delays in resolving disputes, especially in Mr. Lance's case. But in Mr. Udall's case, the commission completed its audits of 1976 Presidential candidates in 1980.

Even Common Cause, the public interest group that remains one of the commission's strongest defenders, has acknowledged the agency's shortcomings and has called for major changes.

Other Source of Problems Seen

While critics such as Senator Roger W. Jepsen, Republican of Iowa, would abolish the commission, Common Cause insists that the problems lie more with the politicians than with the agency itself.

The commission's defenders point out that Congress controls the agency's budget, conducts oversight hearings, approves commissioners, who are often political appointees recommended by the President, exercises legislative veto authority over some of its rulings and from the beginning has limited its powers.

"Congress wants to be able to point to a campaign watchdog," said one commission staff member who did not want to be identified, "but they don't want it to do anything. Our enemies in Congress would like to abolish us. Their second choice is to castrate us."

As bad as things are at the commission, they could get worse. The commission is operating on a continuing resolution while Congress tries to set its budget for the 1982 fiscal year. Although the Reagan Administration has proposed $9.7 million, the House and Senate appear to be less generous, talking about $8.9 million to $9.3 million.

Sharon Snyder, a commission spokesman, said that the agency had already made plans to lay off 16 of its 32 auditors, a reduction she said would translate into even greater delays and problems in dispensing and auditing Federal matching funds for President candidates in 1984.

Worries About Enforcement

Even more worrisome to some commission officials is the threat to the agency's enforcement division. If the budget is cut to the low figured being bandied around in Congress, said one official, "enforcement will become a joke."

Bert Lance likes to say, "If it ain't broke, don't fix it." But nearly everyone, including some of the commission members, agree that the election commission is "broke" and needs fixing.

"It is time, after seven years, to step back and analyze the commission's charter and operations to see what needs to be changed," Frank P. Reiche, chairman of the commission, said. "I don't think there should be any sacred cows in our self-analysis. There are real problems."

Mr. Reiche said there was no question the Lance and Udall cases hurt the commission's credibility, and he said the commission planned to review some of "these old matters on our books" this year with an eye toward quick resolutions, or dismissals.

But the commission's greatest problems, he added, are rooted in its charter, which deprives it of political independence, and its way of operating. To Mr. Reiche and other commission officials, the problem is best described in the title of a Common Cause study of the agency's first seven years: "Stalled From the Start."

Issue Analysis

Tax Money vs. Private Money: Practical, Theoretical & Constitutional Considerations in the Funding of Federal Elections

file - FEC

Public Service Research Foundation

A topic receiving considerable attention these days by legislators in Congress is tax-funded federal elections. Before theoretical or practical implications of any such system can be considered, it must pass Constitutional scrutiny. That is, the first and foremost question about such a proposal should be: Would such legislation violate any rights under the U.S. Constitution?

The U.S. Supreme Court has a strong record of striking down laws which violate Constitutionally-guaranteed rights, especially First Amendment rights: freedom of religion, freedom of speech, freedom of the press, and political freedom. Case law on political freedom, however, has only evolved recently due to the fact that laws limiting that freedom were not passed until well into the 20th century.

This study examines the constitutional questions arising from a system financing federal election campaigns with tax money, as well as the practical and theoretical underpinnings of such an arrangement.

by John C. Armor

John C. Armor is a Constitutional attorney who has worked on ten cases in the Supreme Court, nine of them dealing with the First Amendment and freedom of political activity. He has also written articles on this and related topics for the American Bar Association *Journal*, the *Harvard Political Review*, the *North Dakota Law Review*, the *Government Union Review*, and articles for several hundred newspapers including the *Washington Post*, Long Island *Newsday*, among many others.

He is also an Assistant Adjunct Professor of Political Science at the University of Baltimore.

The Public Service Research Foundation, founded in 1977, is an independent, nonprofit, nonpartisan public education foundation whose purpose is to increase research, scholarship, and public awareness in the area of public policy regarding public sector employer-employee relations, with emphasis on the influence of public sector unions on the nation's federal, state and local governments.

Copies of this study are available upon request by contacting:
Public Service Research Foundation
8330 Old Courthouse Road, Suite 600
Vienna, Virginia 22180
Tel: (703)790-0700

Tax Money vs. Private Money: Practical, Theoretical & Constitutional Considerations in the Funding of Federal Elections

by John C. Armor

The introduction of various bills for election reform in the House of Representatives, and the holding of oversight hearings in the Committee on Rules and Administration of the Senate, have refocused national attention on the question of the funding of the campaigns for federal offices. The question breaks down into several parts: how much money is currently being spent on such races? What are the sources of that money? What are the uses of that money? What are the recent trends both in the raising of the money, and of the cost of campaigning?

What aspects of the present pattern, or of the pattern to be anticipated in the near future, ought to be changed? How should those changes be approached, either by legislation or regulation?

There are three ways to analyze the funding of federal elections. The obvious one is a pragmatic one of what laws can be passed. The second is theoretical. What laws should be passed to produce the best possible system? The third is the question of what laws are Constitutional.

Unfortunately, many of the proponents and opponents of various possibilities for change in political funding, have not bothered to begin their analysis with accurate information. The best such source is the Citizen's Research Foundation, which has been analyzing and publishing data in this area for 25 years. Information from that source will be presented later in this study.

A proper approach to any public question, including that of election funding, should not be either pragmatic or theoretical. An analysis which is purely pragmatic can quickly degenerate into sheer opportunism, exhibiting nothing more than an unethical scramble for ill-gotten special advantages, to the detriment of the public. On the other hand, a purely theoretical approach may generate a great deal of passion, and a plethora of charges and counter-charges, but its ultimate results may be zero. As veteran legislators of all persuasions – liberal, conservative, and all points in between – will readily agree, the best and most productive analysis of present and future legislation must always be schizophrenic. It must pay constant attention to practical considerations, while simultaneously never losing sight of the theoretical goals.

The proposed change in federal election funding which would work the most massive change in the electoral process, is that of "public funding." As a theory it can be easily stated, it means that either all of the costs, or some proportion of the costs (usually half) of campaigning for the House or Senate, would be paid from the public treasury. However, as soon as the attempt is made to turn the theory into reality, enormous practical problems arise, not the least of which is a very strong opposition among the general public to any major and new program involving the spending of additional tax dollars. This opposition is especially strong to any program whose recent history suggests that it involves getting the camel's nose under the tent, *i.e.* beginning a program where the graph of growth to date suggests that the future costs will accelerate much faster than the inflation rate, with no end in sight.

As important as the practical and theoretical considerations of federal election funding might be, the third question in the title, the matter of whether such laws and regulations are Constitutional is the most important one, and should be addressed first.

I. Constitutionality of Federal Election Funding Laws

The First Amendment of the United States Constitution, like all other parts of that document, is intended as a restriction on the power of the government to act in certain areas, and in certain ways. To make that point quite clear, it means that if the Senate and House are able to agree on any particular form of election funding law, pass such a bill unanimously, and have it signed into law by the President, it will still be useless and meaningless if it offends the First Amendment. The Supreme Court has shown throughout its history that any action by Congress which amounts to an attack on the basic First Amendment rights, can and will be struck down, regardless of whether Congress thinks that the law is a good idea, and regardless of whether the public agrees with that assessment.

The Court has established two separate and very different standards for the review of the legitimacy of federal laws. Where fundamental rights are not at stake, the

Total Election Spending: Too Much, Or Too Little?

In 1980, total spending for all elections at all levels exceeded $1 billion for the first time. The exact total was $1,203,000,000. Of that total, $505 million was spent for state elections, local elections, and ballot issues such as referenda and constitutional amendments.

The figures for each purpose, and comparisons with the spending in 1976, are found in Chapter 4, of *Financing the 1980 Election,* by Herbert Alexander, D.C. Heath & Company, 1983.

Some commentators say that this is an excessive cost for the process of electing public officials. But it pales in comparison to other subjects of national spending. For instance, it is exceeded by the annual advertising budgets for the alcohol industry, and for the tobacco industry. It is exceeded many times over by the annual advertising budgets for such basics as food, clothing, transportation and shelter. It is legitimate to ask whether communciations for choosing public officials is more important than that for determining what beer we drink, or what cigarettes we smoke.

Put in other terms, total election spending in 1980 averages out to about $5.45 for every American. The national government has a $1 trillion budget and determines such critical questions as war and peace, inflation, and unemployment. State and local governments spend about two-thirds as much as and determine such basic matters as education, police protection, water and sewer service. All levels of government are heavily involved in a wide variety of social services.

It can well be argued that considering the important consequences of the electoral judgments being made, and the need to have maximum citizen knowledge about the representatives being chosen, that spending should be greater than $5.45 per citizen, rather than less.

Court tends to defer to the legislative judgment. If the Congress has determined that there is a problem to be addressed, and if there is any rational basis to conclude that the law as passed will address the problem, the Court's inquiry ends, and the law is upheld.

However, where the subject matter of the legislation concerns the fundamental rights of Americans, the Court subjects the law to strict scrutiny. It must be the least burdensome means of approaching a compelling state interest.

The Court has stated time and again that legislation dealing with the process by which our representatives are chosen touches on the very heart of our system of government. Free, fair and open elections are not only explicitly guaranteed by the First Amendment, the existence and conduct of such elections is the basic guarantee of every other right and freedom, established by the Constitution.

Therefore, to approach the question of federal election funding from either the pragmatic or the theoretical side, or both together, is to miss the fundamental point. The very first question must be, are these proposals legitimate under the First Amendment?

Those who ignore this question and proceed directly to questions two and three will be reeducated sharply and forcefully by the Supreme Court as to the importance of what they have ignored, and the overriding power of the Constitution.

Since "public financing" is the largest single question now under consideration, let us examine whether it is or can be Constitutional. As the first order of business, it should be recognized that the label "public financing" is a misnomer. As Senator Mathias, Chairman of the Senate Rules Committee, pointed out in his opening remarks to the oversight hearings, the financing of elections is always public, always has been, and always will be.

Under the cash-and-carry method, which existed prior to 1971, money could be obtained in any amount, and from almost any source. The only two sources which were at that time specifically forbidden by law, were direct contributions by unions and corporations. The sorry history of laundered checks and civil and criminal prosecutions amply demonstrates that even the weak restrictions which then existed in the law, were not observed. After 1971, and especially after 1974, both the sizes of the gifts, and their sources, were regulated to a reasonable extent. The result was that individual giving declined sharply, both to the candidates and to the parties. Various forms of collective giving increased. These included political action committees, trade and professional associations, and permissible forms of indirect expenditures by both corporations and unions. The point, of course, is that the ultimate source of the money continued to be the public itself. Whether the dollars were generated through fees to unions, professional associations, trade associations, or were generated from the sales of goods and services, ultimately every penny was still paid from the pockets of the public.

Let us assume that 100 percent of the cost of campaigning consisted solely of the purchase of radio and television time. Let us assume that Congress established by law, or the Federal Communication Commission established by regulation, a requirement that free television time be provided to all candidates. (There are enormous First Amendment problems with any such proposal, but for the present purposes, we assume it can be done.) The apparent cost of campaigning would then be reduced to zero. However, the statement with which Alistair Cooke ended his series, *America,* would apply, "There ain't no free lunch."

Even though the apparent cost would be zero, in fact the cost of that time would be made up from the television and radio industries themselves, by charging higher rates to the advertising agencies, who in turn pass the costs on to the companies involved. The companies in turn would pass the costs on to the public. This analysis is offered to make it clear that elections will always be financed by the public.

The only question is the terms and conditions under which the money flows from the public in order to support the campaign.

Therefore, the question today is not whether we should have "public financing" of elections. It is whether federal elections should be financed with tax money, or with private money, or with some combination of the two.

And in the analysis, the first question is, what restrictions can be placed on that flow of money, while staying witin the constraints of the First Amendment?

In 1976 the Supreme Court decided the case *Buckley* v. *Valeo*, 424 US 1, determining that roughly half of the provisions of the Federal Election Campaign Act of 1974 were Constitutional, and roughly half were not. Among the provisions struck down were the limitations which Congress had sought to place on either the individual spending of money by candidates themselves, or the spending of money outside of a campaign by individuals and by groups who had strong feelings for or against any particular candidate. Because *Buckley* concerned itself directly with federal election funding, and with the First Amendment, all those who are concerned with such laws today pay lip service to the determinations of the Court expressed in that case. Few, however, demonstrate much understanding of the specifics of that decision, or of the logic on which it is based.

None of the debates so far has referred at all to the latest applicable decision of the Supreme Court. On 19 April, 1983, the Court decided *Anderson* v. *Celebrezze*, _____ US _____ (1983), determining that the State of Ohio could not bar John Anderson from running for President as an independent after 20 March, 1980. The importance of the *Anderson* decision is that it restated and reinforced a conclusion which had appeared in a number of the prior decisions on election laws, that elections and elective office in the United States should not be and cannot be, under the First Amendment, the private preserve of the Republican and Democratic Parties.

The Court reached this conclusion by reviewing American political history. Both the Democratic and Republican Parties arose by replacing other political parties which had previously elected Presidents, but which had lost touch with the public will, became obsolete, and eventually passed from the scene. If it were legitimate for the law to restrict the parties who can participate with the chance of success in the next election, to those which dominated the last election, neither the Republican or Democratic parties would now exist. But such a restriction is not legitimate. That is precisely why many of the present proposals for federal election funding laws have serious Constitutional problems.

There is even a question today, whether a retrial of the *Buckley* case after the *Anderson* decision would result in striking from the books almost all of the current federal laws and regulations in this area (excepting only the reporting and disclosure requirements).

The First Amendment contains guarantees of four basic freedoms. In addition to political freedom, they are: freedom of religion, freedom of the press, and freedom of speech.

In the latter three areas the case law is well developed. Although there will always be cases concerning the fringes of the law, the broad principles are well established, and well understood.

For instance, it is clear that Congress could not write a law governing religious activities and charitable deductions

The Case for Unlimited Contributions: Fat Cats Might be Both Good, and Necessary

Seemingly, the hardest argument for anyone to make against regulation of federal election financing, is that there should be unlimited contributions. Yet part of the argument has been held to be a First Amendment right, by the Supreme Court. And part can be argued from our political history.

Example: John Kennedy spent very heavily in the West Virginia primary in 1960. The reasoning was that a victory there would demonstrate that it was possible for a Catholic to be elected President. He won, using mostly family money. The point was proven, and he was able to attract from then on the kind of support that Democratic candidates normally expect and receive.

According to the Supreme Court, Kennedy would have today an unlimited right to spend his own money. According to the FEC, he would not have a right to receive more than $1,000 from any member of his family.

Example: In the early primaries of 1976, Jimmy Carter was an unknown candidate to most of the public. He lacked personal wealth, and by then the law barred large, individual contributions. However, extension of credit from the advertising agency of Gerald Rafshoon, in the amount of more than $600,000, allowed him to stay in the race, build his recognition factor, and ultimately win.

Example: Late in 1980, John Anderson lacked sufficient funds for a national advertising campaign to demonstrate that he was still in the race, and to attract a decent level of support in the general election. And, unless he could attract at least 5 percent of the vote, he would receive no federal election funds (*after* the election) and would be unable to pay back campaign debts incurred to date. An extension of credit from the direct mail firm of Stewart Mott, in the amount of more than $400,000, allowed Anderson to continue, and to exceed the 5 percent target.

What the last two examples demonstrate is that the potential contributor of a large amount of money (other than the candidate himself), has been replaced by the extender of credit in the same amount, who is willing to lose that debt. The function remains the same. There are times in many campaigns, usually at the beginning, when a large amount of seed money is needed to keep the campaign going. Such funds (or now credit), do not elect anyone. All they do is allow the candidate to stay in the race, and continue to seek public support, both in votes and in large numbers of small contributions.

Large gifts or large credits (other than the candidate's own money), have never amounted to more than a small fraction of the total funds raised for any successful campaign. And, after the advent of disclosure laws in 1971, the press and the public have known of such efforts, and have been able to judge for themselves whether the giver or the creditor has sought or received any special favors.

The argument in favor of unlimited contributions, then, is that without such funds or credits, candidates may lose before they have well begun. And that the voters, not the FEC, should be the ultimate judges of the legitimacy of any connection between any candidate and his chosen associates.

to advance the four major religions in a way that would perpetuate them and hamper the development of all others. It is likewise clear that Congress has no power to favor and perpetuate the interest of the present major newspapers, to the detriment of all others. Nor does Congress possess a power of selective protection and perpetuation of the freedom of speech of those individuals who express views espoused by the majority of the public.

In short, political freedom is the stepchild of the First Amendment. This happened for historical reasons. Although most people are unaware of it, it was not until 1912 that a majority of American jurisdictions had *any* restrictions whatsoever on who could run for public office, under what party label, and under what circumstances. It was not until after 1924 that any significant or difficult restrictions were placed on the rights of any candidates to run for any public office and under any party label, and correspondingly on the rights of the voters who supported such candidates, or who might vote for them.

The main reason why political freedom has not yet achieved the full stature of the other three freedoms is that it was not challenged by any laws prior to the 20th century. Therefore, there have been only 50 years, rather than 200 years, for the Court to develop a body of case law defining and protecting those rights.

In the hearings before the Senate Rules Committee on 17 May, 1983, representatives of both the Republican National Committee and the Democratic National Committee appeared to present the views of their Parties on desirable changes in the law. They disagreed sharply and almost totally on those aspects of the existing law which they felt ought to be changed, and on those points which they felt should be added to the law. They agreed on only one point.

All the representatives of both the RNC and DNC agreed that the law should be changed in order to preserve and enhance "the two-party system." Both agreed that the incentives in the law should be changed to encourage substantial increases in contributions of money to these two Parties for them in turn to distribute to their candidates. And both agreed that this enhanced flow of money to these two Parties should not be accompanied by an enhanced flow of money to other political parties, or to independents.

In short, the RNC and the DNC agreed that the First Amendment should be vigorously and thoroughly violated, disagreeing only as to the terms and conditions of that abuse. But, any program of using tax money to finance elections which operates solely to benefit the Republican and Democratic Parties is unconstitutional, and will be so declared by the Supreme Court.

It is mandatory under the Constitution that if a program of using tax money to finance elections should be established, in order to be constitutional it *must* provide reasonable and achievable standards which will allow third-party and independent candidates access to the funding on a non-discriminatory basis. Just as tax deductions for religions cannot discriminate, based on the religious beliefs of each, so, providing tax money to support election campaigns cannot discriminate based on the beliefs of the candidates and the voters.

