What Should Be Done about Independent Campaign Expenditures?

Michael J. Malbin

IF THERE IS one form of political campaign spending that frightens politicians, it is the "independent expenditure." These are the expenditures made by individuals or groups without any coordination or consultation with the candidates or parties they are supposed to help. Candidates who become targets of negative advertising by independent spending groups complain that the groups' independence permits them to be aggressive, even reckless and inaccurate, without having to worry that voter resentment will hurt the candidate they prefer. Incumbent candidates are especially averse to independent expenditures—particularly members of the House, who enjoy the big campaign advantage of name identification based on constituency service and their use of the media. The groups tend to focus on national issues and the more a campaign turns into a referendum on such issues, the less the advantages of incumbency.

Even candidates favored by the independent spending groups often are wary of them. The groups tend to be either ideological or focused on single issues, and the issues they raise may not be ones the candidate would prefer to stress. Of course, that is exactly why the groups raise those issues. They want to be sure the candidate stays on track after the campaign, in office. They seek not only to influence election results, but also to make their issues important parts of the governmental agenda.

Although candidates may not like it, independent expenditures are here to stay. The campaign finance act of 1974 limits campaign contributions to $1,000 in a primary or general election campaign for individuals and $5,000 for political action committees (PACs). The technology of raising a lot of money in small amounts favors ongoing organizations with well-developed mailing lists (parties, groups, and direct mail consultants) over ad hoc ones that have to develop their lists on the run (candidate committees, especially those of challengers). Of course, the people who head the ongoing groups have their own reasons ("organizational maintenance") for conducting never-ending campaigns on their issues.

According to figures released by the Federal Election Commission (FEC), independent expenditures totaled $16 million during 1980, $2 million of which was spent on congressional elections and $14 million on the presidential race—$10.6 million to aid Ronald Reagan in the general election and the rest scattered in the

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primaries.* The figures suggest that while contribution limits in congressional races may encourage independent spending somewhat, the flat prohibition against all private contributions to the major presidential candidates in the general election encouraged it even more. Independent spending on both kinds of races

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can be expected to grow in the near future. In fact, for presidential elections, the combined value of independent expenditures, coordinated expenditures by labor and business, and unlimited spending by state and local parties may soon surpass the amount made available to the candidates from the Treasury. At least, that would be the most likely prospect, if not for a section in the law on independent spending in publicly financed presidential elections whose constitutionality the Supreme Court left unresolved in a 4–4 decision handed down without an opinion, this past January 19.

Independent Spending and the Law

The role of independent spending in Senate and House races grows out of the Supreme Court's 1976 decision in the landmark case of *Buckley* v. *Valeo*. The 1974 campaign finance law limited campaign spending as well as contributions; and, to close what looked like an obvious loophole, it also prohibited independent expenditures by individuals or groups in excess of $1,000. In *Buckley*, the court struck down the limits on campaign spending and on independent expenditures as violations of the First Amendment's protections of speech and association. According to the Court, the law's various spending limits "represent[ed] substantial rather than merely theoretical restraints on the quantity and diversity of political speech," and, the $1,000 independent spending limit also intruded on the right of free association because it "preclude[d] most associations from effectively amplifying the voice of their adherents."

That would seem to have ended the matter, but for a strange quirk in the law. The *Buckley* opinion struck down candidate spending limits for most federal races, but it upheld them for publicly financed presidential campaigns. The Court said that while Congress could not simply impose spending limits, it could require a candidate to accept such limits as a condition for receiving public financing, as long as the candidate was free to reject them both.

In the same section of the 1974 law that set up public financing, Congress had included a then redundant limitation on independent expenditures that was essentially the same as the one overturned in *Buckley*, except that it applied only to political committees (not individuals) spending money in publicly financed races. Since the Court never discussed this provision in the *Buckley* case, it remained in the statute, unused but waiting to be picked up. Common Cause did just that by bringing suit during the 1980 campaign. Once in court the FEC, which had showed no inclination to enforce the provision, defended its constitutionality. A three-judge panel of the U.S. District Court for the District of Columbia unanimously disagreed with the FEC in an opinion issued September 30, 1980. Circuit Judge Malcolm

*10.6 million represented less than one-sixth of the $64.5 million that was spent by or on behalf of Ronald Reagan in the general election. By comparison, the $15 million spent by labor, which did not have to be independent under the law, made up more than one-fourth of the $53.9 million spent by or on behalf of President Carter. The difference between the totals was mainly because of party expenditures.

