CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

CATO INSTITUTE
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10. Campaign Finance, Corruption, and the Oath of Office

Congress should

- repeal the Bipartisan Campaign Reform Act of 2002,
- reject proposals to mandate electoral advertising paid for by the owners of the television networks,
- reform the Federal Election Commission to bring it under the rule of law, and
- deregulate the current campaign finance system.

The 107th Congress passed the most sweeping new restrictions on campaign finance in a generation, the Bipartisan Campaign Reform Act of 2002, marking them to take effect at the conclusion of the 2002 elections. During much of the 108th Congress, the new law, challenged the day it was signed, will be working its way through the judicial system. Meanwhile, proponents of even more restrictions will be urging Congress to mandate ''free'' political advertising for candidates and to replace the current Federal Election Commission with a new agency modeled on the Federal Bureau of Investigation.

The new law and the proposed changes in current law reflect the mistaken assumptions of the so-called reformers. We begin by exposing those flawed assumptions about corruption and American politics.

Freedom and Corruption

We begin, as we must, with the Constitution, which prohibits the government from abridging freedom of speech. In the seminal case of *Buckley v. Valeo* (1976), the Supreme Court recognized that restrictions on political spending are restrictions on political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Note that the Court did not say, ''Money equals speech.'' It said that money is necessarily tied to speech in a society in which candidates communicate to the voters through the mass media. Restricting political spending thus restricts political speech just as surely as throttling the speaker on the proverbial street corner soapbox limits speech. Both spending ceilings and strangulation shut off the medium of political expression and thus the protected speech itself.

Unfortunately, contributions to campaigns do not enjoy the same constitutional protections. In 1974, Congress imposed limits on campaign contributions for the purpose of preventing ''corruption or the appearance of corruption.'' Until recently those ceilings have governed American elections without being adjusted for inflation. BCRA raised the limits on ''hard money'' contributions, but their real value remains well below the ceilings enacted in 1974.

The lower protection provided for contributions makes little sense. Political candidates spend money to obtain the means (often television time) to get their messages across to voters; such spending, as noted earlier, is properly protected speech. But contributors give to candidates for the same reason—to enable candidates to obtain the means to advance their views to the electorate. Thus, limiting contributions inevitably ''reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached'' by the candidate.

What about corruption? Campaign finance reformers claim to be driven by the desire to end corruption or its appearance. But what is the nature of the corruption that concerns reformers? And just how much corruption is there to be rooted out?

Clean government requires that public office not be sold—not for money, not for personal gain, not even for elective office. Thus, money is not the real issue, even if cases of corruption often involve money. The issue, rather, is trust. Public office is a trust, solemnized by the oath of office, through which officeholders swear to support the Constitution. That oath obligates public officials to serve the general good, the good of all,

as spelled out in the Constitution, a document intended to serve all the people. When an officeholder sells his vote to a special interest for any narrower reason, he appears, at least, to be breaching the trust he assumed when he swore to support the Constitution. His oath entails an obligation to avoid even the appearance of doing so.

As a practical matter, however, corruption requires us to distinguish between appearance and reality. A member of Congress who votes for a bill in exchange for some payoff is said to be corrupt. But if that same member votes the same way because he believes he is serving the general good, he is not thought to be corrupt. The same act may or may not be corrupt depending on the reasons behind it. Yet reasons or motives, being subjective, are notoriously difficult for others to determine, especially when they are mixed. What are we to say when a member accepts a campaign contribution from a special interest, votes as the interest wishes, but does so because he genuinely believes he is voting for the general good? After all, a particular good and the general good may coincide.

Until the federal law of 1974, we recognized the difficulties of discerning corruption and chose to enact only limited rules addressing fairly clear cases of favors granted for cash, what the Supreme Court has called quid pro quo corruption. Judged by that standard, our legal system has found rather less corruption in politics than the reformers would have us believe exists. Social scientists also report scant evidence of corruption of the legislature. One proponent of public financing concludes, ''Various studies have failed to produce the sort of evidence of a strong correlation between campaign donations and a representative's public actions needed to back up suspicions of general quid pro quo understandings.'' Thus, the basic premise of the campaign finance reform movement—that money corrupts and more money corrupts even more—comes up short on the evidence.