If and when tax-funded elections are established on a non-discriminatory basis, they immediately approach other Constitutional hurdles which must be cleared. It should be pointed out that 17 states have various forms of tax-financed elections. Most of these allow the voters to designate directly either the candidate or the party to which the money will go. Others of them provide money to all candidates who have qualified for the general election ballot for certain offices, which also involves a designation system in that each such candidate has been chosen by the public, either by being the winner in a primary election, or by having qualified by obtaining petition signatures if the candidate is an independent, or a member of the third party which does not have permanent ballot status. Some of these laws also contain provisions which mean that the check-off is a true allocation of funds from the taxpayers who so indicate. By comparison, under the federal system the 27 percent who check the blocks on their tax forms cause the other 73 percent who did *not* check a box, to have their taxes pay for political candidates, some of whom they may intensely dislike.

A law which funds all candidates on an apparently non-discriminatory basis will mean a vast expansion of the staff of the Federal Election Commission. It will mean a corresponding vast expanse in the number of decisions made by that staff, subject to the direction of a Commission which belongs wholly and solely to the Republican and Democratic Parties, in equal measure to each. Lastly, it will mean a vast expansion in challenges to the decisions being made by that Commission and its staff, especially concerning dissident Republican and Democratic candidates, and third-party and independent candidates.

"[T]he insensitivity to First Amendment values displayed by the Federal Election Commission. . ." (as one court described it) has been demonstrated in a number of cases in which Courts reversed FEC decisions. Court descriptions of such abuses have been quite harsh, even saying that the FEC has "failed abysmally to meet this awesome responsibility."

There are smaller details in the proposals for election funding reform which are also clearly unconstitutional. The Obey Bill (H.R. 2490) includes a provision offering additional money to any candidate who is attacked by independent expenditures, and in proportion to the costs of those expenditures.

Since the Supreme Court has upheld the finding that independent expenditures are a Constitutional right, a provision such as this would be an effort by Congress to reverse by legislation a decision of the Court. When there is a conflict between legislation and the Constitution, the Constitution governs.

Another proposal which suffers the same type of defect is the effort to restrict the amount of money which can be donated by people who do not live in the candidate's district. Since a farmer in Wisconsin has an obvious and legitimate interest in the policies of a Senator or Representative on the respective Agricultural Committees, and since

the actions of such elected officials will obviously affect him, there is a serious question whether the Court would permit such a restriction to stand. It would be in accord with the Court's decisions striking down residency requirements for welfare benfits, to do the same with this restriction.

Another proposal which seems clearly unconstitutional is the provision that if any licensed television or radio station permitted anyone other than the candidate or his authorized committee to purchase time, equal and free time must be provided to a candidate who is attacked in such purchased advertising. This is a clear effort by Congress to nullify the findings of the Court that independent expenditures are a Constitutional right. It would probably be struck down.

In summary, there is a serious question in light of the *Anderson* decision whether the existing pattern of laws and regulations governing the financing of federal election campaigns is Constitutional. There is no question that many of the provisions of proposed laws which would further control and restrict the financing of such elections, are unconstitutional. And there is also no question that there will be ample plaintiffs and attorneys to bring such challenges swiftly, effectively, and successfully.

II. Theory of Federal Election Funding Laws

Almost everyone who is interested in election laws agrees on this point: There are two essential desired effects of the laws, and of the political process that develops under them. The process should both *be* as clean as possible, and it should also *be perceived* by the public as being clean. It is self-evident that the reality of vote-selling is a cancer on the body politic. But it is also true that the appearance of vote-selling is dangerous, by eroding confidence in public institutions and officials.

What are the methods which in theory could deal with both aspects of this problem?

There is near unanimity that disclosure is an effective method. It has been one of the earliest and most consistent features of both federal and state election finance laws. With certain necessary exceptions based on the First Amendment, and growing out of *NAACP* v. *Button*, 371 US 415, (1963) this has been the most effective provision of any election finance laws.

Disclosure, of course, has no direct effect on the flow of money. It does not bar any particular contribution, either by source or by size. All it does is make certain that each candidate shall be known by the company that he keeps.

There has been no systematic research to determine whether candidates who have accepted large contributions, or who make them to themselves out of their own pockets, or who accept contributions from noxious sources, tend to be viewed with disfavor by the voters. There is no hard evidence that because of these types of money, these candidates are more likely to be defeated. The fact that increasing numbers of candidates, as part of their campaign strategy, announce publicly that they will not accept contributions over or certain size, or will not accept contributions from certain sources, suggest that this particular theory is having some real effect.

Beyond disclosure, however, there seems to be little or no majority agreement on any specific theoretical methods for improving the conduct of federal election funding. In some ways, both the present law and many of the proposed changes reveal themselves on close examination to be a patchwork of whatever provision were capable of passage, rather than a coherent approach to a specific problem, based on an identifiable theory.

The next most common effort to control both abuse and the appearance of abuse, is contribution limits. The varying limits in the federal election law demonstrate the failure of this theory.

The maximum single contribution that the law allows to a candidate from any source is $5,000 from a political action committee per election. The presumption made by Congress in developing the law, and upheld for the moment by the Supreme Court in *Buckley,* is that a contribution in this amount to any candidate's campaign will not be sufficient either to purchase the loyalty of that candidate, or even to give the appearance of purchasing that loyalty.

Since $5,000 is about 1 percent of the cost of the least expensive contested federal campaign, and about 1/15 of one percent of the most expensive such campaign (excluding the Presidency), the assumption made by Congress seems to be a reasonable one.

Another provision of the law, however, limits individual contributions to $1,000 to a candidate for a specific election. If $5,000 from a PAC cannot buy a Congressman, then there is no reason to believe that the same amount of dollars from any individual can purchase a Congressman. The two different limits do not square in theory.

The difference between them, however, has two undesirable effects. First of all, it forces more of the money which members of the public want to go to candidates, to flow through PACs, and less to go by direct contribution. It also creates a theoretical subterfuge, to which several major candidates have resorted.

Since an individual can give $5,000 to a multi-candidate committee, it is a simple matter for a major candidate to set up a multi-candidate committee. He has it run by his supporters. They can donate as little as they choose, say 1 percent of its money, to other candidates. The result is that the individual can make his contribution to that committee and have the effect of making a $4,950 gift, and will receive the respect and thanks of the candidate for such a large gift.

One of the greatest theoretical breakdowns, however, in the proposal of tax-financed federal elections, as opposed to privately-financed ones, is the unexamined assumption that the former is the only method by which the results can be achieved.

In approaching any goal, including the one of free and open elections, the government has two basic theoretical choices. It can either establish a framework of incentives which causes individuals to make their decisions in a way which achieves the desired result. Or it can establish a

government agency to achieve the desired result by compulsion.

The first approach has been much neglected in recent years. But the greatest achievement ever, from any action ever taken by Congress, was based on that method.

The settlement of the American West, the growth of this nation to a world power, and all of the national and international ramifications which flowed from that growth and power, stems from the homestead policies established by Congress. The first Homestead Law was passed in 1804, and the last did not expire until 1936.

The beauty of the pattern was its simplicity. In a short text, the law made 160 acres available for $1.25 an acre (in the 1862 version). Anyone who took and farmed the land, owned it. In short, the law provided an opportunity for anyone who chose to take advantage of it. It created a framework within which personal incentives achieved the goal.

There was not in the 19th Century any consideration of the opposite approach, creating a Federal Western Settlement Commission, plus laws on who could settle where, regulations to keep the whole thing honest and non-discriminatory, employees to carry out the scheme, and of course judicial review of all decisions made.

The question which should be asked is whether the West would ever have been settled if each and every pioneer had been compelled to deal with and through the FWSC, in the same manner that candidates for federal office must deal with and through the FEC.

The alternative choice in election funding would also be to create a framework within which the free and direct choices of individuals would collectively accomplish the goal. We have a long tradition of allowing charitable deductions in order to encourage private individuals to accomplish eleemosynary purposes. We have that tradition everywhere but in politics.

At present, the ceiling on deductibility of political contributions is $100. What would happen if it was raised to $5,000, which is the non-corruption level which Congress has already established? It could either be a straight deduction, or partially or wholly a credit against taxes owed.

The result should be to encourage an outpouring of individual contributions to individual candidates, based entirely

Bad Logic, Bad Laws, Bad Results

Two organizations are at the forefront of the effort to extend taxpayer-financing of federal elections to all offices, not just President and Vice President. If the logic of their approach is wrong, then so may be the laws that they propose. And so may be the results of them, causing yet another round of reforms to correct the last series of reforms.

The two organizations are Common Cause and Public Citizen. Both contend that Congress is essentially bought and sold by the special interests. Both have reviewed several years of Congressional activity to find examples to prove their case. Their logic can be examined through the examples they offer.

In 1979, Common Cause published a booklet entitled, *How Money Talks in Congress.* It gives five examples of how special interest contributions apparently bought results in the Congress. ("Special interest" is not defined, but in context it seems to be any organization of citizens which raises and spends money to achieve results that Common Cause dislikes.)

The five examples are, the American Medical Association's effort to exempt doctors from FTC regulation, the American Trial Lawyers Association opposition to no-fault insurance, special breaks for the maritime industry, for millionaire Ross Perot, and special deductions for horse breeders. While Common Cause points to Subcommittee, Committee, or one-House votes, a close reading of their text shows that the special interest prevailed on only the first two issues, and ultimately lost the last three issues.

A similar approach, with similar results, was taken by Public Citizen's Congress Watch project. A staff attorney testified for it before the Senate Rules Committee on 26 January, 1983. It, too, gave five examples.

The examples were, the opposition of used car dealers to an FTC rule on defects, the AMA's renewed proposal for exemption from FTC regulation, a credit industry proposal to make certain debts payable even after bankruptcy, antitrust exemption for the shipping industry, and tax breaks for certain industries in the 1981 Tax Bill.

To demonstrate the evil, Congress Watch pointed to Subcommittee, Committee, or one-House votes. A close reading of their testimony shows that the special interest succeeded only on the first issue. It ultimately lost on the remaining four.

Congress Watch also contributes to the caliber of the public debate by including nine quotations form various Senators and Representatives in which they confess the sins of their colleagues. Each says that votes can be bought, but not, of course, from the giver of the quote. No other names are offered.

There are two logical problems with the approach taken by Common Cause and Public Citizen. One is the assumption that all Congressmen are political neutrals with no positions on any issues until they have counted the cash. The truth is that almost no one is elected as an unknown. Almost all have made their philosophical positions clear to some extent in public statements and in prior government service. Given that, it is far more likely that the contributors are supporting known friends, rather than causing new or switched allegiances.

The second error is the assumption that the position of these two organizations is always right, and should always prevail. In their hand-picked examples, they won 7 and lost 3. Any political interest group, which these two organizations are, should be delighted with a success rate of 70-30. That is a greater landslide than any President, including FDR, ever achieved.

Any group which is not content with a landslide, demonstrates a failure of political logic, which suggests that the legislation it proposes, and the results it predicts, may also be bad.

on the private decisions made by each contributor concerning the desirability of each candidate. The American people give billions of dollars to worthy charities every year. Should not politics be considered a worthy calling? Should not public service be considered a worthy cause?

The cost of politics would then be spread very widely. Obviously, the lower the level of deductibility is set, the broader the contribution base each candidate must achieve in order to produce the same number of dollars. The present level of $100, however, is practically worthless. The theory and practice of direct mail communications is beyond the scope of this monograph. But in an excellent book by Professor Larry Sabato, the process is laid out in detail. Suffice to say, only a PAC, operating consistently and year-round is able to raise significant amounts of money efficiently from contributions of less than $100.

The result of a higher level of deductibility would be to spread the costs of elections out among the people of the country, producing a relatively fair and free system of private financing of elections. This alternative of setting a framework, rather than a rigorous enforcement mechanism, avoids the expense, the First Amendment problems, the flood of litigation, and the diminution of the dollars which always occurs between the collection of the tax and the payment of the dollars to the ultimate recipients.

Another major theoretical error made by many of those who propose more laws, more regulations, and more federal control of the federal election process, concerns the subject of balance. It is argued that some sort of mystical balance should be maintained between the Democratic and Republican Parties. It is argued that pro-business interests should be in some sort of balance with pro-labor interests. It is also argued that consumer interest should be balanced with those of every other group, from the American Medical Association to the United Auto Workers.

The theory of balance is easily disproved, with one of the classic examples being consumer interests. Since every voter is also a known consumer, it follows that every candidate is elected by voters who consist 100 percent of consumers. That being true, it ought to follow that every single committee vote, procedural vote, and vote on final passage for every piece of legislation in every legislature should always be in favor of consumer interests.

What this sort of superficial analysis misses is that in addition to being a consumer, every voter is a member by choice or stroke of fate of a number of special groups which each have agendas of their own. Issues concerning women or men, different racial groups, different religious groups, different professional and employment groups, and different political ideals can all be more important in the mind of any individual voter when he pulls the levers on election day, than the issues which the lobbying groups for consumers believe should be first and foremost.

Or consider the theory of balance between business and labor. The claimed imbalance in favor of business is one of the primary incentives for those who presently propose deeper and more stringent involvement of the federal government in the process of funding federal elections. But this theoretical approach is based on the abuse of the facts.

This argument begins by pointing out that business-oriented PACs raise and spend substantially more money than labor-oriented PACs. As Dr. Alexander explained in detail in his article, "The Case for PACs," business PACs give 64 percent of their candidate donations to Republican candidates, whereas union PACs give 93 percent of their candidate donations to Democrats. The result is that of every business dollar to candidates, the margin of victory of Republicans over Democrats is 28 cents. On the other hand, the margin of victory of union dollars for Democrats over Republicans is 86 cents. Contributions from business PACs would have to more than double while those from union PACs remain constant for the effect of the dollars raised and contributed to balance out between Republicans and Democrats.

As Dr. Alexander has further pointed out, unions are traditionally and historically the best single source of volunteers for any candidate. Whatever their problems with individual candidates in individual elections, over the span of time unions produce more people, more reliably, than any other source. To a certain extent, in politics spendable dollars and useable volunteers are interchangeable. And no dollar value has ever been assigned, or reasonably could be, to the contribution of manpower by the unions.

All of this assumes that there should be some kind of balance between business and labor. It is certainly true that at times in the industrial age the Congress has favored business interests. At other times it has favored labor interests. The shifts from one side to the other have occurred because the people have decreed it by their decisions in the voting booth. What the critics who attack the election system on the subject of balance refuse to recognize, is that sometimes the failure of an idea or an organization to attract support is simply an expression of well-deserved public disinterest.

Especially galling is the suggestion that in theory there should be a balance between Republicans and Democrats. Only in the 20th century has the law been used as a life-support system for political parties. Prior to 1900, political parties lived or died, election by election, based on the acceptance of their ideas and their candidates by the voters. And if their rejection was sufficiently acute, the parties completely collapsed and were replaced by others.

Only in this century, and especially since 1974, have the current major parties used the law itself, and particularly tax-financing for presidential elections, to maintain their preferred status for the future, regardless of the caliber of the candidates they offer, or the programs they support. Prior to 1900, if any political party offered second-rate candidates with third-rate ideas (or *vice versa*) it not only ran the risk of being soundly trounced at the polls, it also ran the risk of ceasing to exist as a poltical party.

The idea of balance between the Republicans and Democrats is nothing more than a mutual assistance pact between those Parties to guarantee that neither of them will suffer the most serious consequences of voter dissatisfaction.

Many of the people now proposing increased federal

control of election funding are complaining about the "unintended consequences," or "unforeseen results," of previous reforms in the election laws. To people who are intelligent and experienced, major results of the decisions they make and the actions they take cannot properly be called unintended or unforeseen. It is more proper to say that when any government program, including election funding, produces major and negative side-effects, the reason is not some strange defect in the program, instead it is a failure of the theory of those who designed it.

When a lawyer or legislator says that his new law didn't work, it is the same as when a surgeon says, "oops." In both instances it means that the skills of the professional have failed, and the patient is in deep trouble.

As Barry Commoner said, "You cannot do just one thing." By definition, politics consists of a series of interconnected and overlapping relationships among candidates, groups, and individual supporters. It follows that a single change at the input end of the process, namely election funding, cannot produce a single change at the output end, namely government that is always good and wise.

Money has been called the "mother's milk of politics." It is. It always has been. And it always will be. Any theory based on the assumption that money can be removed from politics is as worthless as a theory that politics can be removed from politics. Any theory which seeks to remove entirely the flow of money from people and groups who are interested in election results, to the candidates involved,

The Money Flow: Who Really Gives, Who Really Gets

The argument that federal election funding is out of whack and requires major change, boils down to an assumption that contributions from business PACs are overwhelming all other sources, and are purchasing elections for the Republican Party. The facts do not support those assumptions.

Corporate PACs are nowhere near as single-minded as labor ones. In the last three federal elections, business gave 62 percent, 64 percent and 65 percent of its funds to Republican candidates, whereas labor gave 94 percent in each year to Democrats. In short, two-thirds of all business money was opposing other business money. With far less decision-makers, and greater coordination among them, labor PACs almost never wound up at cross purposes.

When contributions from other types of PACs were added in, the Democrats maintained a steady and significant advantage in each of these three federal elections, receiving 56 percent, 52 percent and 54 percent of the total contributions (1978, 1980 & 1982). The sources of all the PAC contributions, and the divisions of each between the Republicans and Democrats, are shown:

PAC Contributions by Category to Democrats and Republicans (All Congressional Candidates), 1978-82 (in Millions and Percentages)

PAC Category	Year	Total Cont.	Democrat	Republican
Corporate	1982[a]	$23.4	$ 8.2/35%	$15.2/65%
	1980	19.2	6.9/36	12.3/64
	1978	9.8	3.6/37	6.1/62
Labor	1982	$17.1	$16.1/94%	$ 1.0/ 6%
	1980	13.2	12.4/94	.8/ 6
	1978	10.3	9.7/94	.6/ 6
Trade/ Member/ Health	1982	$19.7	$ 8.5/43%	$11.2/57%
	1980	15.9	7.0/44	8.9/56
	1978	11.5	5.0/43	6.5/57
Non-Connected	1982	$ 7.5	$ 3.6/48%	$ 3.9/52%
	1980	4.9	1.5/30	3.4/70
	1978	2.5	.7/28	1.8/72
Cooperative	1982	$ 1.8	$ 1.1/64%	$ .6/36%
	1980	1.4	.9/65	.5/35
	1978	.9	.6/67	.3/33
Corp. w/o stock	1982	$ .9	$ .5/59%	$ .4/41%
	1980	.6	.33/52	.30/48
	1978	.1	.1/96	.04/ 4
Total	1982	$70.4	$38.2/54%	$32.2/46%
Total	1980	55.2	28.9/52	26.2/48
Total	1978	35.1	19.7/56	15.3/44

[a] Totals for the 1981-1982 election cycle cover the period beginning January 1, 1981, through October 13, 1982. This shortened cycle may distort the percentages of total giving in favor of incumbents.