These figures come from estimates derived by Herbert Alexander, director of the Citizens' Research Foundation. In addition to the $29.4 million flat grant from the Treasury that went to each candidate, Alexander identifies the sources of these totals as follows.

For Reagan: $4.5 million, almost the legal maximum, by the Republican National Committee; $15.0 million by state and local parties; $1.5 million by labor unions on internal communications, registration, and turnout activities, that can be coordinated with the candidate; $1.5 million on similar corporate and association activities; $10.6 million in independent expenditures; $1.5 million on compliance; and $0.5 million on transition.

For Carter: $4.0 million by the Democratic National Committee, $4.0 million by state and local parties, $15.0 million by labor, $1.5 million on compliance, and less than $30,000 in independent expenditures. These figures do not include the true costs of Air Force One and other perquisites of incumbency.

Wilkey, speaking for himself, Circuit Judge Edward Tamm, and District Judge John Penn, wrote that "it is absolutely plain that the free speech rights protected under *Buckley* extend beyond individuals."

Unanimity on the lower court apparently did not satisfy half of the members of the Supreme Court which split 4–4 in its January 19 decision, with Justice O'Connor abstaining. While the ruling had the immediate effect of upholding the lower court, it did not, according to the FEC lawyers, set a precedent that will automatically cover similar cases brought in other circuits.

With the Court split 4–4 it would be imprudent for anyone to speculate what it may decide the next time it hears the issue. It would be particularly imprudent for such speculation to come from this quarter, since I cannot for the life of me see how even four justices could have voted to uphold the spending limit on political committees.

The FEC and Common Cause made essentially two basic arguments to support the limit. One said that the First Amendment protects only individuals and not groups, and that the speech rights involved therefore were only indirect. But this position was rejected explicitly in *Buckley* on grounds relating to the rights of both speech and association. The other argument grew out of the spending limit imposed on candidates in publicly financed campaigns. According to the FEC's brief, limits on independent expenditures are needed to achieve the legislative objective of controlling campaign costs. "Congress," said the FEC, "saw the Fund Act as an alternative to private financing, not as a subsidy where each candidate can begin with $30 million in public funds and then go out and raise private funds."

The problem with the FEC's argument is that the funds were raised *not* by candidates, but by private individuals who wanted to exercise their own right to speak. Candidates may have the right to renounce the exercise of their own rights in exchange for federal money, but it is hard to see what gives them the authority to relinquish rights that belong to someone else. From the point of view of an independent spending group, decisions made by outside par-

ties, whom it cannot control, should have no bearing on the legal rights of its own members. If the government pays me off, that does not give me the authority to renounce my friend's right to a fair trial. What makes this any different?

What Next?

Congress clearly should respond to the Court's decision, but how? The easiest, and most likely, response would be to accept the status quo, but that course should be resisted. No one knows what the status quo is in presidential races, while the post-*Buckley* status quo in congressional races clearly could be improved. As long as the legal issues remain unsettled, it may be possible to assemble a coalition of people who would prefer different court results but who agree that the growing importance of independent expenditures must be checked. Once the court decides, half of that potential coalition will lose its incentive to act.

A second approach, preferred by some conservative Republican senators, paradoxically accepts the view that unlimited independent spending makes a mockery of the law's other contribution and spending limits. So they would simply do away with the other limits, and leave nothing but the law's requirements for public disclosure of contributions and spending by candidates and political committees. This would probably succeed in weakening the independent groups by making other sources of money proportionately more important. The problem is that disclosure cannot serve its intended purpose if left to itself.