Congressional Conflicts of Interest

The intense interest in the campaign finance regulation shown by members of Congress—substantially greater than the interest shown by most Americans—should hardly surprise. For no other issue today affects members more directly—not taxes, not spending, not war or peace. Indeed, campaign finance law bears directly on the ability of members to remain in office. All the talk of good government aside, for many it is a matter of job security. Thus, the high correlation between past campaign finance legislation and reelection rates is no accident, for the temptation to write the law to favor incumbents is palpable and inescapable.

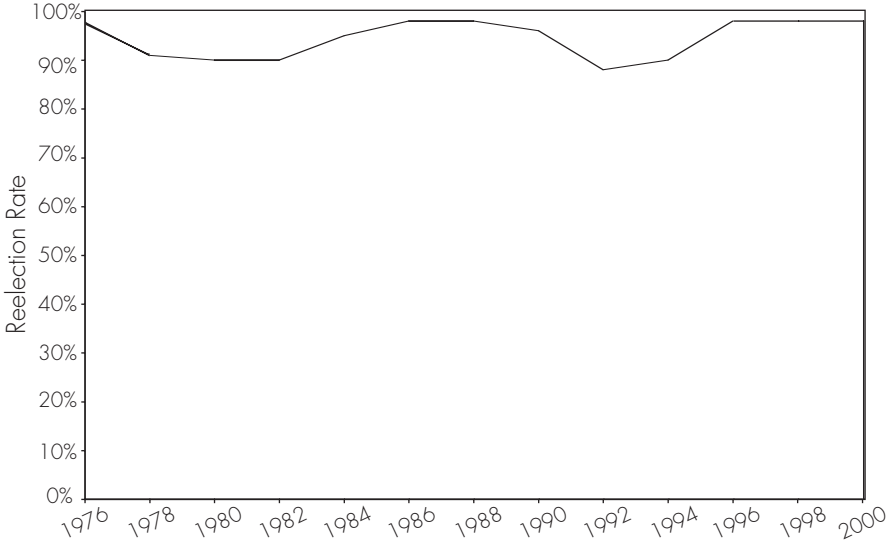
There, in stark relief, is the conflict of interest that every member of Congress faces when considering proposals to reform our campaign finance law. Campaign finance regulation brings every member face to face with the problem of self-dealing—not only the self-dealing the regulations are supposed to prevent but, more immediately, the self-dealing that is inherent in writing regulations not simply for oneself but for those who would challenge one's power to write such regulations in the first place.

Figure 10.1 graphically suggests the electoral consequences of having the winners write the rules for financing congressional campaigns.

Only one congressional election since 1974 has seen an incumbent reelection rate lower than 90 percent. Even the ''revolution'' of 1994, which changed control of the House of Representatives, saw 90 percent of incumbents reelected. The last three elections have seen reelection rates of over 98 percent.

Campaign finance restrictions may not fully explain the lack of competition in American politics. But those restrictions encumber entry into the political market and thus discourage credible challenges to incumbents. A challenger needs large sums to mount a campaign for public office, especially at the federal level. He needs big money to overcome the manifest advantages of incumbency—name recognition, the power of

Figure 10.1
Reelection Rates of Congressional Incumbents, 1976–2000



SOURCES: Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress: 1999–2000* (Washington: AEI Press, 2000), p. 57; and Cato calculations.

office, the franking privilege, a knowledgeable staff, campaign experience, and, perhaps most important, easy access to the media. Yet current law limits the supply of campaign dollars: in any given election cycle, an individual can give no more than $1,000 to a candidate, and a political party or a political action committee (PAC) can give no more than $5,000. BCRA did raise the limit for individuals to $2,000. But again that remains far less in real dollars than was allowed by the original 1974 law.

In a free and open political system, challengers would be able to do what they used to be able to do—find a few ''deep pockets'' to get themselves started, then build support from there, unrestrained by any restrictions save for the traditional prohibitions on vote selling and vote buying. That is how liberal Eugene McCarthy challenged an incumbent president in 1968. It is how conservative James Buckley challenged an incumbent senator and a major party challenger in 1970. Today, neither would be able to do that—thanks to the ''reforms'' of 1974. Both would incur massive compliance costs, including the risk of future litigation and prosecution. Both would be discouraged, in all likelihood, from mounting a challenge. That is not healthy for democracy.