Business PACs: What Kind of Contributions, From What Kind of People?

The maximum contribution that any PAC can make to any candidate is $5,000 per election, meaning a total of $10,000 for the primary and general elections combined. That might seem in the abstract like an influential gift, but it is less than 2 percent of the cost of a contested House race, and less than 1 percent for a Senate one.

But the actual giving of business PACs is far less than the maximum. Surveys have shown that in the 1979-80 election cycle, the average contribution to House candidates was only $471, with only 20 percent giving more than $500. On the Senate side, the average contribution was only $824, with only 23 percent giving more than $1,000. PACs also contribute to the democracy of election funding. Twenty-five percent of them allow donors to designate either the party or the candidate to whom the gift should be made. That is significantly more fair than Presidential election funding, under which every citizen was forced to give 17 cents to Reagan, 17 cents to Carter, and 2 cents to Anderson, whether he checked the box or not.

PACs also seem to have increased the number of Americans who have become financially involved in elections. Between 1952 and 1976, the percentage of Americans making political contributions varied around a norm of 9 percent. In 1980, it jumped to 13.4 percent, or 17.1 million donors. This increase in personal giving was apparently due to the influence of PACs. [All of the above information is taken from the article by Dr. Alexander, "The Case for PACs," Public Affairs Council, 1983.]

The other side of the equation is, who are the people who donate to PACs, and how much do they give?

Representative examples can be found in the testimony before the Senate Rules Committee. On 27 January, 1983, Julio LaGuarta spoke on behalf of the National Association of Realtors, and David B. Wagner spoke on behalf of the Sheet Metal and Air Conditioning Contractors' National Association.

The Realtors PAC is one of the largest and most active in the country, as indicated by its giving $2,383,971 to federal election candidates in 1981-1982. However, it represents more than 600,000 Realtors, 93,000 of whom made contributions to the PAC, with an average gift of $12.33.

The Realtors PAC, like most of them, is a means of collecting and using a large number of very small gifts. Given the high costs of direct mail, and the relatively low rates of return, an individual candidate who got average contributions of $12.33 would barely cover his fund-raising costs.

The Sheet Metal PAC is more typical, because it is relatively small. In the 1982 election cycle, this PAC contributed $253,000. The funds were raised from more than 1,300 individuals, who made an average gift of $198. As Mr. Wagner said, "Clearly, these are not contributions of the 'influence-peddling' variety."

In short, PACs are organizations that generate large numbers of relatively small contributions. Then, on the basis of what the members of that organization think is in the interests of the nation, they make relatively small contributions to candidates for office. They each make their own judgments about candidates to support. And they frequently disagree with one another.

A statement from Mr. Wagner is a proper summary of the kinds of people, and kinds of contributions, which are involved in business PACs. "We have been depicted as inherently evil people bent on corrupting otherise virtuous Members of Congress. We don't feel that perception is fair, warranted, or based on any type of documentable evidence. We do recognize of course that the Darth Vadar image sells newspapers and helps the Nielsen's."

is doomed to failure. Political money may be looked upon like a giant tube of toothpaste. If the top is squeezed, it moves to the bottom. If the bottom is squeezed, it moves to the top. If the middle is squeezed, it moves to both ends. But it is always there, and it will always move to the point of least resistance.

In short, the incredible growth of independent expenditures and PACs is a direct, logical, and inescapable result of the election reforms of 1974. Those people and those groups who were deeply involved in the reforms of 1974, and who claim not to have foreseen the consequences of those reforms, should have their theories of government seriously reexamined before any new set of reforms from the same sources are taken seriously.

III. Practical Considerations of Federal Election Funding Laws

The practical points concerning proposals to place major new controls of federal election funding, and to use tax money to finance those elections, can be summarized in two sentences. The people don't want it. The Congress cannot pass it.

All the major public opinion polls have shown that the public consistently opposes the idea of using tax money to finance all federal elections. The margin of opposition is usually 2 to 1.

The present opposition is based on a general public disapproval of any major new spending programs in these deficit-ridden times. The level of opposition is quite likely to rise once price tags are attached to some of the major proposals.

As discussed in the first section, in order to be Constitutional, any public funding program must be available to third-party candidates and independents as well as to Republicans and Democracts. If we assume that taxpayer-financed elections are set up only for the House of Representatives (which is the present proposal pending in the

House), and if we assume the maximum level of tax dollars per candidate is $100,000, the result becomes the following: Current experience in jurisdictions across the country suggest that it would be about right to expect four candidates for each House seat in each general election. That would make the initial price tag $174 million every two years. That in turn would make the four-year total almost three times the present government cost for Presidential elections. It is doubtful that the people would accept even this cost level.

If Senate elections were added to the equation, the dollars would go up sharply, since all Senators run state-wide, and the cost of their campaigns can be easily forty times that of a House candidate.

Adding to the unattractiveness of the idea to the general public is the obvious fact that the cost will skyrocket. Recent history shows that campaign costs are rising much faster than inflation, with no end in sight. Therefore, the public can see that the $100,000 per candidate is only a starting point. And each $10,000 increment per candidate multiples out to $35.8 million additional in total costs over a four-year cycle. These are just the direct costs to the candidates. They do not include the related government costs of expanding the FEC staff, and the private costs to the candidates of suffering under, and fighting with, that staff.

Efforts to keep the costs from rising, encounter problems of their own. The common proposal is to place a limit on total spending on both challengers and incumbents.

This idea has received some favorable notice in every recent Congress. The reason is easy to fathom. If the challenger is allowed to spend only an amount equal to the incumbent, the incumbent will always have a leg up. Going into the election the incumbent has spent years using staff, materials, travel expenses and free postage, all of it paid for by the taxpayers, to make himself well-known and well-liked. No wonder many commentators refer to spending limit laws as the Incumbents' Protection Acts.

Perhaps the practical reason why this idea has not become law, is that incumbent Democrats cannot figure out a way to protect themselves personally without severely narrowing the chances of Democratic challengers to Republican incumbents. The same logic applies in reverse to Republican incumbents, although more of them philosophically oppose spending limits.

From a purely practical and selfish viewpoint, any attorney who practices before the FEC (as the author of this study has on occasion) should be solidly in support of tax-financed federal elections. If such a program is installed, it would obviously offer to every such practitioner lifetime employment. It would put all of our children through college and law school. But that does not make it legitimate under the First Amendment, not does it make it acceptable to the taxpayers, nor does it make it politically reasonable.

A pragmatic approach to what kind of federal election funding laws can be passed by Congress boils down to the question of what areas, if any, lie in a zone of common interest of the Republican and Democratic Parties. As dis-

This Strange, American Idea of Open and Fair Elections

This study is concerned solely with laws governing the financing of federal elections. Among many other commentators, former Senator Eugene McCarthy has forcefully stated the case, in *The Ultimate Tyranny,* that there are three kinds of laws by which American governments (in this century only) have deliberately restricted the ability of new or different political groups and candidates from open and fair competition.

In the United States, there are three weapons against political competition: restriction of access to the ballot under state laws, restriction of access to the media under federal laws, and restriction of access to funding under federal laws. These three restrictions have a combined effect, which can be demonstrated by analogy.

If competition in American baseball was controlled by the same laws and regulations as American elections are, this would be the result. The teams which competed in the World Series last year, St. Louis and Milwaukee, would be labeled the only "major league" teams this year. [Combined effect of the ballot, media and funding access laws.] All others would be some type of minor league team. The Libertarians would be AAA League. The Citizens Party would be AA League. John Anderson might still be a rookie, not having played in enough games.

St. Louis and Milwaukee would have guaranteed television contracts for all games. [Media access.] Their special status would be assured by a "nonpartisan" organization, the League of Women Baseball Fans. [Presidential debates.] These two teams would have an automatic right to participate in all games. The other teams would have to qualify to play, under conditions ranging from easy to nearly impossible, in various states. [Ballot access.]

The salaries and expenses for St. Louis and Milwaukee would be paid by all fans, nationwide, regardless of whether or not those fans liked those teams. [Presidential election funding.] The other teams would have to raise their expenses as best they could, subject to legal restrictions written by the Cardinals and the Bucs. [Federal Election Campaign Act, as amended.]

Lastly and perhaps most important, there would be an Umpiring Commission, consisting of three members chosen by St. Louis, and three chosen by Milwaukee. [The Federal Election Commission.] This Commission would select all of the umpires for all games. It would write the rules under which they would be played. If it chose, it could rewrite the rules, and redesign the playing field, while the season was underway. [FEC staff, FEC regulations, and FEC Complaint procedures.]

Now, with all those controls in place, the season would begin.

No fan of baseball would consider that a system for encouraging open and fair competition, in which the best team could win. Yet, baseball is only a game. Politics is serious business on which the future of the nation depends. Is it not far more important to have legitimate competition in elections, than it is in baseball?

cussed above, what is good for those two Parties, is not necessarily good for the nation.

At various times in our history, the Federalists, the AntiFederalists, the Whigs, and the Republican-Democratic Parties have each controlled either the Congress, the White House, or both. If any of them had had the ingenuity and temerity to pass the kind of laws which are presently being discussed, none of the later parties (including the Republicans and Democrats) would have come into existence.

The saving grace of the pragmatic side of present politics is that there are very few areas of federal election finance laws on which the Republicans and Democrats can agree as Parties, and on which the House, Senate, and White House can agree as institutions (regardless of which party currently controls each).

The net result of the pragmatic analysis is that no major change in the election funding laws can be expected to come out of the present Congress, and be signed by the President.

IV. Summary

The analysis of any aspect of federal election funding law ought to have three parts. It should begin with the question of whether the present or proposed law is legitimate under the First Amendment of the Constitution. The truth is that most of the proposals for new laws, and possibly major sections of the existing law, are now unconstitutional. The greatest and most unfortunate lack in the present public discussion on this subject is in the area of what the First Amendment really means.

The second step in any such analysis should involve the theory of politics and elections. Unfortunately, most of the people who are most active in the debate on this subject jump into the subject of theory mid-stream. Instead of figuring out their theories all the way from beginning to end, they begin in the middle. They start with a number of assumptions about the process, some of them unproven, some of them half-baked, and some of them flatly wrong. They construct their partial theory on those bad assumptions, and are then quite surprised when the results turn out entirely different from what they had expected.

The third part of the analysis should be the pragmatic side. This part of the analysis is never ignored in politics. The pollsters take the pulse of the American people on this issue as on any other major public issues. The organizations who are interested in the subject, the lobbyists who represent special interest groups on all sides of the issue, and especially the Congressmen themselves, without fail always consider the practical questions of what can and cannot be passed in any given Congress. It is not the neglect of practicality, but rather the overemphasis of it, which has produced the sometimes highly negative results of prior election reforms.

As Chairman Frank Fahrenkopf of the RNC said in testimony to Senate Rules, "I come before this Committee to advocate elimination of nonsense." As an aside, it would be desirable for someone to advocate the end of nonsense in every Congressional hearing on any subject. Specifically on federal election funding lesgislation, nonsense will be endemic until both witnesses and Congressmen get a logical handle on the Constitutional, theoretical and pragmatic underpinnings of the subject.

A thoughtful consideration of all three points, the Constitution, the theory of government in the United States, and the practical considerations of passing laws, should all lead to the same conclusion. Congress should and must be concerned both with the honesty of elections, and with the appearance of honesty in elections. It should act to make the process as visible as possible, and as accountable as possible. But it should do so by methods which are in harmony with the basic premise of democracy itself. The ultimate choice, the ultimate sovereignty, must always rest with the individual voter. Since freedom of choice is the essence of democracy, it ought to be as available in a voter's checkbook, as it is in his voting booth.

In short, government involvement, tax dollars, government employees, and government regulations should be involved as little as possible in the process of choosing those who will run the government itself. No company, no union, and especially not the government itself, should consist solely of, and by, and for its leaders. That is contrary to the premise of our government. We are met again on a bloodless battlefield where the question of whether government of the people, by the people, for the people, is able to survive. If the House, the Senate, and the White House do not act to protect our political freedom at this time and on these issues, recent history suggests that the Supreme Court shall.

p. 2 "rational basis...standard...." *Railway Express Agency* v. *New York*, 394 US 576 (1949).

p. 2 "strict scrutiny...least burdensome...." *American Party of Texas* v. *White*, 415 US 767 (1974).

p. 2 "free, fair and open elections...." *Reynolds* v. *Sims*, 377 US 533 (1964).

p. 2 "After 1971, and especially after 1974...." For a historical review of federal election law reforms, see Herbert Alexander, "The Case for PACs," Public Affairs Council, Washington, D.C. (1983), at pps. 5-7.

p. 2 "Whether the dollars were generated...." The latest in the series of election finance reviews is Herbert Alexander, *Financing the 1980 Election*, D.C. Heath & Co., 1983. The previous volumes covered the elections of 1960, '64, '68, '72, and '76.

p. 3 "reviewing American political history...." *Anderson* v. *Celebrezze*, Slip Opinion, pps. 11-13, footnotes 13, 16, 17.

p. 4 "political freedom is the step-child of the First Amendment...." John Armor and Eugene McCarthy, "The Turning Point," *Harvard Political Review*, Vol. VIII, No. 1, Fall, 1980.

p. 4 "not until 1912...*any* restrictions on who could run...." 88 *Harvard Law review* 1111 (1975). This is a seminal discussion of election laws. Although substantial portions have been rendered obsolete by subsequent court decisions, the historical analysis is correct.

p. 4 "the two-party system...." Senator Laxalt, General Chairman of the Republican Party, called it "traditional." If this tradition had been permanent, his party would not exist, and Abraham Lincoln would not have been elected. See, testimony to the Senate Rules Committee, 17 May, 1983, p. 5.

p. 4 "17 states have...tax-financed elections..." See, *Public Financing of State Elections*, Citizens Research Foundation, 1982.

p. 4 "The insensitivity to First Amendment values...." Some of the FEC's more egregious errors are discussed by Paul Kamenar, in "PACs, the Taxpayer, and Campaign Finance Reform," Heritage Foundation Background Paper 275, April, 1983, pps. 10-11.

p. 4 "independent expenditures...a Constitutional right...." In *Common Cause* v. *Schmitt*, 71 L. Ed. 2d 20 (1982), the Supreme Court upheld a unanimous decision of a lower court that the FEC could not place limits on any independent expenditures. The Supreme Court tied, 4-4, and issued no opinion. The FEC now takes the position that it is not bound by the result in that case. But the FEC had intervened as a party, and parties in any case are bound by a tie result in the highest court.

p. 5 "striking down residency requirements...." *Shapiro* v. *Thompson*, 394 US 618 (1969).

p. 6 "settlement of the American West...." See the Homestead Law of 1862, which defines the entire pattern in 2 1/2 pages. The present Congress could not declare National Pickle Week in that few words.

p. 7 "direct mail process...." Larry Sabato, *The Rise of Political Consultants: New Ways of Winning Elections*, Basic Books, Inc., New York, 1981, especially the two-page chart showing that effective direct mail is too long to fit within a normal campaign.

p. 8 "unintended consequences...unforeseen results...." Among many witnesses who used such phrases and apparently did not understand the consequences of election laws, was Steven Uhlfelder, Chairman, Special Committee on Election Law, American Bar Association, who testified to the Senate Rules Committee on 27 January, 1983. By contrast, see the testimony of Professor Sabato, on 26 January, at pps. 2-3, and testimony the same day from Bradley O'Leary, at pps. 4-6.

p. 8 "money...the mother's milk of politics...." For another view that political contributions cannot be suppressed, but that diversity of interests and a broader base of contributors can be encouraged, see Michael Malbin, "The Problems of PAC-Journalism," *Public Opinon*, Dec./Jan., 1983, p. 15.

p. 9 "public opinion...against using tax money...." Four surveys, conducted annually from February, 1980, through February, 1983, showed the following totals for Disapproved and Strongly Disapproved (combined) compared to Approved and Strongly Approved (combined): 1980–Disapproved, 68.2 percent; Approved, 23.1 percent. 1981–67.9 percent to 21.0 percent. 1982–64.2 percent to 25.2 percent. 1983–65.0 percent to 24.5 percent. The surveys were conducted by Civic Service, Inc., St. Louis, Missouri. Other major polls agree with these results.

p. 10 "four candidates for each House seat...." The estimate of four candidates per district might prove to be too low. The probability that greater tax-financing of elections will have the same effect on candidacies that manure does on roses, is explored in Mary Meehan's article, "Why They Can't Afford Not to Run in '84," *Inquiry*, March, 1983, p.19. The general point is that available funding will make some hopeless candidates enter the races, cluttering the ballots and increasing the costs still further.

p. 11 "partial theory on...bad assumptions...." Fred Wertheimer writes in, "The PAC Phenomenon in American Politics," that monies given by PACs are, "contributions with a legislative pupose." (*Arizona Law Review*,Vol. 22, No. 2, 1980, at pps. 607-609, including supporting data.) Well of course such contributions have such a purpose. Every political act is intended either to help a friend or hurt an opponent. That is part of the definition of politics. A theory based on the assumption that human nature can be reversed, is not of much use in the real world.

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COMMENTARY

Japan Versus the United States

Max Hugel, author of the following article on what the United States must do to compete successfully with Japan, spent more than 20 years as a business partner to the Japanese. He learned Japanese while in military intelligence during World War II. From 1954 to 1975 he was president and chief operating officer of Brother International Corp. and from 1975 to 1980 was executive vice president and chief operating officer of Centronics Data Computer Corp., Hudson. He was President Reagan's national director of voter groups in the 1980 campaign, and has been deputy director for administration and deputy director of operations of the Central Intelligence Agency.

By MAX HUGEL

Ever since World War II, the Japanese have inexorably made massive commercial penetrations around the world, particularly in the United States. Their manufactured goods are everywhere, and have often succeeded in displacing U.S. products. Turning to the other side of the coin, U.S. manufacturers have rarely been able to penetrate the Japanese market. The Japanese have an unbalanced duty rate on many American-manufactured goods. The forest of Japanese regulations is an almost impenetrable obstacle to most American manufacturers attempting to penetrate that market.

Still worse, the Japanese possess a very complex distribution system which most American manufacturers do not understand and cannot penetrate.

As a result, there is a massive imbalance of trade between the United States and Japan and between Japan and much of the rest of the free world. The Japanese have dogmatically and aggressively pursued their strategy in taking over markets for their products throughout the world. America's industrial base has suffered accordingly. We all can cite examples of how their success has impacted here.