It is true that disclosure is the linchpin of the campaign finance law. The purpose of the law is to help reduce the appearance of corruption that exists when people who have business before the government give large amounts of money to candidates who may be in a position to influence how that business turns out. Six and seven figure contributions, delivered in cash neatly wrapped in suitcases, hardly inspired public confidence in the election process that existed before the 1970s. Neither did the ridiculous legal subterfuges practiced under the old Corrupt Practices Act, which limited how much a person could contribute to a political committee, but allowed candidates to form unlimited numbers of committees with completely uninformative do-good sounding names. The disclosure provisions of the 1971 and 1974 acts did away with much of this. So did the provision permitting corporations to form PACs, which transformed corporate participation from a surreptitious and occasionally sleazy activity to an open and much healthier form of political engagement.

No one today, after ten years of experience, will deny the utility of disclosure. And I, for one, agree that its success should lead to some loosening of the limits. Specifically, there is no reason not to let a few early donors give large seed money contributions. Raising seed money is a real problem for new candidates: half of all House challengers who gained only 40 percent of the vote or less in 1980 raised less than $25,000. In addition, seed money comes early enough to let the public react and too early to attract purely opportunistic givers.

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Still, disclosure by itself, without limits, is not enough. To rely only on disclosure means to rely on the voters' judgments about the potential future policy relationships between contributors and candidates. This assumes that the voter (1) learns about contributions in time to react to them, (2) knows or can learn something about the policy interests of major contributors, (3) has or can form an opinion of his own about the policies in question, and (4) is willing to let his vote be determined by those issues. These assumptions cannot possibly work in a campaign's closing weeks—or afterwards, when candidates retire their debts. But even in mid-campaign, the assumptions contradict everything we know about the level of voter information and the role of issues in a campaign. As David Adamany has argued, the economy and defense may be voting issues, but who gets what contract is not—particularly not when the number of potential contractors bearing gifts reaches thousands. Relying solely on disclosure at the end of a heated campaign would be asking voters to be like that viewer

who was told to count the number of scanning lines on a TV screen. He could do it, but only by losing sight of the picture.

The third possible approach to independent expenditures is to find something short of an outright ban that would have the same effect. That is the approach Common Cause took in testimony before the Senate Committee on Rules and Administration last November: it asked Congress to require radio and television stations to provide *free* equal time to candidates attacked in negative independent advertising. Since the proposal would have about the same practical effect as an outright ban, it deserves the same opposition. I happen to think the political climate benefits from robust political debate, so I would not want to see the First Amendment circumvented by a cute parlor trick.

The fourth approach, suggested by Republican National Committee chairman Richard Richards, would involve dilution by addition instead of subtraction. Richards asks that the national parties be given the same right as independent groups to spend unlimited amounts on behalf of their candidates. This proposal would do the job. The parties clearly have the potential, with the shackles off, to outstrip the potential growth of independent spending groups. But the proposal would have some negative effects as well—both for Democrats, who are in a position to block its passage, and for the broad structure of government. Fortunately, there is an alternative that would capture the benefits of Richards's plan without its costs.

Building Up the Parties

When the public funding provisions of the 1974 law were enacted, many political commentators said they would hurt parties. While that prediction might have come true with full public funding of congressional campaigns, it clearly has not under the present law. If anything, the law has helped the parties indirectly by making it impossible for individuals to contribute to the party's most visible personal symbol, its presidential nominee, and by giving that nominee strong incentives to raise funds for the party. (The indirect help this gives parties would lead me to disagree with proposals made by Herbert Alexander and David Adamany to permit private contributions to publicly funded presidential candidates in the general election.)

For the most part, the law has neither helped nor hurt the parties; it has simply stayed out of the way. In the years since Watergate, and especially during the 1977–81 chairmanship of Bill Brock, the Republican National Committee moved decisively into direct-mail fundraising, providing sophisticated low-cost technical service for its candidates. The effects of this program have been fully described elsewhere and need not be repeated. Suffice it to say that the three major Republican national committees (the RNC and the Senate and House campaign committees) raised $111 million in 1979–80, mostly from small donors. Their Democratic counterparts, relying on more traditional fund-raising methods and large contributions, raised only $19 million. In 1981, the Democrats began trying to copy Republican tactics —building up a mailing list and plowing all of the initial receipts back into more mailings. But it may take years for the Democrats to catch up with the GOP's six-year head start.