BCRA makes things worse. By banning ''soft money''—unregulated contributions given to the political parties—Congress has complicated the lives of challengers. Parties have traditionally directed soft money contributions to races in which challengers might have a chance. A Cato Institute study found, not surprisingly, that state restrictions on giving to parties (regulations similar to BCRA's soft money ban) reduce the overall competitiveness of elections. At the same time, BCRA does not affect donations by PACs, most of which go to incumbents. BCRA does loosen federal contribution limits for incumbents running against self-funding individuals. Apparently, contributions over $2,000 corrupt politics—unless an incumbent faces a self-funding millionaire. That strains credulity. In the end, BCRA seems little more than an incumbent protection law, a monument to the dangers of self-dealing.

But conflict of interest does not end with the ban on soft money. For several years now, interest groups have underwritten aggressive issue ads criticizing members of Congress during their reelection campaigns. To be sure, some of those ads have been unfair or inaccurate, but the Constitution protects the right to be both. With the passage of BCRA, however, Congress decided to regulate such issue advertising by redefining it as ''express advocacy'' and hence as subject to federal election law, including contribution limits. In effect, Congress has decided to complicate the lives of its

critics. Making issue ads subject to election law means the next election will have fewer issue ads, less debate of public matters, and less criticism of elected officials. Many experts think the Supreme Court will strike down those restrictions on political speech. Congress might save the Court the trouble by reconsidering its regulations.

Taxpayer Financing of Campaigns

Many people have argued that our system could preclude corruption or its appearance by prohibiting all private contributions, whether designated as campaign contributions or not, and moving to a system of taxpayer-financed campaigns. As a practical matter, how would a system of public campaign financing work? Would incumbents and challengers receive equal amounts of money? Given the extraordinary advantages of incumbency noted above, that would hardly level the playing field or respect the democratic process. Then what is the right ratio? When Congress last seriously debated taxpayer financing in 1997, the funding levels proposed were not adequate. Law professor Bradley Smith, now a federal election commissioner, assessed the 1997 proposal:

> Every challenger spending less than the proposed limit in Senate campaigns had lost in each of the 1994 and 1996 elections, whereas every incumbent spending less than the limit had won. Similarly, only 3 percent of challengers spending less than the proposed limit for House races had won in 1996, whereas 40 percent of challengers spending more than that limit had won.

Taxpayer financing of congressional campaigns would only exacerbate the conflict of interest faced by every member in writing campaign finance regulations.

Proponents of campaign finance reform will likely propose that the 108th Congress enact mandatory political advertising paid for by the owners of the television networks. Over the years, such proposals have taken several forms; the latest would make the networks ''donate'' air time, which would then be given to the political parties in the form of vouchers. Thus, the shareholders of the companies that own the networks effectively would be taxed to pay for this advertising. Proponents justify such taxes as a fair price for the use of public property, the airwaves. In fact, economist Thomas Hazlett has shown that government's claim to ''ownership'' of the airwaves amounts to nothing more than imposing political control over the media of radio and television. Even if we grant for purposes of argument that the airwaves belong to the public, we might

ask why the broadcasters have to pay for political advertising. After all, trucking companies pay taxes for the upkeep of roads, but they are not required to haul freight for members of Congress.

The Federal Election Commission

Not content to have passed BCRA, reformers now argue that the Federal Election Commission has failed to enforce the old law, that the FEC will undermine BCRA, and that Congress should replace the FEC with a stronger agency—one with a law enforcement mission, a kind of Federal Bureau of Investigation for elections and political campaigns.

The juxtaposition of the FBI and political campaigns should give immediate pause. Do we want a federal law enforcement agency investigating the campaigns of members of Congress and those who challenge them for office? That is an invitation for political or partisan abuse. The late, unlamented Independent Counsel statute comes immediately to mind. Do members of Congress really want every detail of their last campaigns subject to investigation by an agency controlled either by their political enemies or the reformers themselves?

This does not mean the FEC should continue to exist. Congress should get rid of the FEC as part of a broader deregulation of political speech and electoral campaigns. Absent that, Congress should move to reform the FEC to make its procedures comport with the rule of law.

Defendants before the FEC have few due process safeguards. When a complaint comes before the commission, its general counsel makes the case against the alleged lawbreaker, who has no right to appear before the commission. The general counsel provides the commission with a report that summarizes and criticizes the legal arguments of the accused and is present to answer questions from the commissioners. Those reports are not given to the accused even though they may contain new arguments or information.