There are many reasons for what we are seeing today. Many U.S. manufacturers of consumer products have been extremely complacent. They have not resisted, and have allowed the Japanese to slowly but surely dominate their markets.

There are other factors.

After World War II, we designed the Japanese industrial base, told them what products to make, gave them significant advantages, financed many of their new factories, starting them off with a more up-to-date industrial base than we had. Since then they have continuously and constantly upgraded their facilities, automated, and utilized the character of their people and institutions to outpace us in productivity. Think about it. It is quite amazing. Japan imports almost all her raw materials, manufactures its products, sells them abroad, and competes effectively with everyone.

Unless we can cope with this situation, we could find ourselves reduced to the status of a secondary power. America could end up as a strictly services and agricultural country without a competitive industrial base. We would be a raw-materials source for Japan.

We have a hard climb ahead of us. Yet before we can tackle the problems, we first must understand Japan, its people, and how to negotiate with the Japanese, both on a government and business level.

The following is a thumbnail sketch of what corporate and political Japan is all about. If that is understood, I think we can begin to effectively negotiate with them, on government and business levels; to balance our trade with them, to increase our penetration of Japan's markets and to compete effectively through the world with Japan.

To successfully negotiate and deal with the Japanese, we must make an effort to understand them comparable to the one they put forth to understand us.

Let me outline some elements commonly found in the Japanese character that have been overlooked and about which we must obtain a much better understanding. Only about one fourth of Japan is arable and usable for traditional commercial and agricultural purposes. Well over 100 million people are crammed into these islands. They are not, like us, people accustomed to large open spaces and ample room for expansion. This is an intense, hard-working people, who focus so closely on their

work that they often view many leisure pursuits and humor as frills or frivolity.

Many Japanese possess a superiority complex towards other Asian nations, yet also feel they must race to catch up in their relationships with Western nations.

I have found the Japanese do not respect weakness and take advantage of it. They admire and respect strength, and I draw a careful line between strength based on reality as opposed to mere bluster in negotiations. If you are ignorant and unable to produce, table pounding guarantees disaster.

Japan is laced with contrasts. People in kimonos brush shoulders with others in business suits. Some seek a return to the traditions of old. Others embrace the ultra-mdoern. Many follow Western ways outside their homes, yet sit on the floor and eat and dress in a kimono behind closed doors.

The Japanese rarely plunge in to business dealings immediately. They will carefully evaluate you as a individual for some time before getting to the business at hand. Only when you are respected as an individual does commerce commence. Assets like money and power take a temporary back seat to their process of getting to know you.

Invariably, they have a plan. They know what they want and don't want, often leading to conflict during negotiations.

What the Japanese do is colored by intense nationalism. The government and other Japanese institutions of all kinds usually work as a team. Through various associations and organizations built into their system, they are often able to decide which companies will penetrate given markets with certain products in such situations. Operating by unwritten law, other Japanese companies will not attempt to match their efforts, eliminating potentially destructive competition.

Japanese banks assist Japanese companies in many sophisticated ways. In this area, they establish cooperation that small or medium size U.S. companies do not receive in establishing credit lines around the world.

Japanese companies design products exclusively for export, catering to specialized foreign needs. They are willing to adapt the product for a particular market, including design, color or power requirements. They do this continually. American manufacturers rarely, if ever, do this. Japan subsidizes companies manufacturing products in areas of commerce Japan seeks to expand in. They make no secret of this. Such subsidies take many forms. In some cases, one company will create a specialized product, and another will do the exporting.

Today, Japan is concentrating on electronics, computers, robotics and genetic medicine, all areas guaranteed in the future to be competitive with the United States. Japanese companies need not concern themselves with profits in a manner comparable to publicity-held U.S. companies. This allows them a longer view. Stockholders do not make waves in Japan. Japanese companies therefore can put more money into R&D and are free to show less earnings.

Of course, they have had the enviable luxury of rebuilding and penetrating world markets with their products behind the military shield erected for their benefit by the U.S. We pay for their defense, and have done so for 38 long and expensive years. Nice work if you can get it. This is a key element in their ability to successfully compete with us.

Japanese financial institutions, together with the Japanese government, extend long-term credits to Japanese companies to enable them to compete with us around the world. American companies have lost enormous markets to Japan because of such favorable credit terms.

Japanese companies do not have to worry about losing key personnel, many of them spend an entire working lifetime with single companies. Such top-executive continuity gives them an immeasurable advantage. When someone does not perform appropriately, the Japanese do not fire or disgrace them. They work around them.

They use their people far more effectively than do most American companies. Japanese executives often get their hands dirty, maintaining contact with workers, down through and into production lines. Suggestions are invited. Everyone becomes and feels directly involved with the success of the company. Suggestions are implemented, rewards and recognition for first-rate performance are common. Everyone pulls together.

Their pay scale is different from ours. Bonuses supplement base salaries. When profits dip, bonuses are withheld or cut. The burden of a maximum salary base is non-existent

Unfriendly corporate takeovers are frowned upon and do not exist in Japanese businesses. And the Japanese employ the most extensive economic intelligence system known.

Before making a product or penetrating a market, the Japanese do intensive market research. They are almost 100-percent prepared to do the job. Companies share information, often even when in competition with one another.

In new market penetration situations, their approach is quiet, slow, and step by step. Even if they lose money in the beginning, they persist, following long range plans.

Commonly, American manufacturers do not see such initial market penetrations by Japan as a threat. Initially, the Japanese product may not be up to American standards. But slowly the Japanese correct the product, ultimately dominating that particular product market place. It is now imperative for American manufacturers to react immediately and compete promptly when such competition presents itself.

Any Japanese-American business relationship is strictly temporary. Once the American business connection is no longer needed, the relationship is quietly terminated. The Japanese always seek to put any such relationship under their complete control . . . in its entirety.

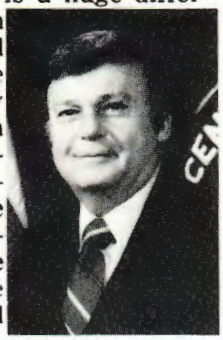
If they find themselves on the short end of a business deal, the Japanese will take whatever time is necessary, even years, to correct that imbalance. All subsequent negotiations are geared to reaching that goal.

Their patience is enormous, guaranteeing them still another advantage. Americans invariably seek quick results, a virtual impossibility in negotiating with the Japanese. We must learn to endure boredom, frustration, and endless go-rounds. We must out-sit them.

They seek control of patents worldwide. Our technology is continually under their scrutiny. Anything we make that is first-rate will ultimately be grafted onto Japanese products, and will be sold right back to us and our customers.

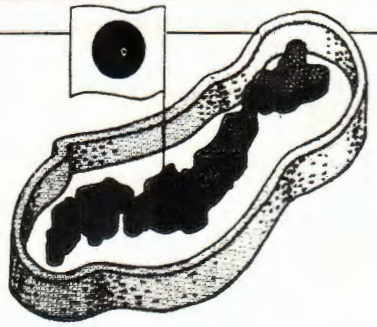
Now let's look at the United States. Our workers are as strong first as theirs. Our abilities are as good as theirs. We can and should copy their methods as they copy ours, establishing relationships within American companies that will yield comparable results. Japan, resource-poor, effectively uses its wits to out-compete us. Because we are rich and successful, we have taken too much for granted. And we have lost out because of this attitude. We *can* use our massive industrial base to correct existing imbalances. Once we realize the true nature of the struggle we are engaged in with the Japanese, we should be able to effectively compete. We possess the resources. What we require now is the same kind of cooperation and mutual support within U.S. companies and between American financial institutions and our government.

We are committed free-traders. But there is a huge difference between free trade and fair trade. We have largely traded both freely and fairly in competition with the Japanese. Unfortunately, the Japanese have not competed fairly. Therefore, they have been able to seize many rich markets, especially in Asia, that once were ours. We must regroup and again battle for such markets. Our overall economic strength is our best asset here.



MAX HUGEL

Trade Barriers, Japanese Style



American business executives reserve some of their most persistent complaints for Japan, which imposes a mountain of barriers on U.S. service firms and products while selling its own goods and services easily in this country.

Red tape, tough inspections, stalling and special taxes, including many that land more heavily on imported luxury products, make American business leaders and officials in Tokyo shake their heads in frustration.

Among examples from U.S. government and business sources:

Sporting goods. The American inventor of aluminum baseball bats was forced by regulators to stop selling in Japan on the ground that his bats had the wrong kind of aluminum. A Japanese baseball league bars the use of all foreign-made aluminum bats.

The Japanese Lawn Tennis Association lifted its ban against use of foreign-made tennis balls, but foreign manufacturers must apply one year in advance of matches. Volleyball, soccer and handball leagues permit use of Japanese-made inflated balls only.

Tobacco. Japan imports U.S. tobacco leaves to manufacture its own cigarettes, then discourages sale of American cigarettes.

Imports of cigarettes and other tobacco products are tightly controlled by the Japan Tobacco and Salt Public Corporation, an agency of the Ministry of Finance. The company sells American cigarettes to a limited number of retailers at 50 cents per pack more than is charged for Japanese cigarettes. Profits from this markup go to the Japanese treasury.

Currently, about 99 percent of the 300 billion cigarettes sold annually in Japan are produced in that country.

Agriculture. Quotas limit the amount that can be imported of leather goods and of such farm products as beef, oranges, fruit juices, milk and cheeses, despite the fact that Japan has signed treaties agreeing to bar these specific types of restrictions.

Cars. Autos exported to Japan require six volumes of documents on standards and testing for each model, adding as much as $500 to the retail price.

Auto inspectors are so strict that defects are found 80 percent of the time, and long waits are required before retesting is completed. U.S. firms also have trouble finding Japanese distributors.

Health care. Pharmaceuticals and medical equipment are especially hard to sell in Japan, U.S. officials say.

A manufacturer seeking to sell a product there turns it over to the government for a safety inspection. Product testing takes months—even years—and, in the meantime, Japanese producers are given samples of the item by the government and thus have time to produce their own competing product before the foreign version is allowed on the market.

Alcohol. High-priced whiskies, brandies and other alcoholic beverages are taxed at a steeper rate than low-priced liquors, thus discriminating against the usually more expensive imports.

Paint. The Tokyo metropolitan government recently rejected a rust-retarding paint made by a small British company because the firm's agent in Japan did not have a university-trained engineer or architect on the staff, as required by Japanese law.

Services. Foreign securities firms are not permitted seats on the Tokyo Stock Exchange and receive smaller commissions from member firms than do nonmember Japanese brokers.

The Japanese Ministry of Finance licenses only an average of one new, foreign life-insurance firm each year, in spite of a considerable backlog of applications from non-Japanese insurers.

Despite a more liberal law passed in December of 1980, foreign investment still is restricted in certain fields, such as mining, petroleum, leather and leather products, agriculture, forestry and fisheries.

In our dealings with them, whether political or commercial, our people must have the skills, including language, to understand the game and play it successfully.

The Japanese have a word for certain types of negotiations. They call it "*harakimaru*" which means they "set their stomach." This means they have in mind a bottom line below which they will not go. We must set our minds to meet and beat them in such situations. We should not give up until we attain *our* goals. Through such a tedious process, we will gain their respect. We must build up a core of people who can beat them at their own game.

Japan remains vital to America's overall strategic interests. Whatever we do commercially must not erode or destroy the essential rapport between these two countries. Japan should be spending much more money of its own for its own defense. Japan has the money and we should insist that they use it. On this point, there should be no U.S. compromise.

A similar stance should be taken regarding fair American access to Japanese markets, with the goal of correcting much of the existing imbalance of trade. On this we also should be unyielding.

It is imperative that we succeed in attaining these goals. The alternative is a dangerously growing American frustration with Japan, as more average Americans view this essential ally as a threat to their jobs and future. This will ultimately only lead to punitive American legislation, erecting trade barriers and embracing a negative protectionism. This must be avoided at all costs. We should rely on those great strengths which can be brought to bear on the U.S.-Japan trade relationship.

1) We remain the most powerful nation in the world.

2) We are research rich.

3) We possess the largest, most multi-faceted industrial complex.

4) We have the largest, most effective, important financial community.

5) Our currency is the most desirable and accepted currency in the world.

6) We have the most effective high-tech research and development.

7) We are the greatest agricultural nation.

8) We are the most powerful military nation.

9) We have the most impressive business organizational structure and our labor force is still the best overall.

America must create new and cooperative relationships between labor and management in this country, matching and creating such admirable relationships in Japan.

We have a serious education problem. Ninety-nine percent of the Japanese people are literate and dedicated to schooling. It is a family affair to properly educate a child. There is a fierce, intensive desire for such excellence.

Educational systems in our country are in disarray. Our school system has seriously deteriorated. Many American high school graduates are functional illiterates. Excellence and advancement on the basis of merit have often become secondary American considerations. The national debate raging today on this subject is both vital and long overdue. I am confident that from it will emerge an exciting new series of initiatives. These fresh beginnings will and must be effective, or the next generation of Japanese will be far better prepared to deal with the future's challenges than will the next generation of Americans.

Despite this litany of shortcomings and failures, I remain an incorrigible optimist. We have confronted similar challenges in the past and have emerged totally victorious. Americans are invariably at their best when the chips are down, as they are now. Among our people there is a growing realization and understanding of these threats. We will respond to them effectively and competitively, avoiding the counterproductive hostility that has occasionally resulted. There is room for both nations to compete and prosper. We must respond in a sophisticated and mature manner. I have no doubt as to the outcome.

The Washington Times

MONDAY, JULY 18, 1983

MAX HUGEL

Namibia *does* matter to the West

Few Americans have visited Namibia, otherwise known as Southwest Africa. Having just returned from there, I have a new understanding of the strategic and economic necessity governing our relationships with that corner of the world. Namibia, like much of southern Africa, is a treasure of minerals essential to any modern industrial society.

We must have access to such resources in order to remain economically viable and to continue to enjoy our advanced standard of living. The Soviet Union has a vested interest, therefore, in denying such access to us. The South Africa government plays a major role in determining the shape of Namibia's future, and this colors the glass through which Western eyes view this area.

The residue of guilt left over from more than a century of colonialism constitutes a massive burden for the West. Apartheid compels Western press to scourge South Africa, and Western public opinion on South Africa is largely negative because of this barrage of coverage.

This in turn plays into the hands of the Soviet Union, which adeptly manipulates the media, playing on the West's conscience and guilt. This brings all South African initiatives, including those on Namibia, into disrepute. Combined with support of "wars of national liberation," this effort constitutes a significant threat to non-communist control of this part of the world.

The Soviet bloc, the Organization of African Unity, and the United Nations all support the Namibian version of a Third World revolutionary movement — South West Africa People's Organization. SWAPO seeks to deny legitimacy to any other attempts to create a free government in Namibia, particularly any effort commanding South African support.

SWAPO, like so many other similar Third World movements, is Marxist-oriented and armed by the Soviets.

Whenever anyone questions SWAPO or attempts to assist the Democratic Turnhalle Alliance (DTA), they are assailed in the world press as racists and fascists. Regrettably, too few Western journalists see SWAPO for what it really is, a Marxist-led terrorist organization. Too few see DTA as a multiracial, popular-based movement, seeking to form a government to represent all the people of Namibia.

The United Nations, ever eager to harm the West and aid the Soviets and their Third World allies, has recognized SWAPO as Namibia's de facto government. It wishes to supervise any election. Sadly, supporters of Western government and Western-style democracy are willing to go along with this.

There are other misconceptions about Namibia. Because SWAPO stems from the Ovambo tribe, representing about half the population, SWAPO wants observers to believe they are the majority political party. This is not true, and would be definitively proven in any free and fair election.

Another misconception holds that because Namibia is presently under South African political control, South African racial policies govern there. This is also untrue. In 1979, the elected national assembly abolished racial discrimination. Legislation exists providing equal pay for equal work, irrespective of race. Trade union membership is open to all, as are all residential areas. Education is free and compulsory for all children between the ages of 6 and 16. DTA presided over these reforms, and constitutes the first true multiracial party in modern African history.

DTA is confident it can win a fair and free election now. But it is leery of the United Nations playing a supervisory role in such an election, legitimately fearful that U.N. forces will allow SWAPO abuses. SWAPO has already killed two past presidents of DTA. Intimidation, torture and murder are its chosen methods. We must understand this clearly in order to play a role that will guarantee a result favorable to the West.

Recently, Secretary of State Shultz met with the head of SWAPO. He should extend the same courtesy to DTA Chairman Dirk Mudge.

It is vital that Americans not shrug off Namibia. The Soviet effort to destabilize that area of Africa has already created economic and social chaos. Several Marxist regimes in that area preside over economic catastrophe, and are casting covetous eyes in the direction of America. They want our financial aid, aid which they know will not be forthcoming from the Soviet Union.

Russia will pour weapons into any Third World country where there is a prospect of revolution. But they cannot and will not do a thing to turn those countries' economies around so they may benefit the poor people of such nations.

The Soviets seek political domination and destabilization of that area, with us paying the bill. Then they will exercise their political leverage to deny us access to the raw materials while maximizing their strategic, geographical and military advantages.

For these reasons, we must support those movements which, while admittedly imperfect in terms of pure democracy, are essentially Western-oriented. To do otherwise is to contribute to our own downfall.

Max Hugel was CIA deputy director for operations, and now heads Hugel Enterprises in Washington.

The Washington Times

MONDAY, JULY 18, 1983

U.S. urged to undo communist advances

By Ed Rogers
WASHINGTON TIMES STAFF

A former head of covert action for the CIA believes the free world must "roll back" communist gains — not just contain them — and considers Angola in southern Africa an ideal starting point.

Max C. Hugel, who resigned under fire in 1981 because, as he says, fighting media charges of earlier stock manipulation appeared a "no win" deal even though the charges were false, recommends covert action in Angola.

To do this, Hugel said in a wide-ranging interview with Washington Times editors and reporters, the United States needs to show Congress, the people and the world the significance of Soviet gains and the Soviets' true intentions.

Behind the local strategy, he said, whether in El Salvador or in Angola, is "world Marxist domination."

Hugel said regaining an area the Soviets are encroaching upon would be a far better goal than merely containing them where they are.

"You can't just stop them," Hugel insisted. "You have to roll them back to let them know they just can't continue on that basis.

"The only way that I could see rolling it back is to have covert action as part of our foreign policy, accepted by the president, accepted by the Congress and the American people," Hugel added.

Is there any hope of gaining such a policy?

"If you can't get a foreign policy initiative under this administration, I don't think you can," Hugel replied.

Hugel believes "the most logical" place to roll back communist forces is in Angola.

"If you roll them back there, you will start a rollback in other areas of the world," he said.