Until the two parties are closer to fundraising parity, Richards's proposal would have little chance in Congress. Maybe that is just as well. The idea has at least two other sets of far-reaching implications that need careful assessment and thought. First, unlimited spending would give the national committees enormous power over congressional candidates. For the party in control of the White House, that could mean a decisive shift in power between the presidency and Congress. Even for the out-party, the plan would be likely to strengthen the national party over already weak state and local forces.

The second major institutional effect would be to strengthen the hands of campaign technocrats employing economies of scale that make them the prototypical national party staffers of the future. As long as intelligent people are left free to choose, they will naturally spend their money in the most efficient way possible. For candidates, the most efficient expenditures are those that reach the greatest number of potential voters at the lowest unit cost. In the heat of a campaign that covers the whole nation or even a large state, that means media advertising and professionally run registration and get-out-the-vote drives. It emphatically does *not* mean

personalized campaigning, except to get free media coverage, and it does not mean using inefficient grass-roots volunteers to build up an ongoing post-election day organization. The national party committees may have an incentive to create a volunteer network, but that incentive cannot be expected to outweigh the pressures a presidential candidate would bring to bear in an unregulated environment.

If the health of the political community as a whole is taken into account, as it should be, regulations are needed to make candidates do what they otherwise would not. No candidate will voluntarily behave inefficiently, and thus weaken his competitive position in an unregulated environment, to improve the long-range health of the political community; but regulations promoting inefficient behavior can leave the candidates on an equal footing, satisfying their own needs and the country's simultaneously.

Strengthening the Grass Roots

The way to begin would be with a provision already in place. In 1979, Congress passed an amendment to the campaign laws, at the urging of both major party national chairmen, permitting state and local parties to spend unlimited amounts on registration and get-out-the-vote drives to help presidential candidates. The regulations limited the exemption to phone banks and other activities that use volunteers, although professionals were allowed to act as supervisors. The same amendments lifted the limits for state and local parties that printed, and used volunteers to distribute, campaign materials for congressional as well as presidential candidates. Under these two new exemptions, Herbert Alexander estimates that Republican state and local committees were able in 1980 to spend some $15 million on Reagan's behalf, using at least 800,000 volunteers, about half of whom were estimated by RNC officials to be engaged in their first campaign activity. The Democrats, less successful than the Republicans, spent an estimated $4 million on these activities—a ratio that was somewhat better than their overall 6 to 1 party fund-raising disadvantage.

If Congress wants to counter the growing impact of independent expenditures, it should simply extend the current exemptions for state and local parties in presidential elections to campaigns for the Senate and House. Such an extension would help the parties across the board. By giving parties an incentive to use grass-roots volunteer networks every two years, instead of every four, the procedure could quickly become an ongoing activity, instead of a sporadic one that depends on presidential personalities.

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This proposal would answer all three sets of objections to the Richards plan. First, it does not play partisan favorites. Democrats, with their ties to the Communications Workers of America, should be able to match the Republicans' use of phone banks without much difficulty. Second, by relying on state and local organizations, the technique would build up the party where it is weak, without excessively shifting the balance of governmental power toward the presidential end of Pennsylvania Avenue. Third, and most important, the technique gives parties and voters a reason for becoming actively engaged with each other. Without it, the direct relationship between candidates or parties, on one side, and voters, on the other, has become essentially passive. That is precisely why single issue groups and other private volunteer organizations have become so important. Their supporters may be in a minority, but they are minorities that care. To counter that requires rebuilding the most important mediating structure the country's politics has ever seen, the political party. Rebuilding the parties as mass organizations, and not simply as a central headquarters for technical services, means making citizens care about them too. That requires a lot more than any changes in campaign laws or other formal rules can do by themselves. Encouraging local volunteer activities would be a good way to start. ■