The FEC also sends out discovery subpoenas on the recommendation of its general counsel. To contest a subpoena, a citizen must appeal to the FEC itself, which turns the matter over to its Office of General Counsel. Need we mention that the commission rarely grants motions to quash its own subpoenas? Beyond that, the commission often will not provide the accused with documents that might aid the defendant. How could all of this accord with the rule of law?

The FEC has hardly been a pussycat in enforcing federal restrictions on campaign finance. Like most burgeoning bureaucratic empires, it has

continually tried to extend its regulatory authority. Consider issue advocacy. In *Buckley v. Valeo* the Supreme Court said that the government could regulate only those ads that expressly advocated the election or defeat of a candidate. The First Amendment protects all other advocacy about political issues.

The FEC has tried through most of its history to expand the meaning of ''express advocacy'' beyond explicit words advocating the election or defeat of a candidate. Time and again courts have rejected those grabs for more power. Thus, in 1997 a federal court struck down an FEC regulation redefining express advocacy, concluding that the commission's argument that ''no words of advocacy are necessary to expressly advocate the election of a candidate'' could not have been offered in good faith. Far from weak, the FEC's stance on express advocacy has defied judicial authority and tended toward lawlessness.

The FEC has attacked political speech in other ways as well. Thus, the government can constitutionally regulate ''political committees.'' Some people on the FEC argue that spending on issue advocacy, a protected freedom, makes a group a political committee and thus subjects it to regulation. In the Orwellian world of the FEC, a constitutional freedom justifies government coercion. Federal law also regulates electoral activities if they are coordinated with a candidate. The FEC has always pushed a broad concept of coordination, the better to bring more political activity under its control.

Not surprisingly those aggressive FEC attacks have chilled political activities at the grassroots. After all, individuals and small groups hardly have the resources to take on a bevy of specialized, zealous lawyers supported by taxpayers. The FEC represents yet another expansive federal bureaucracy that should be reined in by Congress in the near term and eliminated over the long term.

The Real Problem

The laws we now have on the books have made our politics less competitive by favoring incumbents over challengers, thereby striking at the very heart of democratic government. The whole point of democracy, after all, is to enable the people, through the ballot box, to select and thereby control those who govern. To the extent that campaign finance law undermines that power, it undermines democracy. Moreover, as we will now see, to the extent that incumbency is correlated with ever-larger

government, as studies repeatedly show, our present law exacerbates the very problem it was meant to reduce—corruption.

We come, then, to the heart of the matter. The focus on campaign finance reform is a distraction from the real issue, the ultimate source of the potential for corruption—ubiquitous government. Government today is a magnet for corruption of every form because it exercises vast powers over virtually every aspect of life. Given that reality, is it any wonder that special interests—indeed that every interest but the general—should be trying either to take advantage of that or to protect themselves from it?

The Founders understood the problem of what they called ''factions.'' They understood that interests would be tempted to capture government for their own ends. To reduce that temptation, they wrote a constitution that granted government only limited powers. They understood that the best way to reduce corruption is to reduce the *opportunities* for corruption.

Far from forcing everyone to contribute to campaigns, the Founders left individuals free to decide the matter for themselves—and free also to decide how much to contribute. The Founders were mindful of the potential for real corruption, which they left to traditional legal means to ferret out. They had a pair of better ideas about how to handle the various forms of corruption. The first was to rely on competition, to construct a system that enabled interest to be pitted against interest. There is no shortage, after all, of special interests. But if you fetter them all, through some grand regulatory scheme, you stifle the natural forces that are necessary for the health of the system. No individual, no committee of Congress, no blue-ribbon committee of elders, can fine-tune the system of political competition. It has to be free to seek its own equilibrium.

The second idea was equally simple, yet equally profound: limit power in the first place, the better to limit the opportunities for corruption. After all, if a member of Congress has only limited power to sell, there will be limited opportunities to buy. That will not eliminate all corruption, of course, but it will greatly reduce it.