Republican Study Committee

file

BACKGROUNDER

THE FEDERAL ELECTION COMMISSION -- HOW ELECTION REFORM BACKFIRED

SCOPE: This Backgrounder examines the issues surrounding election reform legislation and the creation and performance of the Federal Election Commission. The study will analyze the history of federal election laws, the "liberal" arguments for election reform regulations, problem areas of the current law, the inadequate "liberal" solutions to these problems, key issues relating to campaign regulation, examples of FEC regulatory abuses, the case for abolishment of the Commission and transferring its disclosure functions to G.A.O. and enforcement powers to the Justice Department, the cost of campaigns, the growth and influence of political action committees, and the needed amendments to the law (the most important being the elimination of contribution limits).

EXECUTIVE SUMMARY

The Federal Election Commission is fundamentally flawed and should be terminated as an independent agency. It has weakened this country's political system and seriously damaged the First Amendment guarantee of free speech established in the Constitution. Its basic structure makes it impossible to reform.

The federal campaign reform laws enacted in the early 1970s were designed to do many things, among them:

-- clean up the political system (especially the abuses revealed by Watergate), and restore public confidence in government;

-- limit the influence of special interest groups;

-- restrict the advantages of wealthy candidates and big contributors;

-- encourage spontaneous volunteer political involvement by ordinary citizens;

-- open up the political process to more people;

-- promote more competition in the electoral process by making it easier for challengers to effectively challenge incumbents;

-- stem rapidly escalating campaign costs; and,

-- strengthen the role of political parties.

Instead, an excellent case can be made that the exact opposite has happened over the past 10 years. Rather than strengthening our political process, the creation of the Federal Election Commission has actually had a definite "chilling effect" on grassroots interest and participation in politics, protected incumbents from challengers, weakened the role of the political parties, discouraged third party and independent candidates, increased the influence of special interest money, encouraged voter apathy, increased the advantages of the rich over poorer rivals, increased the length and cost of campaigns, and has contributed to public distrust of government and lack of respect for the law due to bureaucratic/regulatory overkill.

It is long overdue for Congress to dismantle the FEC and place its disclosure functions within the General Accounting Office and its enforcement functions back within the Justice Department where they were before 1975. Regardless of when this abolishment occurs, numerous and significant changes need to be made in current election law to ensure free and open elections in the future. By far, the most essential change is the removal of all restrictions on campaign contributions by political commitees as well as individuals. Complete financial disclosure of meaningful campaign contributions and expenditures (along with continued prohibition of direct labor and corporate campaign contributions) form the foundation of an equitable and effective election system.

An informed and intelligent voter is the most important restraint of potential political corruption, not a government agency, such as the FEC. As Senator Roger Jepsen (R-IA) recently stated:

> If individuals want to give time or money to a campaign, that is their right. If candidates want to accept unlimited contributions from individuals or groups (business or labor) that is their right. The important consideration is that the voters will know who is accepting what and make their decisions based on that knowledge. It's about time we recognize the common sense of the American people. When given the necessary information, they can make intelligent decisions without Washington's help.[1] (Emphasis added)

INTRODUCTION (Key Issues at Stake)

The topic of campaign ethics and election law is very complex and raises numerous issues that must be resolved if a free and democratic system is to be maintained. For example:

-- Where is the balance between the public's right to know who is financing political campaigns and the candidate's right to privacy and his ability to make this information readily available?

-- How do we address potential political corruption while at the same time not infringe on the Constitutional guarantee of free speech and association?

-- Who is qualified to run for public office and to what extent should the electorate be limited in its participation in the electoral process?

-- How does one reconcile the apparent inequality associated with the unequal distribution of economic resources with the concept of "one person, one vote?"

-- What effect does money have on the quality of a campaign and the process of producing an informed electorate? Is there a point where campaign contributions and expenditures become "excessive?" If so, when does it reach that point and is it proper for government to place restrictions on this freedom?

-- Is there something inherently wrong with individual campaign contributions and expenditures?

-- Is it helpful for citizens to form sepcial interest groups to lobby elected officials and finance political causes?

-- What exactly constitutes an "election law abuse" within the confines of the U.S. Constitution?

-- To what extent does disclosure inhibit contributions to campaigns by making them part of the official record?

-- What is the best way to promote free and open elections?

These are tough questions that are not easily answered, but they must be addressed in any consideration of election law reform. In fact, a good case can be made that much of the current election law was enacted without really thinking through these issues.

LEGISLATIVE HISTORY OF CAMPAIGN FINANCE LAWS

1907 - Tillman Act -- first federal prohibition on corporate contributions to political candidates.

1910 -- the first campaign disclosure law was adopted requiring House and Senate candidates to fill out financial statements prior to any primaries and conventions. The law also limited the amounts congressional candidates could spend in their pre-convention election efforts. Much of this law was ruled unconstitutional by the Supreme Court in 1921 (Newberry v. The U.S.).

1925 - Federal Corrupt Practices Act -- further extended the prohibition of campaign contributions by national banks and corporations, required limited disclosure of political committee contributions, and limited campaign spending of congressional candidates, but not Presidential or Vice-Presidential candidates. However, the Act could be easily circumvented because of vague definitions and by rendering the committee expenditure limits nearly useless by allowing parties to form committees in each state so that no one committee exceeded the $3 million limit. When considered in the aggregate, candidate spending far exceeded the intended amount.

1940 - Hatch Act Amendments -- barred federal employees from active participation in national politics, limited the amount an individual could contribute to federal candidates, and placed a ceiling on expenditures by political committees similar to the one in the 1925 Federal Corrupt Practices Act. However, these expenditure/contribution provisions were also easily circumvented.

1947 - Taft-Hartley -- prevented labor unions from contributing to political campaigns from their general funds.

1971 - Federal Election Campaign Act -- limited the amount candidates could spend on media advertising, placed a ceiling on how much candidates for federal office could contribute to their own campaigns (although this was later declared unconstitutional), required much more detailed disclosure information, provided for a tax credit for contributions, and established a check-off system to fund Presidential elections.

1974 - Federal Election Campaign Act Amendments -- created the Federal Election Commission to administer the campaign laws, established limitations on contributions to all candidates for federal office from individuals, political parties, and other political committees, modified reporting requirements, and changed criminal penalties for campaign law violations. Individuals are allowed to contribute up to $25,000 a year to political candidates and committees, with a limit of $1,000 per candidate per election and $5,000 per committee. PACs can give up to $5,000 per election to a federal candidate.

However, immediately after the amendments became law, their constitutionality was challenged in court by Sens. James Buckley and Eugene McCarthy, Stewart Mott, the A.C.L.U., and the American Conservative Union. In 1976, the Supreme Court, in Buckley v. Valeo, struck down some of the provisions of the FECA. The Court upheld the contribution limits and disclosure rules, but rejected as unconstitutional the Act's independent expenditure ceiling, its limitations on a candidate's expenditures from his/her personal funds, and its ceilings on overall campaign expenditures. The court also ruled that the process of selecting the Commission violated the Constitution.

1976 - Federal Election Campaign Act Amendments -- In response to the Buckley decision, changes were made in the Act to provide for Presidential appointment of all the Commissioners, along with several amendments with respect to enforcement procedures and the authority of the Commission to render advisory opinions.

1978 and 1979 -- the Congress failed in an attempt to establish public financing for congressional elections and to place tighter limits on the amount of money political action committees can contribute to campaigns.

1979 - Federal Election Campaign Act Amendments -- relaxed filing requirements for "fringe" candidates by establishing a contribution/expenditure threshold of $5,000; attempted to encourage volunteer activity on the part of individuals, parties, and grass roots organizations; changed reporting requirements by simplifying information in reports as well as reducing the number of reports the candidate must file during an election cycle; and raised the threshold for reporting contributions from $100 to $200.

LIBERAL ARGUMENTS FOR ELECTION REFORM REGULATIONS

Prior to 1974, the primary emphasis of campaign finance reform was on extending disclosure rules, and providing tax incentives for people to promote political participation. Public financing was also an issue frequently discussed and partially adopted in 1971. When the Federal Election Campaign Act Amendments were adopted in 1974, the emphasis shifted to a more negative approach of actually limiting individual contributions, restricting party and committee support of candidates, and limiting individual campaign spending. This shift in approach was due in large part to Watergate.

Fred Wertheimer, Senior Vice President of Common Cause, summarized the reform movement of the time when he said:

> We had reached the point in this country where the presidency was on the auction block, where the question of who became an ambassador was a question not of merit but of money, where political decisions were based as much on the capacity to use campaign contributions to buy influence as on anything else. We were faced with a fundamental threat to our form of government.[2]

The primary assupmtion behind this concern was that "money is evil -- money buys influence," and that large campaign contributions are automatically deemed dangerous. Richard Nixon raised an estimated $61.4 million to retain the Presidency in 1972, some $20 million donated by approximately 50 people. In addition, Nixon was accused of giving ambassadorships to high-dollar contributors, exchanging a pledge to raise milk price supports for campaign contributions, and "laundering" contributions through questionable sources for questionable activities.

Other arguments expressed during this period were:

-- No government agency was enforcing federal campaign laws, thereby requiring the establishment of an independent agency: i.e., the Federal Election Commission.

-- As the cost of campaigns was forcing candidates to turn to help from wealthy individuals and business, labor and other organizations, candidates needed to be protected from being obligated to special interests.

-- It was becoming increasingly more difficult for the average, honest citizen to challenge the "entrenched incumbent."

-- Limiting campaign contributions would help equalize influence and promote competition in elections.

-- In order to strengthen the public's faith in government, restrictions on campaign contributions are needed to avoid even the "appearance" of corruption and undue influence.

As a result of the 1972 election, these cries turned into calls for expenditure limits, contribution limits, public financing of elections, and limitations on political parties and committees. However, the call for more government regulation of our political system raised important questions. Herbert Alexander[3] outlines five key questions:

1. Do expenditure limits mean there will be more or less communication between candidates and voters?
2. Do contribution limits and expenditure limits encourage more competition, or do they favor incumbents and discriminate among candidates in differing jurisdictions and circumstances?
3. How will government funding of political campaigns alter the political process?
4. Will government instrusion be an opening wedge for control over various political activities?
5. Are "floors" (minimal levels of public funding) better than ceilings or limits on spending?

One additional question raised during this reform movement is what exactly constitutes "undue" influence? ... and how does one measure this influence? If an elected official listens a great deal to his wife or best friend, are they guilty of having "undue" influence with the representative when compared to an everyday constituent. Is this good or bad?

10 PROBLEM AREAS WITH THE CURRENT LAW

In answering these questions and reviewing the FEC's track record over the past six years, it is obvious that regardless of whatever "abuses" occured in 1972, the cure is now worse than the disease. The '74 and '76 reforms have only made matters worse. The '71 law was never given an adequate chance to work. In respect to Watergate, Senator Eugene McCarthy stated the facts very clearly in 1976:

> All of the prosecutions under Watergate were done without any reference to the Federal Election Campaign Act [of 1974]. All of the convictions had to do with existing law. To suggest that this law [1974 amendments] has any relationship to, or would have prevented Watergate ... is to confuse the issue.... We might say that if we had had this law, Watergate might not have happened. Watergate would not have happened if we had not had Richard Nixon. A lot of things would not have happened, but to say that the Federal Election Campaign Act has any bearing upon Watergate is sheer nonsense.... I think we would have been better off without it. The '71 act was a good act, and the country would be better off without the new federal election act ['74 amendments].[4] (Emphasis added)

The reason we would have been better off without the creation of the Federal Election Commission is the numerous problems it has created. Ten key weaknesses stand out.

1. Incumbents Protected/Challengers Hindered

Incumbent members of Congress have numerous advantages that most challengers cannot match. The incumbent is usually better known, with almost constant access to the press. Everything he does can be made to be "news." The incumbent can communicate with his constituents at public expense using the franking privilege. In 1977, the Americans for Democratic Action estimated that incumbent congressmen have a $567,000 advantage over their challengers. This figure includes staff salary, office space, communication and travel allowances. That figure is much higher today. Incumbents also have access to the Library of Congress and various congressional research groups to assist them in securing vital information and facts needed in a campaign. Challengers enjoy none of these benefits.

To compound the problem, challengers are forced to run for office and make a living at the same time. As John Bolton explains:

> If an employee of a corporation takes a leave of absence from his job to run for federal office and the corporation continues to pay his salary, the corporation has made an illegal contribution. Yet when a member of Congress runs for re-election, his salary is paid by the government and lawfully available to him to spend on his campaign. Thus, while incumbents have control over their own income, the FEC is busily restricting what challengers can do with theirs.[5]

Since challengers do not have access to these benefits, it makes it all the more necessary for them to raise money -- lots of money in most cases if they want to have a fair chance at winning. As a result, it is in the incumbent's direct

have a fair chance at winning. As a result, it is in the incumbent's direct interest to have contribution and spending limitations. This is especially true in the early phases of a campaign. It is the unknown challenger who has a critical need for large sums of start up or "seed money" to begin a serious campaign effort. If such a candidate were able to solicit and receive a contribution from a wealthy benefactor, perhaps in the range of $50,000 to $100,000, that candidate could more easily get on the road to a viable candidacy. Disclosure of the name of the benefactor and the amount of the contribution might alleviate any concern over "undue influence" the benefactor might gain over the candidate. It might also be possible to designate an early pre-election period as a time of lax contribution limits in order for candidates to raise "seed" money. However, total elimination of contribution restrictions, coupled with meaningful public disclosure, would be the best way to solve the problem.

Eugene McCarthy needed an influx of large loans and contributions in the early stages of his campaign to finance his challenge to Lyndon Johnson in New Hampshire in 1968. The presidential campaigns of John Lindsay and Terry Sanford in 1972 got off the ground because each found a wealthy contributor to help get them started. Lindsay got a gift of $260,000 from one family; Sanford received $700,000 from a single contributor. Neither candidate made a strong showing, however. But they did not fail to be heard on the issues for lack of money.[6]

Another advantage accruing to incumbents relates to the FEC's paperwork and records regulations. Even to an experienced incumbent, many of the FEC rulings appear confusing, vague, arbitrary, and complex. Inexperienced challengers, who more often are relying on volunteer and part-time help, find it much tougher to comply with the regulations. As a result, the incumbent is in a much better position to avoid problems that could hinder his campaign.

Furthermore, since the FEC must receive its funding from the Congress, historically many of its rulings have been slanted in favor of incumbents.

2. Weakened Party Influence

A second major problem created by the 1974 Campaign Act has been the further weakening of our political parties. The $5,000 contribution limit and the "$.02 per person of voting age" expenditure limit have seriously curtailed the amount of party aid available to its candidates. A Harvard University study in 1979 revealed that in the 1972 House elections, 17% of the money available to House candidates came from party sources. By 1978, that figure had declined to an estimated 4.5%.[7] Final figures from the FEC confirm the Harvard analysis, and preliminary figures for the 1980 congressional elections also reveal party expenditures and contributions for congressional races at or just under 5%.

The current campaign law has worked to separate candidates from their parties in two main ways: 1) contribution limits have forced candidates to seek financing from national sources (such as PACs) rather than the party, and 2) state and local parties are inhibited from supporting candidates due to the numerous FEC regulations and reporting requirements. The paperwork burden adds another disincentive to citizen involvement through their local party.

A further problem is created because of the limited resources due to contribution restrictions. Candidates often find themselves competing with their own party for money from these national sources, such as PACs.

The significance of this decline in party influence cannot be overstated, especially with the tough economic and defense decisions currently facing Congress. Herbert Alexander makes an excellent point when he comments:

> The greater dependence of the candidate on the party, the greater the party's leverage, the greater the chances to achieve some policy coherence and discipline among candidates and elected officials, the greater the chance of mobilizing party majorities for key votes in the Congress -- and, paradoxically, the greater the possible national unity and consensus on some issues. It is easier to get two parties to agree, than 535 fiercely independent members of Congress.[8]

In addition to weakening the role of political parties, the charge has often been heard that the campaign reform laws of the 1970s were designed to protect the Democrat party from Republican challenges. Since the Democrats were the majority party in 1974 when the FEC was set up (and recalling the advantages of incumbency), it is not surprising that former Democrat Senator Eugene McCarthy would state in 1976 that:

> There is no question that this new law [1974 Amendments] gives special preference to the Democratic party ... the Federal Election Campaign Act favored one of the major parties, not both of them. It established the first state political party in the history of this country, which is the Democratic party. And I think that the Democrats who voted for the act more or less intended that this would be the result.[9]

Even though the 1980 elections have temporarily challenged this statement, the fact remains that Republicans and Independent candidates have had to fight an uphill battle due to the current law; and there are still many examples to show how incumbent Democrats can use the law to their advantage. Many experts believe that 1980 was an exception to the one party rule and unless the law is amended to allow for free and open competition, the Democrats will eventually regain control of both Houses of Congress.

3. Nitpicky and "Chilling" Regulations

The FEC has devoted a great deal of its resources and energy towards investigating the most trivial kinds of violations. Actual examples of FEC regulatory excess will be outlined in another section of this paper. However, it is important at this point to note that the heart of the problem revolves around the vagueness and complexity of the statute -- especially concerning the definitions of what actually constitutes a "contribution" and "expenditure." In testimony before the House Administration Committee, this problem was clearly revealed:

> The FECA has grown into a much more detailed and confusing statute. For example, there are least seventeen contribution limitations related solely to the amount contributed, which vary depending on whether the donor or the recipient is an authorized or unauthorized campaign committee, a national or state party committee, or certain other committees. There are three principal definitions of the term

"contribution," fourteen exceptions to one definition of contribution, five exceptions to the other two definitions, and a substantial number of exceptions to the exceptions. Similar complications are found throughout the statute.[10]

° For example, one campaign in 1980 faced this situation: when does a campaign "sign" become a campaign "billboard?" If a volunteer wants to put a sign in his yard in favor of a particular candidate, he does not have to report it as an "in-kind" contribution. However, if the sign becomes too big, then it becomes a billboard which must be reported as a contribution. One can almost visualize the local party official having to hold a seminar with local volunteers in order to instruct them on the proper size for yard signs. Not only is this a waste of time and energy, but when volunteers are faced with this type of regulation (knowing that a penalty may be imposed on them for violating a rule of which they may be unsure), they quite naturally disappear.

° When does an outside organization (which publishes a paper on where public officials stand on the issues) leave the realm of education and become a political organization? For example, a religious group in the 1980 campaign put out a publication showing where each of the three major candidates (Reagan, Carter and Anderson) stood on various issues of concern to religious-thinking people. The FEC said the group was a political committee, had to file with the Commission, and meet all the contribution and expenditure limits of the Act.

