16. Campaign Finance

Congress should

- repeal the prohibition on soft money fundraising in the Bipartisan Campaign Reform Act of 2002 (BCRA),
- repeal the provisions of BCRA related to electioneering communications,
- eliminate taxpayer funding of presidential campaigns,
- 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 (BCRA). During the 108th Congress, the Supreme Court endorsed almost all of BCRA. Proponents of more restrictions will urge the 109th Congress to criminalize the fundraising of 527 groups, force taxpayers to spend more on presidential campaigns, mandate ''free'' political advertising for candidates, and replace the current Federal Election Commission with a new agency modeled on the Federal Bureau of Investigation. BCRA and the proposed changes in current law reflect the mistaken assumptions of the so-called reformers.

Freedom and Corruption

The Constitution 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 abridge 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 political speech requires spending money. Restrictions on money thus translate into restrictions on speech.

We should encourage, not restrict, campaign spending. John J. Coleman of the University of Wisconsin found that campaign spending increases public knowledge of the candidates across all groups in the population. Less spending on campaigns is not likely to increase public trust, involvement, or attention. Implicit or explicit spending limits reduce public knowledge during campaigns. Getting more money into campaigns benefits American democracy.

Unfortunately, contributions to campaigns do not enjoy the same constitutional protections as spending. In 1974 Congress limited campaign contributions to prevent ''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 afforded contributions makes little sense. Political candidates spend money to obtain the means (often television time) to communicate with voters; such spending, as noted earlier, is protected speech. But contributors give to candidates for the same reason—to enable candidates to present their views to the electorate. Moreover, ceilings on contributions complicate raising money and thus inevitably reduce ''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? We have more than 200 pages of federal laws regulating campaign finance. All of those laws purport to prevent corruption or the appearance of corruption in national politics.

What is corruption? Bribery is a clear case of corruption. Bribery involves secretly giving public officials something of value (usually money) in exchange for political favors. Officials then spend bribes on private consumption. Campaign contributions also involve giving money to public officials or their agents. However, by law the recipients may spend contributions only for political purposes. Anyone who spends campaign contributions on fancy cars and lavish houses commits a felony. Unlike bribes, contributions are publicly disclosed.

82978$CH16 12-08-04 07:54:17

Critics argue that contributors influence the judgment of legislators and receive favors for their donations. The evidence says otherwise. Three leading scholars examined 41 studies of the influence of money on legislative voting. They conclude: ''The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. Contributions explain a minuscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning reelection. They must attend to the constituency that elects them, voters in a district or state, and the constituency that nominates them, the party.'' The assumption that money corrupts and more money corrupts even more comes up short on the evidence.

What about preventing the appearance of corruption? We might first wonder why the mere appearance of illegality should be sufficient reason to restrict First Amendment rights. Proponents argue that campaign contributions appear to corrupt the political process, thereby undermining public confidence in government. Once again the evidence runs against proponents of campaign finance restrictions. John Coleman found that campaign spending had no effect on public confidence in government. Nathaniel Persily and Kelli Lammie discovered that Americans' ''confidence in the system of representative government'' is associated with individuals' positions in society, their general tendency to trust others, their beliefs about what government should do, and their ideological or philosophical disagreement with the policies of incumbent officeholders. On the other hand, they found our system of campaign finance had no effect on public confidence.

Congressional Conflicts of Interest

The intense interest in campaign finance regulation shown by members of Congress—substantially greater than the interest shown by most Americans—should hardly surprise. Campaign finance law affects their prospects for reelection. 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.

Only one congressional election since 1974 has seen an incumbent reelection rate lower than 90 percent. Even in the ''revolution'' of 1994,

82978$CH16 12-08-04 07:54:17

which changed control of the House of Representatives, 90 percent of incumbents were reelected. The last three elections have seen reelection rates of more than 98 percent.

Campaign finance restrictions may not fully explain the lack of competition for incumbents 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 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 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: an individual can give no more than $2,000 to a candidate, and a political party or a political action committee (PAC) can give no more than $5,000.

In a free and open political system, challengers would find a few ''deep pockets'' to get them 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. Candidates following their examples today would be criminals. Challengers living within the law incur massive compliance costs, including the risk of future litigation and prosecution. Many are discouraged, in all likelihood, from mounting a challenge. That is not healthy for democracy.

The Soft Money Ban

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 candidates running against self-funding individuals. Apparently, contributions over $2,000 corrupt politics—unless an incumbent faces a self-funding millionaire. That strains credulity. BCRA seems little more than an incumbent protection law, a monument to the dangers of self-dealing.

82978$CH16 12-08-04 07:54:17

Activists have circumvented the soft money ban by raising unlimited contributions on behalf of groups organized under Section 527 of the Internal Revenue Code. BCRA's sponsors will urge Congress to restrict the activities of those groups. Indeed, the FEC has already passed regulations to that end to take effect after the 2004 election. Instead of adding more restrictions, Congress should repeal the soft money prohibition, thereby removing the rationale for the existence of the 527 groups.