Once we recognize the essential character of corruption—that it is a breach of the trust that is grounded in the oath of office and, ultimately, in the Constitution—it becomes clear that the problem is much broader than is ordinarily thought, even if most such corruption should not be the subject of regulation and prosecution. In fact, people who try to reduce the issue to one of money—big money buying access—miss the larger picture entirely. Money may induce a member to vote for an interest narrower than the general good—the evidence notwithstanding—but when

we ratified the Constitution we gave members the opportunity to do so only to a very limited degree. In fact, it was because we understood, as Lord Acton would later put it, that power tends to corrupt and absolute power corrupts absolutely, that we so limited our officials. And we realized that they would be tempted to breach their oaths of office not only for money but for power as well—indeed, for the office itself. Thus, it was not ''special interests'' alone that the Founders feared but the people too: The Founders wanted to protect against the capture of government by that ever-changing special interest known as ''the majority.'' For that reason too—no, especially—they limited government's powers.

The problem with post–New Deal government, with its all but unlimited power to redistribute and regulate at will, is that it virtually ensures that members of Congress will act not for the general good, the good of all, but for some narrower interest. Indeed, the modern state is premised on ''corruption,'' for when it takes from some to give to others, it does not serve the *general* good—and cannot, *by definition.* Thus, candidates find themselves selling their office right from the start. When they promise ''free'' goods and services from government, in exchange for votes, they are selling their office, plain and simple: ''Vote for me and I'll vote to give you these goods.'' That is where corruption begins. It begins with the corruption—or death (the root of ''corruption''}—of the oath of office. For not remotely does our Constitution authorize the kind of redistributive state we have in this nation today (see Chapter 3 of this *Handbook* for a detailed discussion).

To root out the kind of generalized corruption that is endemic to modern government, then, one should begin not with more campaign finance regulations but with the Constitution and the oath of office. The Constitution establishes a government of delegated, enumerated, and thus limited powers. It sets forth powers that are, as Madison put it in *Federalist* no. 45, ''few and defined.'' Thus, it addresses the problem of self-dealing by limiting the opportunities for self-dealing. If Congress has only limited power to control citizens' lives—if citizens are otherwise free to plan and live their own lives—there is little power for members of Congress to sell, whether for cash, for perquisites, or for votes.

Before they take the solemn oath of office, therefore, members of Congress should reflect on whether they are swearing to support the Constitution as written and understood by those who wrote and ratified it or the Constitution the New Deal Court discovered in 1937. The contrast between the two could not be greater. One was written for limited govern-

ment; the other was crafted for potentially unlimited government. As that potential has materialized, the opportunities for corruption of every kind have become ever more manifest, as members know only too well. Indeed, to appreciate the point, we need only notice the corruption that is endemic to totalitarian systems—the ultimate redistributive states—despite draconian sanctions against it. It goes with ubiquitous government.

Conclusion

In most cases, therefore, the answer to the corruption that is thought to attend our system of private campaign financing is not more campaign finance regulations but fewer such regulations. The limits on campaign contributions, in particular, should be removed, for they are the source of many of our present problems. More generally, however, the opportunities for corruption that were so expanded when we abandoned constitutionally limited government need to be radically reduced. Members of Congress can do that by taking the Constitution and their oaths of office more seriously.

Suggested Readings

Basham, Patrick. ''It's the Spending, Stupid! Understanding Campaign Finance in the Big Government Era.'' Cato Institute Briefing Paper no. 64, July 18, 2001.

BeVier, Lillian R. ''Campaign Finance 'Reform' Proposals: A First Amendment Analysis.'' Cato Institute Policy Analysis no. 282, September 4, 1997.

Hazlett, Thomas W. ''The Rationality of U.S. Regulation of the Broadcast Spectrum.'' *Journal of Law and Economics* 33 (April 1990): 133–75.

LaRaja, Ray, and Thad Kousser. ''The Effect of Campaign Finance Laws on Electoral Competition: Evidence from the States.'' Cato Institute Policy Analysis no. 426, February 14, 2002.

Pilon, Roger. ''Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles.'' *Notre Dame Law Review* 68 (1993).

Smith, Bradley A. ''Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences.'' Cato Institute Policy Analysis no. 238, September 13, 1995.

———. *Unfree Speech: The Folly of Campaign Finance Reform.* Princeton, N.J.: Princeton University Press, 2001.

Smith, Bradley A., and Stephen M. Hoersting. ''A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission.'' *Election Law Journal* 1 (2002): 145–71.

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