° When does hosting a party in your own home leave the realm of hospitality and enter the area of campaigning? The current law says a person may spend up to $1,000 on hosting a party for a candidate without the candidate having to report it. What if the individual has the party with some other friends as well ... does he split the cost 50-50? What if he bought some extra card tables and chairs for the party which he plans to use in his home later on ... is this a personal expenditure for personal use, or does it have to count toward the $1,000 limit? Why should the federal government have to waste its time with such questions? But under the current law, it must.

° When does taking an individual out to lunch leave the realm of personal friendship and enter the realm of providing refreshments for campaign workers? What if I have already given a $1,000 campaign contribution to someone who is a candidate for federal office. Should I check with the FEC to see if I am in danger of exceeding the contribution limits if I pay for a luncheon for an individual on this person's campaign staff?

° What exactly constitutes an "independent expenditure?" If the spending party happens to know the candidate or his staff, does that constitute "political coordination" and does that person lose his First Amendment right to engage in independent expenditure activity on behalf of that candidate?

There are literally thousands of problems like these that confront the FEC each election year. The more the Commission and the Congress attempt to "fine-tune" the definitions and regulations, the more problems are created. The fact that the Act has had to be amended in 1974, 1976, and 1979 (along with major debate and legislative proposals on possible changes during each and every year between 1971-1980) clearly demonstrates that the political process is too dynamic and volatile to regulate in a static and equitable fashion. As the Supreme Court has stated, the First Amendment "needs breathing room." The FEC and much of the current election law is suffocating the right of free speech and association.

While major Presidential candidates and most business and labor PACs can be expected to acquire the expertise to comply with the FEC rules, it is almost certain that the average congressional candidate, and especially a citizen contributor, may violate the law many times without knowing it. It is almost impossible not to be guilty of some provision of the Act as interpreted by the FEC.

Because a campaign is a short-lived endeavor, candidates need an immediate response to questions they have on whether or not a particular practice is acceptable under the law. Answers given over the phone by FEC staff are often found to be in direct conflict with another FEC pronouncement later on. It often depends who you talk to on any given day. Formal Commission responses vary from a week to several months -- sometimes several years, depending on the nature of the inquiry. For example, the National Right to Work Committee had to wait two years and three months for an advisory opinion that was totally useless when it was issued. This time-consuming manner of regulatory oversight used by other federal agencies is something the political process cannot tolerate. Nor can the Commission expect campaigns to be operated in a tightly-controlled manner as many businesses. Campaigns generate spontaneous activity among many volunteers -- much of which is beyond the reach and direct influence of the candidate or his staff. But the FEC holds both the candidate and the volunteer liable.

The actions by the FEC are often very haphazard, arbitrary, confusing, and inconsistent. John Bolton, a lawyer who helped represent Sens. Buckley and McCarthy in their suit against the FECA has made this important observation concerning the FEC's regulatory practice:

> One candidate may be audited, while another goes virtually unnoticed; one group may seek an advisory opinion from the Commission, waiting for months for a decision, while another more daring group will engage in precisely the same activity hoping to prevail in any ensuing confrontation with the FEC. None of this contributes to "fairness" in the political process, nor does it have anything to do with the central statutory purpose of the FECA -- the elimination of corruption and the appearance of corruption.[11]

To compound the problem, many of the people at the FEC who write the regulations needed to administer the Act have never worked in a campaign and have not had to deal with whether the little old lady's yard sign places her over the $1,000 limit or what dollar value should be placed on a voluntary concert for the candidate by a well-known musician.

It is long overdue for the Congress to end this regulatory abuse of the political process. Does the public really care about 95% of the stuff the FEC is trying to regulate? Many of these regulatory problems would resolve themselves if contribution limits were eliminated.

4. Wealthy Candidates Favored

Election law as it currently stands gives a big boost to those candidates who are personally wealthy. There is no limit on how much an individual can spend on himself. Candidates who are not rich are placed at a distinct disadvantage since contribution limits make it more difficult to raise money. The 1979 Harvard Study revealed that in 1974 challengers (non-incumbents) provided 10.9% of their own campaign money. In 1976, this figure had grown to 17.5%. Ten House candidates spent more than $100,000 of their own money on 1976 campaigns.[12]

The 1976 Pennsylvania Senate race provides a clear example of the use of personal funds. In the Republican primary, "Rep. H. John Heinz III financed almost 90% of his successful campaign against former Philadelphia District Attorney Arlen Specter with loans from his personal fortune -- $585,765 out of a total of $673,869. Specter spent only $224,105 on the primary, according to his campaign reports; of this total, Specter loaned his campaign $38,744. Counting the general election race, which he also won, Heinz made loans to his own campaign amounting to $2,465,500."[13]

Wealthy candidates already have the advantage of name recognition, easier access to wealthy contributors, and fewer problems in securing credit. On the other hand, the argument is often made that public officials who have a personal fortune are more free to vote their conscience and less likely to feel beholden to special interests. However, if one of the original goals of campaign reform legislation was to reduce some of the advantages of personally wealthy candidates over poorer rivals, the law (in effect) has produced the exact opposite result.

If a candidate can spend as much of his own money as he wants on himself, why limit what he can spend on others?

5. Increase in PACs and Special Interest Groups

- Statistics on Growth -

With limitations on individual and party contributions, candidates have had to fill the void by obtaining funds from political action committees. PACs are essentially the political arm of a variety of organizations: corporations, labor unions, special interest lobbies, and non-partisan, ideologically-oriented political groups. PACs can be viewed as groups of individuals uniting together through contributions to support specific candidates.

As the following table (#1) reveals, the number of PACs has grown considerably since the FEC amendments were enacted in 1974. However, it appears the rate of growth has slowed down dramatically and may be peaking. According to the FEC, the number of PACs in existence during the first six months of 1981 increased by only 5%. The normal six-month growth rate since 1978 has been in the 11-14% range. The most dramatic increase in PAC growth was observed between 1974-1976 when the rate approached 90%. This growth was influenced by the FEC's 1975 SunPac decision allowing corporate PACs to solicit contributions from employees. The 1976 amendments modified this to some extent.

Table (#1) PAC Growth -- From 1974[14]

PAC Type	Number Registered with the FEC					(as of
	1974	1976	1978	1980	1981	7-1-81)
Corporate	89	433	784	1,204	1,251	
Labor	201	224	217	297	303	
Trade/Membership/Health	318	489	451	574	577	
Non-connected	-o-	-o-	165	378	445	
Cooperative	-o-	-o-	12	42	38	
Corporation w/o Stock	-o-	-o-	24	56	64	
TOTAL	608	1,146	1,653	2,551	2,678	

As the following table (#2) shows, the percentage of funds raised by candidates from PACs has also leveled off.[15] According to the FEC's files, of the estimated $251.9 million raised by all Senate and House candidates in 1979-80, non-party committees (PACs) contributed $55.3 million (or 21.9%).[16]

Table (#2) Percentage of PAC Contributions of House Races[15 & 16]

1972	1974	1976	1978	1980
14.0%	17.1%	22.6%	25.3%	26.3%

PACs have created quite a bit of controversy in recent years. It is a frequent topic in the press with the innuendo made that PACs are exerting increasing influence on elected officials. Exaggerated headlines and inflated stories like these on the 1980 campaign ran in the Washington Post:

"Election '80 Was Record Year for PACs, Especially Those on the Right" - Jan. 27, 1981

"PAC Donations Promote Corporation Politics" - May 18, 1980

"It's November, and the Corporate PAC Money Trees Are Shedding" - Nov. 1, 1980

"Top Leaders on Hill Get $6.5 Million from PACs in Last Campaign" - April 8, 1981

"A.T.&T. Spending on '80 Elections Tops U.S. Firms" - April 19, 1981

"10 Biggest Political Action Committees Have Cash Galore as Elections Day Nears" - October 14, 1980

"Oil Emerges as Leading Hill Patron" - Sept. 15, 1981, and so on...

What is not explained in most news reports on PACs is the fact that there is a great diversification in the groups that sponsor PACs which have little in common when it comes to politics and positions on the issues. To imply that PACs control Congress is to say that the Realtors, AMA, Gun Owners of America, UAW, AFL-CIO, Auto Dealers, CSFC and NCEC all agree on the issues and work together.[17] Even though PACs gave $20 million more in Congressional races in the 1980 election cycle than in 1978, all other contribution sources also rose just as dramatically. Another important fact needs to be remembered when reviewing these PAC statistics: the inflation rate went up 23.7% from 1979-1980, and there were 2,265 House and Senate candidates in the 1980 election cycle (an increase of 356 candidates over the 1978 election period).[18] With these facts in mind, it is easily seen that PAC spending growth has not been excessive.

With the aid of the following tables, several other interesting facts emerge. PACs are slowly giving a greater percentage of their money to challengers (Table #4) - up from 21% in '75-76 to 26% in '79-80. However, union PACs gave a greater percentage of their money to incumbents in the '80 election period than in 1978 (see Table #3). Although, corporations (business PACs) increased their percentage of contributions to challengers by 10% in the 1980 election cycle over 1978, the clear leader in challenging incumbents were "non-connected" (ideological) PACs like the National Conservative Political Action Committee (NCPAC). (See Table #3).

However, any conclusions drawn concerning PAC contributions to incumbents should be carefully considered. As Stuart Rothenberg recently stated in his study on Political Action Committees:

The conclusion that PACs favor incumbents misses an important point. Political action committees are run by people, and the individuals who make the decisions about which candidates receive PAC money have their own reasons for making those judgments. In 1980, for example, labor PACs gave 71.1% of their contributions to incumbents. Does this mean that they gave indiscriminately to all incumbents? Does the fact that they contributed such a high percentage to incumbents rather than challengers (16.7%) or candidates for open seats (12.2%) mean that organized labor was "following an ideology of incumbency," to quote Fred Wertheimer? Quite obviously, such an assumption is overly broad. Labor PACs tend to support liberal Democrats. Since a number of well-known liberal Senators were up for reelection in 1980 - Bayh, Javits, McGovern, and Culver to mention just a few - it is not surprising that labor political action committees gave heavily to incumbents.[19]

Table (#3) Pattern of PAC Contributions - (by type) [20]
(% given to Cong. Cpgs. in each category)

	Corporations		Labor		Trade		(non-connected) Ideological	
	1977-78	1979-80	1977-78	1979-80	1977-78	1979-80	1977-79	1979-80
Incumbents	59%	57%	59%	71%	60%	64%	26%	32%
Challengers	21%	31%	21%	17%	19%	23%	45%	49%
Open Seats	20%	12%	20%	12%	21%	13%	29%	19%
TOTAL	100%		100%		100%		100%	
Republicans	62%	64%	5%	7%	55%	56%	76%	67%
Democrats	38%	36%	95%	93%	45%	44%	24%	32%

Another interesting observation is the significant "share of the market" held by each of the three major PAC groups (corporate, labor, and trade). (See Table #4) Each group has maintained a substantial slice of the "giving" pie and kept competition among PACs alive. Union PACs outgave corporate PACs in 1977-78, while business PACs took the lead in 1979. (See Table #4) Point #6 (next section) of the paper will deal with non-recorded, union contributions which partially cloud this comparative analysis due to the size of organized labor involvement in elections outside FEC reports.

Table (#4) Summary and Pattern of Total PAC Contributions to Cong. Cpgs.[21] (rounded off to the nearest $ thousandth)

	1975-76	1977-78	1979-80
Corporation	$ 6,732,000 (33%)	$ 9,775,000 (28%)	$19,174,000 (35%)
Labor	7,389,000 (36%)	10,314,000 (28%)	13,120,000 (24%)
Trade	2,604,000 (13%)	11,325,000 (32%)	16,091,000 (29%)
Non-Connected	2,343,000 (11%)	2,795,000 (8%)	4,819,000 (9%)
Cooperatives	1,379,000 (7%)	886,000 (3%)	1,382,000 (2%)
Corp. w/o Stock	-not significant-	121,000 (1%)	707,000 (1%)
TOTAL	$20,448,000 (100%)	$35,217,000 (100%)	$55,294,000 (100%)
Incumbents	$13,241,000 (65%)	$19,999,000 (57%)	$33,786,000 (61%)
Challengers	4,212,000 (21%)	7,764,000 (22%)	14,335,000 (26%)
Open Seats	3,115,000 (15%)	7,453,000 (21%)	7,172,000 (13%)
Republicans	$ 6,939,000 (34%)	$15,368,000 (44%)	$26,154,000 (47%)
Democrats	13,629,000 (66%)	19,849,000 (56%)	29,049,000 (53%)

- PACs Unfairly Attacked -

Regardless of the controversy and misunderstandings that have surrounded PAC growth, many experts are coming to view PACs as a very legitimate, worthwhile and needed participant in the political process. The increase in the number of PACs has encouraged many people, who otherwise would remain inactive, to participate in politics. PACs can be viewed as representing the views and interests of its individual contributors, thus allowing the collective voice of many like-minded citizens to be heard. The single voice often was overlooked until PACs started growing.

Despite these facts, however, groups like Common Cause love to publish reports alleging that business PACs greatly influence legislation, like: killing hospital cost containment legislation, blocking new enforcement powers for the Department of Housing and Urban Development, and spurring the development of the cargo preference bill. It is almost coming to the point where PACs are being blamed or praised for every single Congressional vote that is taken on a major issue.

For Example, Common Cause issued one such report in April, 1981 titled: "Who's Writing Our Tax Laws?"[22] The article was full of statistics and neat little charts showing how much business PAC money went to members on the Senate Finance Committee and the House Ways and Means Committee. The clear purpose of the story was to leave the impression that greedy businessmen (not average, everyday citizens) through their business PACs are writing our tax laws.

As with many studies conducted on PACs, the article is full of false assumptions and missing facts. The study provides no direct statistical evidence proving that candidates receiving PAC money: 1) win, and 2) end up on the Ways and Means Committee ... nor does the study examine the degree and type of communication each of the PACs gave the Congressmen on how to vote on a particular issue, and why the Congressman actually voted the way he did. There are many more variables and explanations Common Cause needs to consider if it wants to present an intelligent and objective case. The article does not show the type and amount of PAC money challengers received who never made it to Congress, nor does it show the type and amount of PAC money that went to other Members on other committees.

One example from the report will show the type of fallacy groups like Common Cause often fall for time and time again. Close analysis of one Republican Member they cited as having received a large percentage of business PAC money revealed that over 200 PACs contributed to his campaign averaging only $400 per PAC. It is incredible to conclude that one PAC at $400 a clip can have that much influence on a particular legislator. In fact, these 200 PACs represent a substantial segment of the American voting public and have a right to be heard.

Did Common Cause survey these 200 organizations to see where they stood on a particular issue to be used as a case study? Did Common Cause check to see whether the 200 PACs individually communicated with the Congressman on how to vote, whether the 200 PACs were in agreement on how the Congressman should vote, and whether money was increased, decreased, or switched to a different person in the next election? It is only this kind of survey which would begin to provide the link between PAC contributions and specific votes.

... or take the Common Cause study which traces contributions made by the American Medical Association's political action committee to certain Congressmen, and how those Congressmen voted on the Hospital Cost Containment bill (which the AMA opposed). Published in December of 1979, this study concluded that House members who voted to kill the Hospital Cost Containment bill received nearly four times the amount of campaign contributions from AMPAC as did supporters of the bill. The study notes that 202 of the 234 House members who voted for the AMA-backed substitute to the Cost Containment bill received a total of $1,647,897 in AMA contributions, for the 1976 & 1978 elections, an average of $8,157 per congressman. The study goes on to show that of the fifty leading House recipients of AMPAC contributions, forty-eight voted in support of the AMA position. Common Cause has described the same pattern in other cases of congressional legislation.

Empirically interesting as the data may be, the Common Cause study fails to draw a causal link between contributions and congressional votes. Hence, the study does not in fact demonstrate that a Congressman will automatically vote a certain way because he has received money from a certain interest. The problem here is similar to the proverbial question: which came first, the chicken or the egg? That is, does a Congressman vote a certain way because of heavy backing from particular special interest? Or, because a Congressman votes a certain way on the issues (for example against federally-financed health care) does he receive backing from certain special interests, like the AMA? Elements of both undoubtedly exist, though to what extent is impossible to determine. And, because congressional campaigns are only two years apart the "cumulative effect" of contributions may make for a distinction without a difference on these two questions.

The Common Cause study does point out that some special interests spread their money out over a wide spectrum of political opinion to encompass those who as a matter of political philosophy would probably not support that interest. For example, the AMA contributes to some Congressmen who are in favor of more government regulation of health care services, something the AMA opposes. It is in this area of contributing to congressmen who oppose the particular interest -- that some attempt to influence (votes/legislation) may be conceived. Some special interests prefer to simply "touch base" with Congressmen of opposing points of view simply because they are incumbents and likely winners, and they want to "keep the lines of communication open" in hopes of a possible shift of position.

The Common Cause data indicates that some Congressmen who received as much as $13,000 from the AMA still voted against the AMA position. Others who did not receive any AMA money voted for the AMA position. The simplest conclusion to be drawn is that there are many factors that determine how and why a Congressman will vote on a certain issue. Campaign contributions, or anticipation of them, may be one of these factors -- but it has never been convincingly shown to be the major one. It might also be suggested that undue influence might accrue to that special interest which, as a percentage, contributes the most to a candidate -- regardless of the actual dollar amount. If this last point has any validity, it should point out that limits on the amounts of contributions do not fully address the problem of the undue influence of big money in politics. One must also consider the percentage of the contribution to the total amount given to a candidate. One way to reduce the possibility that any one person, group, or interest may dominate in terms of percentage giving, is to allow for a more competitive system of giving from several different sources. Obviously, contribution limitations limit competition and should be removed.

Nevertheless, repeated cries have been heard in Congress to impose further limits on PAC contributions, and to replace this source of funding with public financing of congressional elections. The Obey-Railsback PAC limitation bill passed the House in 1979 but died in the Senate.

This proposal attacks a symptom of the disease, not the disease itself -- which is low contribution limits. The main reason special interest PACs have grown in influence is because other sources of funding available to candidates have been systematically taken away through individual and party contribution limits. To rectify this problem, one must get at the root cause, the low contribution limits.

Further restrictions on PACs would only cause additional emphasis to be placed on independent expenditures, give wealthy candidates increased advantages, and further threaten the right of free association and speech as people tried to combine their resources to be more effective in the political process.[23]

Public financing of congressional elections would not solve the problem either. In fact, that concept would further entrench the incumbent by forcing the challenger to accept spending limits. Combine this with all the other advantages incumbents enjoy, and one can easily see that challengers would seldom have a chance of getting off the ground.

Whatever the cause for concern with regard to PAC money, it is obvious that more regulations and greater limitations will only dry up yet another source of legitimate revenue for campaigns. The solution to the problems created by contribution limitations is not more restrictions.