Political Advertising

Congress's conflict of interest does not end with the ban on soft money. For several years, interest groups and the political parties funded aggressive advertising criticizing members of Congress during their reelection campaigns. To be sure, some of those ads were unfair or inaccurate, but the Constitution protects the right to be both. BCRA prohibits such advertising funded by corporations and unions if it mentions a candidate for federal office. If such ads are coordinated with a campaign, their funding is subject to federal election law including contribution limits.

Those restrictions mean future elections will have fewer ads, less debate of public matters, and less criticism of elected officials. Congress has decided either to prohibit or to complicate the fundraising and political activities of its critics. The Supreme Court went along with that harassment of free speech. To restore the First Amendment, the 109th Congress should repeal all provisions of BCRA relating to electioneering communications.

Taxpayer Financing of Campaigns

Some people believe the United States can preclude corruption or its appearance only by prohibiting all private contributions, whether designated as campaign contributions or not, and moving to a system of taxpayer-financed campaigns.

Taxpayers now finance primary and general election campaigns for president. Compared with the system it replaced, presidential public financing has not increased competition in the party primaries or the general election. The system borders on insolvency because ever-fewer taxpayers check off the contribution box on their income tax return. The declining support for the program makes sense. Polls show Americans reject public financing as ''welfare for politicians.'' Congress should eliminate this unpopular multi-billion-dollar boondoggle.

Proponents of campaign finance reform want the 109th Congress to force the television networks to pay for political advertising. The networks would be required to ''donate'' airtime, which would be given to the political parties as vouchers. The shareholders of the companies that own the networks would be taxed to fund this advertising. Proponents claim such taxes are 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

Proponents of ''reform'' argue that the Federal Election Commission has failed to enforce election law and has undermined BCRA. They urge Congress to 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 trouble Americans. 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 want every detail of their last campaigns subject to investigation by an agency controlled either by their political enemies or by the reformers themselves?

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. The commission rarely grants motions to quash its own subpoenas. It 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. Prior to BCRA, the FEC continually sought to regulate issue advertising, a protected form of speech.

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, exercising 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. Individuals and small groups lack the resources to take on a bevy of specialized, zealous lawyers supported by taxpayers. The FEC is 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 campaign finance laws have made our politics less competitive by favoring incumbents over challengers, thereby striking at the very heart of democratic government. As James Madison said in *Federalist* no. 51, a dependence on the people is the primary control on government. That dependence can only have meaning in elections with vigorous competition. By undermining competitive elections, campaign finance laws undermine democracy. Moreover, 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. Campaign finance ''reform'' distracts us from the real issue, the ultimate source of potential corruption—ubiquitous government. Government today fosters 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.

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.

The Founders 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. If a member of Congress has only limited power to sell, there will be limited opportunities to buy.

Once we recognize corruption as a breach of the trust that is grounded in the oath of office to uphold the Constitution, we see that the problem is much broader than is ordinarily thought. 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

82978$CH16 12-08-04 07:54:17

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 federal government now has an all but unlimited power to redistribute and regulate at will, an ambit that 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 and politics are corrupt by nature. When government takes from some to give to others, it does not serve the *general* good—and cannot, *by definition.* When candidates 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 for a detailed discussion).

To root out the generalized corruption endemic to modern government, one should begin 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—Congress has little influence 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 government; the other was crafted for potentially unlimited government. As that potential has materialized, the opportunities for corruption 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.

82978$CH16 12-08-04 07:54:17

Conclusion

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

Ansolabehere, Stephen, John M. de Figueiredo, and James M. Snyder Jr., ''Why Is There So Little Money in U.S. Politics?'' *Journal of Economic Perspectives* 17 (Winter 2003): 105–30.

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

Coleman, John J. ''The Benefits of Campaign Spending.'' Cato Institute Briefing Paper no. 84, September 4, 2003.

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

Persily, Nathan, and Kelli Lammie. ''Perceptions of Corruption and Campaign Finance: When Public Opinion Constitutes Constitutional Law.'' *University of Pennsylvania Law Review* 153 (December 2004).

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

Samples, John. ''The Failures of Taxpayer Financing of Presidential Campaigns.'' Cato Institute Policy Analysis no. 500, November 25, 2003.

Samples, John, ed. *Welfare for Politicians: Taxpayer Financing of Campaigns and American Democracy*. Washington: Cato Institute, 2005.

Samples, John, and Adam D. Thierer. ''Why Subsidize the Soapbox? The McCain Free Airtime Proposal and the Future of Broadcasting.'' Cato Institute Policy Analysis no. 480, August 6, 2003.

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, NJ: 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.

—Prepared by Roger Pilon and John Samples

82978$CH16 12-08-04 07:54:17