6. Labor Unions Favored

Another problem created by the FECA is the favored status given to labor unions. Two major flaws exist in the current law: 1) the use of compulsory union dues for political purposes, and 2) the ability to engage in campaign activity, under the guise of "non-partisan" voter education that is financed from union dues, much of which does not have to be reported.

Unions are prohibited from making direct cash contributions to candidates, as are corporations. However, every year, millions of American workers are forced to support candidates and causes which they individually oppose because union officials are specifically allowed by law to use union dues for indirect "non-partisan" voter education political activity. The law says there is no limit on what can be spent on voter education political expenditures. Organized labor has used this exception to funnel millions of dollars of political services on behalf of specific candidates.

What constitutes a "non-partisan" voter education political activity? It includes any activity directed at "members" and their families, such as mailing material supporting or opposing political candidates, the operation of phone banks, conducting voter registration and get-out-the-vote drives, establishing and operating a PAC, soliciting contributions for the PAC, and precinct work. All of these activities are very partisan in nature using staff time of thousands of union employees devoted almost exclusively to campaign activity -- all while the individuals continue to draw union salaries paid for by compulsory union dues.

Since much of this activity does not have to be reported, it is difficult to estimate its dollar value. The Public Service Research Council estimates that in 1976, organized labor "donated" $100 million in campaign services to specific candidates.[24] No doubt the 1978 and 1980 estimates would be even higher ... but even if one uses the $100 million figure, that is four times the amount that all PACs contributed in the 1980 election.

The National Education Association (NEA) provides a clear example of this abuse. There is no question that the officials of the NEA used their union and union funds to support Jimmy Carter in 1976 and 1980 in return for the establishement of the Department of Education. The NEA supported 462 delegates and alternates to the Democratic National Convention in 1980 and spent an estimated $3 million on behalf of Carter's reelection campaign. It did this despite the fact that at least 40% of the members of the NEA are Republicans.

There is no problem with protecting the right of union officials to communicate with their members on behalf of a candidate so long as they do it on their own time and with voluntary PAC money instead of using union treasury money. The problem comes when compulsory union dues are used to engage in partisan politics. This forces millions of workers to support (often against their will and convictions) the campaigns of political candidates chosen by union officials. The law should be changed to state that the only source of money used for political purposes must be voluntary in nature. If labor members want to band together for political purposes, more power to them -- but let it be voluntary and not by forcing people of the opposite political persuasion to subsidize such an effort.

Even so-called "non-partisan" voter registration or get-out-the-vote drives are used by organized labor for partisan purposes when they are aimed at specific minority groups and sections of the city known to vote the way the union officials want. Even these activities should be supported with voluntary PAC money instead of compulsory union dues.

As Congressman Dickinson has stated, "we must not permit any man or any organization to force any person to make political contributions against his beliefs or convictions."[25]

7. Lengthens Campaigns and Increases Costs

The current election law places a further burden on campaigning by increasing the length of the election cycle and simultaneously raising its costs. It does this in two ways: 1) contribution limits have forced candidates to start earlier to seek out the small contributor (and in the case of Presidential campaigns, candidates must meet a prescribed formula of receiving contributions from across the nation to be eligible for matching funds), and 2) compliance costs (complying with the FEC's reporting requirements) have added an additional work load on the campaign which often goes well beyond the actual election day.

To attract the small contributor requires the expanded use of direct-mail operations. Direct-mail can be an extremely expensive way to raise funds. For example, Senator Jesse Helms raised around $6 million through direct-mail operations in his 1978 re-election bid. However, it cost him nearly $4 million to do it; so he netted only $2 million. Senator Jake Garn reported that it cost his campaign $100,00 to comply with the FEC's reporting requirements.[26]

8. Lawyers and Accountants Act

The FECA has been described by many as the "Lawyers and Accountants Act of 1974" because the FEC reporting requirements and regulatory hassle have required a new technical specialization in order to campaign. John Sears, former campaign manager for Ronald Reagan, is fond of saying: "In the old days, the first person you would hire was a good speech writer. Now the first guy you hire is a good lawyer, the second is a good accoutant." Precise budgets, detailed reports, carefully controlled expenditures, and countless man-hours of activity (not directly related to educating the public on the candidate) have now replaced the spontaneity and freedom associated with political activity of the past.

FEC recordkeeping and reporting requirements are so complex and detailed that the Commission sends each candidate who registers with the FEC a copy of the following: (a) FEC regulations, (b) the Federal Election Campaign Act and all other laws relevant to elections, (c) a manual on proper bookkeeping and reporting procedures, and (d) a "free" subscription to the FEC's Record (which is a monthly newsletter updating the candidate on the latest court rulings, news of interest, and changes in the regulations). How many candidates have the time to familiarize themselves with hundreds of pages of rules, regulations, and procedures? The need for an army of lawyers and accountants to satisfy political bureaucrats has had a real "chilling" effect on volunteer participation in politics.

9. Political Sabotage and Damaging Press Stories

One of the big problems surrounding the Act is the atmosphere of distrust and suspicion the FEC creates with its regulations and investigatory powers. Anyone can trigger an investigation of a campaign or committee by simply filing a complaint with the FEC. This presents a growing threat to our political system because an ever-growing list of candidates and groups are using the FEC to discredit their opposition.

Complaints filed with the FEC must be sent to the person involved regardless of the merits of the case. The law requires that a copy of the complaint be sent with the notice from the FEC that a complaint has been filed -- but, due to bureaucratic bumbling, it does not always happen. The respondent has 15 days to

answer the Commission and state why no further action should be taken. After that period, the Commission can close the case, sit on it, or investigate further ... all the while, the person being investigated waits in the dark as to what the FEC is doing, not knowing how much information the FEC has is inaccurate, and how much is political sabotage by the opposition.

Depending on the nature of the case and the arbitrary nature of the investigator, a flood of subpoenas, depositions, interrogatories, demands for documents and additional supporting material can be made of the defendant. This potential for legal action only further discourages citizen involvement and volunteer activity -- all the while eating up precious time and resources of the campaign.

If the press gets hold of the investigation, due to a "convenient" leak, then the defendant is in real trouble. Whether he is innocent or not, the headline alone ("Candidate so-and-so Under Investigation by FEC!") will hurt him. A well qualified and upstanding citizen now feels like he is on the FBI's 10-Most Wanted List. The full weight of the federal government with its seemingly unlimited budget and all of its lawyers, auditors, paralegals, and investigators can be used against him. How can an individual fight the federal government and still have the time and money to run for office.

As a result, the person involved will often enter into a conciliation agreement with the FEC (in which the FEC routinely demands an admission of guilt) in order to avoid a lengthy court battle to prove his innocence. It is very difficult to wage a court battle (with all of the negative press connotations) and a political campaign at the same time.

The law is so complex and contradictory, that almost any candidate or political committee can be found to be in violation of some provision of the law or regulations at any time. This opens a host of opportunities for the opposition to exploit the FEC and then sit back and watch the bureaucratic arm of the federal government (and the press) do a real number on the person or organization targeted for attack. A campaign that was supposed to be waged on the issues may be shifted to the compliance arena where some nitpicky interpretation of some obscure regulation written by an obscure bureaucrat may irrevocably damage the campaign. Chances are that no one really knows what the regulation means anyway and the public, by and large, could care less if they knew what all the fuss was about. But the headline in the morning paper reads: "Candidate "X" Investigated by Government Agency," and that is all that matters.

Senator Jepsen/Dick Clark Campaign

The 1978 Roger Jepsen/Dick Clark Senate race in Iowa provides a good example of this problem.[27] During the campaign, Jepsen went to his family bank to borrow $50,000 to use as "seed money" to start his campaign. The bank required the spouse to sign also -- so Mrs. Jepsen's name appeared on the loan since the house used for collateral for the loan was jointly owned by Mr. and Mrs. Jepsen. Since the property was in both names, the bank required both signatures for the loan. This is a common practice.

A complaint (probably filed by someone close to the Clark campaign) was filed with the FEC charging that technically half the loan came from Jepsen's wife. As a result, she was in violation of federal law for contributing over the $1000 limit. Two other matters were also investigated by the FEC: 1) a wild charge that Jepsen had received $250,000 from the government of South Africa, and 2) the manner in which Jepsen was paying for political fund-raising services provided by Richard Viguerie.

Under the law, all of these matters were to have remained confidential but the Des Moines Register picked up the story and reported that Jepsen was being investigated by a federal agency for violating the election law. Needless to say, this did not help his campaign and it placed an unnecessary and unfair burden on his wife and family.

Despite these hinderances, Jepsen won the Senate race. The FEC eventually ended its investigation concluding that: (a) his wife's signature was more than proper and did not in any way violate the law, (b) the South African gift allegation was totally false and the case was dismissed out of hand, and (c) Jepsen was paying the Viguerie bills in a routine and timely fashion. However, when the Senator then demanded the FEC write a letter saying he had been cleared of all these erroneous charges, the Commission said it did not do such things and that like all other 1978 races, his race was still under review.

10. Threatens the First Amendment

Finally, we reach the most important problem created by the FECA amendments of 1974. The free speech guarantees of the Constitution are a fragile gift and must be carefully guarded. However, the FEC has proven time and time again that when faced with a choice between more freedom of speech or less, it consistently chooses less. In fact, in many cases it has acted as if the First Amendment did not even exist -- despite numerous court rulings saying that the Commission is off base with many of its rulings and investigations.

Congress immediately created an inherent conflict with the First Amendment of serious proportions by setting up an independent Federal Election Commission, because the FEC is expected to regulate free speech (election activity) and regulate it with great energy. From the outset the FEC and the First Amendment guarantees of free speech and press were pitted against each other in mortal conflict. Because of the FEC's irresponsible actions, one of them has to give -- let us hope it is the FEC and not the Constitution.

There is no way to have an informed electorate unless an individual's freedom to express his ideas is protected. Regulation of that freedom threatens the very foundation upon which this country has been built. One can only wonder what our forefathers would have thought of a federal agency empowered to investigate the internal workings of peaceful political organizations and regulate what an individual can and cannot freely give out of his own pocket to another individual. Sen. Eugene McCarthy put it well when he said:

> The American Revolution wasn't financed with matching funds ... George III didn't say, "You fellows raise a hundred thousand and we will match it, and you can have a minor revolution." The Revolution wasn't financed by popular subscription. There were some big contributors. If George Washington were around today, he would be accused of buying the commander-in-chief's office.... If someone had come into the Constitutional Convention and said, "We want a system whereby the government will finance politics," he would have been told that this was what the Revolution was against. The control of the people of this country before the Revolution was financed by the government of England, and we now have come back to that.[28]

A democratic form of government, like ours, must have freedom of political activity -- or our government and our people will no longer be free.

EXAMPLES OF EXCESSIVE FEC REGULATIONS AND ACTIONS

The list of FEC abuses is so long that it is hard to limit the analysis to a representative sample. Here are a few which reveal how irresponsible the FEC has been.

-- Reader's Digest

The FEC charged that "there was reason to believe" that the Reader's Digest Association made an illegal corporate campaign contribution against Sen. Ted Kennedy in 1980 by sending television stations videotapes announcing the outline of its study of the Chappaquiddick accident. The Digest had to go to court to block the FEC's investigation.

Congress clearly exempted news stories and editorials from the FECA since most press organizations are also corporations and routinely publish stories and opinions expressing the point of view of the owners and staff. Congress did not want the FEC regulating the press ... yet that is exactly what the Commission is attempting to do.

The danger comes when one realizes that many small papers across the country (which do not have the resources of Reader's Digest to defend themselves against the FEC) may decide to limit their editorial comment for fear of being in violation of the law. If that happens, we are in real trouble as a free nation.

-- Pink Sheet

The FEC has shown further disregard for the Constitution in its investigation of the Phillips Publishing Co. which publishes a conservative, anti-communist newsletter called The Pink Sheet on the Left. The FEC charged the company with five violations of the law -- among them that the company should be registered with the FEC as a political committee and file reports with the FEC since it sent out promotional material to potential subscribers which contained an editorial comment critical of Sen. Kennedy's bid for the presidency in 1980.

The paper refused to honor the FEC's subpoenas for information on its editors, personnel, mailings, and bank account numbers ... and on July 17, 1981, the courts ruled that the FEC must end its investigation of the company. The FEC was appealing the ruling, but then withdrew its appeal in October. Unfortunately, the FEC still does not appear to be able to understand the importance of a free press or the First Amendment.

-- Central Long Island Tax Reform Immediately Committee (TRIM)

In 1976, the FEC attempted to stop a group of citizens from circulating a pamphlet outlining their Congressman's voting record on several issues. Five members of a local TRIM organization in New York raised $135 to pay for the printing of the leaflet. It did not mention the Congressman's party affiliation or his candidacy for elective office -- nor did it even imply that the Congressman should be voted in or out of office. It simply urged the people to contact the Congressman to let him know where they stood on the issues.

Nevertheless, the FEC ruled it had "reason to believe" TRIM was in violation of the law even though this is a common practice among many non-political, educational organizations. For example, numerous church groups like the United Church of Christ, business groups like the Chamber of Commerce, and citizen groups like Public Citizen all publish and distribute information on congressional voting.

With the help of the American Civil Liberties Union, the individual being attacked by the FEC went to court and won a dismissal of the FEC's suit. If the defendant had not been able to secure counsel, he might very well have been forced to admit to a violation of the law that he never violated.

There is no excuse for such a heavy-handed treatment of an innocent citizen simply exercising his political freedoms protected by the Constitution. Even the court opinion stated the concern regarding the "insensitivity to the First Amendment values displayed by the Federal Election Commission in proceeding against these defendants." ... and all for a $135 pamphlet.

National Right to Work Committee (NRTWC) and the NEA and the AFL-CIO

The FEC has revealed an incredible bias in favor of labor organizations. Here are a few examples:

-- NEA

In 1976, the NRTWC filed a complaint with the FEC to take action to halt the National Education Association from using a "reverse (negative) check-off" to raise campaign funds from its members for its PAC. The NEA was automatically deducting "contributions" from members' paychecks without the individual members' permission, and then distributing the money to congressional candidates. When the FEC refused to act, NRTWC went to court in 1977. The court ruled that the $821,000 the NEA raised from 1974 through 1977 was raised illegally and must be refunded. However, the FEC did not seek any penalty from the NEA and did not make the congressional candidates receiving NEA PAC money return the funds.

-- AFL-CIO

In 1978, the NRTWC filed a complaint with the FEC that the AFL-CIO was illegally channeling $312,000 in compulsory union dues from its general treasury "educational fund" into political campaign funds operated by its PAC (the Committee on Political Education). Once again the FEC refused to act and the NRTWC went to court to force the FEC to enforce the law. When the Commission finally did act, it fined the labor organization a mere $10,000 which netted the AFL-CIO $302,000.

-- NRTWC PAC

The NRTWC and the FEC have also been embroiled in a court fight over the right-to-work group's PAC. At issue is whether NRTWC may solicit political contributions from its members. Also at issue is the NRTWC's refusal to disclose its membership roster. Turning over the entire membership list would violate the NRTWC's First Amendment rights, and expose the right-to-work committee members to union threats and harassment. After six long years of litigation, the courts ruled in favor of the NRTWC and re-affirmed the NRTWC's right to set up a legitimate PAC.

A review of the details of this case will show how arbitrary and unfair the FEC has been in its actions.

In 1975, the NRTWC set up its PAC in conformance with its understanding of the newly-enacted campaign laws, and in early 1976 sent the FEC an advisory opinion request asking if its proposed activities -- which were outlined -- were in accordance with the FEC regulations. The FEC acknowledged receiving NRTWC's letter, and promised a response would be forthcoming. Nine months passed before the FEC attempted to respond. In the meantime, the NRTWC's PAC began to operate and solicit funds. The office of the FEC General Counsel submitted a favorable

first draft of the advisory opinion, but after reviewing it, the Chairman (a 20-year Associate General Counsel to the AFL-CIO) Thomas Harris, pulled the opinion from the Commission's agenda. That draft opinion was never given a hearing before the full FEC. Chairman Harris expressed some concern that the PAC didn't have any "members." In less than a month, the National Committee for an Effective Congress (a liberal, independent PAC) filed a complaint with the FEC charging that the NRTWC PAC had no genuine members and therefore was conducting illegal solicitations. It may be of interest to note that the Executive Assistant to Chairman Harris, at that time, was a Ms. Susan King, who had been employed by NCEC as its executive director. A report recommending that the FEC Commissioners take action against the Right-to-Work PAC was completed only 14 hours after the complaint against them was received. (It took a court order to force the FEC to investigate the NRTWC complaint against the NEA, and that after months of inaction by the FEC.)

The Commission notified NRTWC that an investigation would soon begin and demanded to see the PAC's membership list. The Committee responded, but withheld the membership list to protect those whose names appeared from possible hostile actions by union officials. The FEC requested that the PAC withdraw its advisory opinion request, and the PAC refused. Within weeks, the Commission ruled that the PAC was guilty of soliciting "non-members." The Commission ruled that the group must: 1) admit guilt, 2) pay a $5,000 fine, 3) amend its articles of incorporation to provide for membership, and 4) "take all other steps necessary and proper to become a 'membership' organization." However, the Commission failed to define what a "member" really was, and it did not advise Committee attorneys what "other steps" were needed to actually become a "membership organization."

Verbal sparring by both sides for several months gave way to two suits: the NRTWC sued the FEC for violation of First Amendment rights of free speech and association, and violation of due process. The FEC, in return, filed suit against the Committee charging violation of election law. The two cases were combined for hearing in the U.S. District Court for the District of Columbia. The litigation stretched out for almost four years. In the interim, the FEC "completed" its advisory opinion response ... 26 months after the NRTWC had requested it! (Remember, the Commission only took 14 hours to respond to the National Committee for an Effective Congress complaint against the NRTWC PAC.) Yet, the response still was not complete. The document once again failed to define "members" or indicate what "steps" the Committee must take to become a "membership organization." With that lack of direction, the NRTWC would always be open to violating the law regardless of how hard it tried to follow the FEC's interpretation of the law. It would not really matter what the NRTWC did, the FEC could get it coming and going.

The district court judge ruled that the NRTWC PAC violated the election law and ordered over $100,000 in fines and penalties. On appeal, the U.S. Court of Appeals for the D.C. Circuit decided unanimously in favor of the National Right to Work Committee. After nearly six years, the First Amendment rights of the Committee's members were finally and completely vindicated -- at an incredible expense to the taxpayers and the NRTWC. For example, the NRTWC spent an estimated $260,000 to defend itself in this case.

-- Gun Owners of America

The FEC's inconsistency regarding fines as well as its actual rulings is clearly revealed in its action against the Gun Owners of America. GOA thought it had clearance to proceed with a financial arrangement of distributing the overhead (office space) and administrative expenses of two of its affiliated committees. This sharing arrangement had been approved verbally by several FEC staff personnel after GOA decided to check it out with the FEC. To its surprise, however, the FEC later on accused the GOA of violating the law and slapped it with a record-breaking $11,000 fine.

Even though the GOA was clearly trying to comply with the law, it was treated as a criminal organization. As with many groups, rather than fight the ruling in court, the GAO agreed to sign the conciliation agreement and pay the fine. It was simply not worth the negative publicity and the enormous litigation costs to pursue the case. This case presents a problem for political action groups and committees. They are almost afraid to go to the FEC with any "what if" questions for fear of initiating an investigation.

-- Macadamia Nuts (Congressman Heftel)

This is one of the most celebrated incidents illustrating that there is virtually nothing beyond the reach of the FEC. This case concerns whether a congressman could legally send macadamia nuts to his colleagues without breaking the election law. In 1978, the FEC issued a two-page "advisory opinion" saying it was okay. There is no reason under the sun for the federal government to be involved in such trivia. The very fact that Rep. Heftel felt he had to clear the matter with the FEC shows how ridiculously far the law can be stretched in its claim of jurisdiction.

FOUR RELATED ISSUES CREATED BY CAMPAIGN REFORM

1. Cost of Campaigns

The cost of campaigning for public office today has risen dramatically in the past 15 years. This was one of the key issues behind the FECA Amendments of 1974. However, there are legitimate reasons for the higher costs that election law reform cannot control. In fact, an excellent argument can be made that the campaign limits have forced most campaigns to suffer from a lack of funds in a time when the operation of campaigns needs to be more sophisticated and technically efficient.

Following are a few of the reasons why candidates need more money to campaign:

-- inflation (an increase of 24% during the 1979-80 election cycle alone);

-- increased use of computerized systems for "direct mail" fund raising drives, categorization of voters, etc.;

-- larger elctorate (the number of voters that must be reached) and the larger number of candidates to compete against;

-- growing need for political consultants and advisors to better manage and target campaign funds;

-- increased use of polls and public opinion surveys;

-- FEC compliance costs requiring the need to hire more lawyers and accountants;

-- growing use of the media (radio, television, and newspaper ads) to reach prospective voters;

-- revitalization of the Republican Party in many parts of the nation (especially in the south), making it necessary for both Republicans and Democrats to campaign more vigorously;

-- increase in split-ticket voting requiring more energetic campaign efforts; and

-- increase in the number and length of primaries.

When compared with the advertising budgets of private industry, the amount spent by campaigns comprises only a small percentage of total outlay. For example, "the $540 million spent for campaigns in 1976 was less than the total of the advertising budgets for that year of the two largest corporate advertisers, Proctor & Gamble and General Motors. It was a fraction of one percent of the amounts spent by federal, state, county, and municipal governments -- and that is what politics is all about, gaining control of governments to decide policies, on among other things, how tax money will be spent."[29]

According to the Federal Election Commission, the costs for campaigning for Congress in 1979-80 were 23% higher than in 1977-78.[30] This does not even keep up with inflation, much less meet all the other items forcing higher campaign costs. Some items, like media time, newspaper advertising, and polling have risen much faster than the inflation rate. According to the Harvard report:

> Every study based on the information available since 1972 has shown that <u>most campaigns have too little, not too much money</u>. The most competitive elections, where the voters have the most information about candidates, are those in which the most money is spent. Election contests in which spending is comparatively high are also those in which voter participation tends to be the highest.[31]

When it comes to the cost of campaigns, the current election law is part of the problem, rather than part of the solution.

2. <u>Big Money</u>

For some time, many people have expressed the concern that "big money" is controlling Washington. Are election reform efforts to limit the amount of campaign money good or bad? Will the person who outspends his opponent normally win? When looking at the record, it appears that money is not necessarily the essential winning ingredient because the candidate who spends the most money often loses.

The 1980 Presidential race provides a classic example of this fact. John Connally far surpassed his Republican opponents in raising money early in the primary battle. By the end of 1979, he had raised more than $9 million -- around $3.5 million more than his closest competitor. He ended up spending $12.5 million, but he came up with only <u>one</u> delegate pledged to him at the convention. We have all heard of the "$6 million man" ... this delegate was the "$12 million delegate."

In only 16 of the 31 Senate races in 1976 did the winning candidate outspend the loser. That year, six senatorial candidates spent over $1 million in their election effort; John Heinz, PA; John Tunney, CA; James Buckley, NY; Robert Taft, OH; Bill Brock, TN; and Lloyd Bentsen, TX. Only two, Bentsen and Heinz were winners. Also in 1976, the two candidates who on a cost-per-vote basis ran the most expensive senate races; Richard Lorber, D-RI, and Stanley Burger, R-MT, both lost badly in vying for open seats.

In analyzing the 27 House races in 1980 where the challenger defeated the incumbent with no more than 55% of the total vote, the pattern shows that in a general sense, the challenger needed to outspend the incumbent on order to win. The average expenditure for these 54 House candidates was $301,000 per person. The average spent by the incumbent was $254,000, while the average spent by the successful challenger was 31% more, or $334,000.

However, there are numerous exceptions to this rule. For example,

-- Chris Smith (R-NJ) defeated Frank Thompson (D-Incumbent) even though Thompson outspent Smith by 59% ($46,000).

-- Tom Lantos (D-CA) defeated Bill Royer (R-Incumbent) even though Royer outspent Lantos by 61% ($296,000).

-- Bobbi Fiedler (R-CA) defeated Jim Corman (D-Incumbent) even though Corman outspent Fiedler by 53% ($308,000).

-- Guy Molinari (R-NY) defeated John Murphy (D-Incumbent) even though Murphy outspent Molinari by 90% ($134,000).

-- Jim Hansen (R-UT) defeated Gunn McKay (D-Incumbent) even though McKay outspent Hansen by 21% ($47,000).

-- Mick Staton (R-WV) defeated John Hutchison (D-Incumbent) even though Hutchison outspent Staton by 14% ($21,000)

... so it is obvious that there are other factors at play than just money.

But the general rule still applies -- challengers need to spend more to unseat incumbents, and while in this analysis these particular challengers did spend an average of 31% more, this 31% diminishes in proportion when one considers the advantages of incumbency. Obviously, this study would be more complete if one examined the number of incumbents who remained in office despite being outspent by challengers. As the following statistics show, incumbents running for reelection are generally reelected.

Percent of House Incumbents Reelected

1968	98.8%
1970	96.9%
1972	96.6%
1974	89.6%
1976	96.6%
1978	95.0%
1980	92.1%

In any case, whether more money helps or hinders the election process is not really the fundamental issue to be debated. In a free society we should let the people decide what a campaign is worth ... not non-elected, and non-accountable bureaucrats. It is not proper for the government to limit how much a person can raise or spend on his campaign. There is nothing inherently wrong with money. As we have already examined, because of the power of incumbency, limits on contributions reduce competition rather than increase it.

3. Independent Expenditures

Another consequence of the 1974 and 1976 campaign finance laws limiting contributions has been the rise of independent expenditures. An indvidual, group, or political committee (except party) is free to spend as much of their money as they choose in support of a particular candidate or cause, so long as those expenditures

are not coordinated with the candidate's campaign. To date, those who were once wealthy contributors are not partaking of this practice in order to render heavy support to political candidates.

The Supreme Court in 1976 ruled that independent expenditures cannot be limited under the First Amendment in the Buckley v. Valeo case. After the ruling, the practice began to expand greatly although it has not yet come to dominate the political process. Independent expenditures only comprise a tiny percent of the total amount of money spent on campaigns.

Whether or not independent expenditures by individuals, groups, or political committees are having harmful effects on the political process is not really open to debate. There is nothing inherently wrong with the nature of independent expenditures. Such expenditures are protected by the First Amendment. It is consistent under the American political system that citizens be allowed to spend as much money as they desire to promote their political beliefs.

Some legitimate questions can be raised with regard to this type of political expenditure. Yet, as long as individuals, groups, and parties are limited in the amount they may directly contribute to the committee of a candidate, it is likely that the amount of independent expenditures will continue to grow as a percentage of total campaign expenditures. This may lead to a number of unintended consequences: 1) Spending in political campaigns may increasingly move beyond the control of the individual candidate and his organization to the control of outside indivduals and groups. 2) As a candidate loses control over much of the money affecting his campaign, he also loses control over the informational aspects of his campaign. Independent expenditures can distort a candidate's campaign by introducing issues the candidate would prefer not to have taken a position on -- a controversial subject like abortion or busing, for example. 3) If independent expenditures take a significant hold, campaigns may develop into contests mainly centered on conflicting issues and ideologies rather than the position of a wide range of items and the individual qualifications of a particular candidate.

However, in a free society like ours, one cannot limit the practice of independent expenditures without undermining the entire foundation of our democratic system. The First Amendment is not a "loophole" as the FEC often seems to think. The way to prevent centralization of power into the hands of a few groups or individuals is to remove contribution and spending limits across-the-board to promote maximum competition and/or cooperation, as the citizenry sees fit.

4. Disclosure Rules

Disclosure rules operate on the premise that the American people have a right to know who is financing the campaigns of candidates for federal office. Under current campaign finance laws, the names and addresses of all contributors who give over $200 to a political campaign are to be publicly disclosed.

The argument is made that if a candidate is financing his or her campaign with personal funds, the public should know this. If, on the other hand, the candidate is being financed by questionable sources, this too should be made part of the public record. In this way, it is claimed, the public will be provided with the information needed to make informed, intelligent decisions on the choice of who they want to represent them in Washington.

Though disclosure rules are generally desirable provisions in election reform acts, legitimate objections have been raised which must be addressed. There is a cost/benefit balance that must be reached in disclosure requirements. Many of the values served by disclosure rules are obscured because of the low disclosure threshold, $200. One pragmatic objection to the $200 level is that because it is so low, too many insignificant names are being disclosed which are overloading the system. In the 1972 presidential campaigns, 81% of all McGovern supporters gave between $100 and $1,000. Sixty-nine percent of all Nixon contributors also gave within this bracket. Yet, contributors within these brackets provided only 14% of the total funds given to Nixon, and just 21% of the total funds given to McGovern. The volume of the disclosure of all these names who gave such an insignificant amount of money tends to obscure the value of the disclosure process. It is doubtful whether any individual's vote would be swayed by an awareness that a particular person, along with 81% of all givers, gave below $1,000 to a candidate. If the objective is to reduce the influence of "big money" in politics by forcing disclosure of big contributors, the $200 level has obviously over-extended the requirement. To argue that a contribution of $200 runs the risk of possible corruption is simply unreasonable.

If disclosure rules are indeed a permanent part of our politcal process, it would seem that the limit should be geared at the higher, more expensive level at which improper influence could possibly result, assuming such an amount could be determined. Everyone's threshold of honesty is different and bribes are a part of historical record due to the weakness of man. However, as long as man is human and fallible, that is one risk that will always be part of a free society. Some people yield to corrupting influences for next to nothing. Judas sold out for 30 pieces of silver. But to take disclosure down to the $200 level is self-defeating. There is no way to totally prevent corruption through law. The ballot box is still the best restraint.

A far more serious objection to the disclosure level is that the $200 threshold results in a "chilling" effect on contributors who do not wish to have their names published. It is argued that this level greatly undermines any right to privacy an individual might have regarding his political beliefs and activities. Low disclosure levels may subject some to professional harassment, and still others to possible physical abuse because of their contributions.

This point can be made with regard to minor party candidates. Sen. Eugene McCarthy who ran for President in 1976 as an independent said, "We found people who said they would like to contribute but could not go on the record. It is a strange thing to happen in what we call a free society."[32] Some contributors may desire to break party lines and support a candidate in another party. Yet, because this will be disclosed, the full force of party discipline may bear down on that person and support may be withheld.

Other ideologically oriented minor parties, that are not in the mainstream of American political thought, are also seriously affected by low disclosure limits. The weakening of minor parties through the disclosure process, some argue, unfairly fortifies the two-party system, and limits the free competition of ideas and policies which form the foundation of our political system operated under the First Amendment. Although a consensus seems to exist in favor of disclosure rules, they often create more problems than they solve.

"LIBERAL" INADEQUATE SOLUTIONS

Even the framers of the Federal Election Campaign Act acknowledge that the law has created serious problems that must be corrected. As usual, however, most of their proposed "solutions" only hit the symptoms of the disease, creating further problems later down the road.

In March 1981, for example, Common Cause issued a 77-page study titled, "Stalled from the Start: A Common Cause Study of the Federal Election Commission." The report analyzed ten "widely shared" complaints about the FEC and made 22 recommendations for strengthening the effectiveness of the Commission. The thrust of these reforms is to give the Commission more independence and make it more powerful.

The study claims that: "It is our strong view that the performance of the FEC will not improve unless its structure is changed to provide for strong management leadership." Among its recommendations are:

-- a four-year term for the chairman;

-- power to appoint a staff director to act as a kind of "CEO;"

-- removal of the Congressional veto over FEC regulations; and,

-- multi-year budgets for the Commission.

The Common Cause approach is the typical regulatory/bureaucratic solution of ... "if we only had more staff, more money, and better organization -- we could do a better job at regulating." The reason these (along with all the other cosmetic reforms) will not work is that the fundamental structural problem of trying to regulate "free speech" through a governmental agency will not work.

The plain and simple fact is that the FEC and much of the current election law is not needed. Like most bureaucracies, the FEC feeds on itself and is out of control like a loose cannon. The law has allowed it to shoot where it pleases hitting things at random. Administrative changes, tinkering with the threshold limits, and all other minor amendments will give the appearance of reform while the "loose cannon" is free to fire where it pleases, more often than not, firing upon the First Amendment of the Constitution.

RECOMMENDATIONS

A. Abolish the FEC

Because the FEC is fundamentally flawed and beyond reform, it should be abolished. All enforcement powers (both investigation and adjudication) should be transferred to the Justice Department (as was the case before 1975). At the very least, the Department of Justice should be more sensitive to First Amendment issues.

The receipt of campaign reports should be transferred to an office within the General Accounting Office.

B. Needed Changes (Amendments) in the Law

Abolishing the FEC in no way affects the actual election laws. It only touches the Commission. Other needed amendments to the law should include:

1. The removal of all spending and contribution limits across-the-board. Should this not be possible, then at least these changes should be made:

- ° Raise individual limits from $1,000 to $5,000.
- ° Individual contribution limits should be higher for Presidential and Senatorial contests than for House races.
- ° Political parties should face no limit in the amount of financial support they can render to one of their candidates either through party spending or direct contributions.
- ° Remove annual individual contribution ceiling (currently $25,000).
- ° Only contributions and expenditures over $1,000 in an election should be "fully disclosed."
- ° Increase PAC contribution limits to candidates from $5,000 per election to $15,000 per election.

2. Prohibit the use of compulsory union dues for any political purposes.

3. Eliminate the public funding of Presidential campaigns. (this would automatically eliminate state-by-state expenditure limits in Presidential campaigns.) Why should my tax money be used to finance a candidate I don't believe in?

4. Income tax credit for contribution to candidates for public office should be expanded.

5. Permit party committees to engage in business activities in order to pay administrative expenses (i.e., allow for the sale of computer time, for example).

6. Raise the threshold for non-party committee contribution reporting. Currently all contributions from PACs must be reported regardless of amount.

7. Raise candidate reporting threshold from $5,000 to $15,000.

8. Broaden definitions of "membership" in a membership organization, cooperative, or corporation without capital stock and remove the solicitation limits on PACs.

9. Place all political committees (candidate or not) under the same arrangement as party committees in regard to receiving unlimited contributions for administrative costs, rent, overhead, etc.

10. Earmark FEC appropriations so that the Data Systems Division and Public Records Division receive a "no less than..." specific amount. Currently the general counsel and staff director operations are expanding their functions at the expense of data collections.

C. Limitations on the Records Collection Agency

Whether the GAO or the FEC administers the disclosure functions of the Act, specific limitations should be placed on the records collections agency. For example, should Congress decide to keep the FEC as a records collection agency, the following changes should be made:

-- removal of assessment of civil penalties by the FEC;

-- removal of authority for the FEC to send out subpoenas or file suit to enforce subpoenas;

-- removal of authority for FEC to enter into conciliation agreements;

-- removal of authority to process or initiate complaints.

Simply giving the Justice Department sole authority to file law suits to enforce the Act does not go far enough. Unless these changes are made, 95% of the enforcement power would still be left with the FEC. For example, the FEC has to date investigated about 1,500 alleged violations. Actual court suits number only about 50. The real problem is FEC harassment before the suits. The FEC must be prevented from harassing people, issuing subpoenas at random, and from even filing suits to enforce the subpoenas apart from the Justice Department. Unless these changes are made, the current "chilling" effect would still exist under this proposal, and in some ways, it could be worse ... the FEC could pressure the targets of their investigations to supply the FEC with information, or else ..." it is going to be referred to Justice." That is a powerful threat to face.

CONCLUSION

The Federal Election Commission has chilled, not maximized, citizen participation in the electoral process. It has fostered bureaucratic harassment and censorship of our most cherished Constitutional right -- the right to freely express and assemble ourselves together for political purposes without being hindered by the heavy hand of government.

As Donald Lambro has stated: "A simple system of public disclosure of major contributions to a candidate's campaign is all that is needed to keep our political process open, honest, and free."[33]

Steven Chapman puts his finger correctly on the problem when he concludes:

> Given the information about where a candidate gets his money and how he spends it, the voter should be trusted to make an intelligent decision. Instead of trying to make an intelligent decision easier, Congress has tried to make it impossible for the voter to make a bad one, by trying to guarantee that all candidates will be beyond reproach, beholden to no one. That can't be done, and even if it could, the cost would be too high. The cost of the current failure is already too high.[34]

It is long overdue to abolish the FEC and simplify our election laws. However, the argument has recently been heard among some Republicans that no major changes should be made in the election laws because the 1980 election proved that the FECA has backfired and has hurt the Democrats more than Republicans.

Such an argument misses the point. Election laws should not be fashioned on how they help or hurt a particular political party ... or who gained or lost in the previous election.

All Americans (Republicans, Democrats, and Independents) suffer when our political freedoms are limited and curtailed in such an arbitrary and inequitable way under the current FEC. That is the fundamental issue at stake when discussing the need to abolish the Commission.

If freedom of speech and assembly is a good concept and practice to have (and America's 200-year history says it is), then it should be good for everyone, equally, across-the-board. The time to make the move for freedom is now ... before it is too late.

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ENDNOTES

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