April 4, 1983

PACs, THE TAXPAYER, AND CAMPAIGN FINANCE REFORM

INTRODUCTION

When Walter Mondale formally announced on February 21, 1983, his candidacy for the Democratic nomination for the office of President of the United States, he promised that he would refuse to accept political action committee (PAC) contributions for his campaign. At the same time, he pledged his support for proposals that would extend government financing to all federal elections.

Similar positions taken by Senator Gary Hart and others seem to be the latest response to the steady drumbeat, by groups such as Common Cause and by the media throughout the 1982 elections, against PACs and their alleged pernicious effects on the electoral process. The claim is that corporate, trade association, and other "special interest" PACs allegedly "buy" the votes of congressmen with contributions for their increasingly expensive campaigns, and that this erodes the confidence of the public in their elected officials.

Special criticism is heaped against those PACs that engage in independent expenditures because such efforts allegedly exploit the "loopholes" in the election law's strict limits on campaign contributions and are made by groups that critics claim are unaccountable to the political system. The solution prescribed for these "problems" is to eliminate or sharply curtail PAC contributions and independent expenditures, and to substitute public financing for congressional and senatorial elections similar to that provided for presidential elections. These election "reforms," embodied in one form or another in legislative proposals introduced in the last Congress, are now being reintroduced in the 98th Congress. Hearings were held before the Senate Rules Committee in late January, and more are expected before that Committee and the House Administration Committee as well later this spring.

The trouble is that the "reform" proposals largely ignore (1) that PACs in fact play a relatively minor role in financing federal elections; (2) that the source of PAC money is many individuals who share common beliefs and voluntarily pool small contributions; (3) that PAC contributions are fully disclosed under the current law so that voters can determine for themselves whether their elected leaders are voting in the constituents', or some "special," interest; (4) that the so-called loophole exploited by independent expenditures is nothing less than the First Amendment right of free speech and association; (5) that the great majority of the American public opposes taxpayer financing of elections; and (6) that more regulation will only increase the power of the Federal Election Commission, a bureaucracy that has consistently trampled upon basic rights and freedoms, the latest example of which, discussed briefly herein, are proposed FEC regulations sent to Congress for its consideration on March 1, 1983, which, if not vetoed, would seriously limit the rights of corporations and expand those of unions.

It might well be healthier for the electoral process and more in the public interest not to curtail PACs and private contributions. Instead, the political process should be opened further to encourage more direct citizen involvement in democracy's fundamental function: the selection of its leaders.

HISTORY OF CAMPAIGN FINANCE REGULATION

The Tillman Act of 1907 was the first such regulatory law to be enacted. It prohibited national banks and corporations from making money contributions in connection with federal elections. The primary reason for this was the notion that boards of directors should not use stockholders' money for political contributions. In addition, there was concern that large amounts of money would have an undue influence, not on the candidates, but rather on the electorate in choosing its leaders.[1]

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[1] President Theodore Roosevelt in his 1905 annual message recognized that "in political campaigns in a country as large and populous as ours it is inevitable that there should be much expense of an entirely legitimate kind. This, of course, means that money contributions, and some of them of large size must be made...." 40 Cong. Rec. 96 (1905). The following year President Roosevelt further advocated "let individuals contribute as they desire...." 41 Cong. Rec. 22 (1906). In 1907, President Roosevelt proposed what he considered a "very radical" concept of public financing--one that provided monies only to the major national parties, while still permitting individual contributions to candidates. The reason stated for such public financing did not appear to be in response to any issue of corruption, but merely to be an expedient solution to the problem of the major parties raising large amounts of contributions. 42 Cong. Rec. 78 (1907). This reason of "expediency" for public financing as well as others are analyzed and refuted later in this paper. For an excellent historical and constitutional analysis of the legislation regulating campaign finance, see Bolton, "Constitutional Limitations on Restricting Corporate and Union Political Speech," 22 Arizona Law Review 373 (1980).

In 1910, Congress passed the first law requiring political committees to disclose contributions and disbursements, but much of it was ruled unconstitutional by the Supreme Court in 1921. Four years later, Congress enacted the Federal Corrupt Practices Act, which continued the prohibition of money contributions on the part of corporations and further barred their making contributions of "anything of value" or "in-kind" contributions.

In 1940, the Hatch Act, which banned overt partisan involvement by most federal employees, was modified to prohibit any political committee from raising or spending more than $3 million dollars. Individuals and political committees could give no more than $5,000 to any candidate or political committee. There was no limit on the aggregate amount of money that could be given by individuals or groups to various committees, which could then direct those sums to the same candidate. There were limited provisons for disclosure of contributions and independent expenditures.

As part of the Smith-Connally Act of 1943, Congress extended the coverage of the Corrupt Practices Act to labor unions, who were thereby prohibited from making any political contributions. The debate surrounding this measure reveals that Congress for the first time had begun to address the regulation of the political participation of other interest groups in addition to corporations.

In 1947, the Taft-Hartley Act amended the Corrupt Practices Act to prohibit labor unions' use of union treasury funds for expenditures, whether those expenditures were independent or not. Subsequent court decisions, however, limited the extent of this prohibition.

In 1971, Congress enacted the Federal Election Campaign Act, which limited the amount candidates for federal office could spend on media promotions; limited the amount they could contribute to their own campaigns; required fuller disclosure of receipts and expenditures; and established a public financing mechanism to fund future presidential elections. There were no limits on contributions to individual candidates.

As part of its "post-Watergate" reforms, Congress amended the law in 1974 and imposed for the first time strict contribution limits and detailed recordkeeping and reporting requirements. It also established the Federal Election Commission as an independent regulatory agency to administer and enforce the law, with the authority to promulgate regulations, issue advisory opinions, conduct audits, and file civil lawsuits. The 1974 law retained the prohibition of corporate and union contributions and expenditures, but, apparently to accommodate prior court decisions, provided that a corporation or union may establish a "separate segregated fund" consisting of voluntary contributions from employees and union members. This "separate segregated fund" has become the well-known PAC (political action committee). Another category of political action committees includes those that are

not sponsored by a parent organization but are independently organized. These PACs are known as the "ideological" or independent PACs, and their funds are contributed to candidates.[2]

Under the 1974 law, individuals were limited to contributing no more than $1,000 per candidate per election, with an annual overall aggregate limit of $25,000 for all political contributions. Multi-candidate committees, i.e., political action committees, could contribute up to $5,000 to a candidate although there was no overall aggregate limit of the amount that a PAC could give. Independent expenditures were limited to $1,000 dollars, and candidates were limited as to the amount of money they could spend for their own campaigns.

After a coalition of liberals and conservatives filed a lawsuit challenging the 1974 amendments, the Supreme Court in Buckley v. Valeo struck down, as a violation of the First Amendment, any limits on independent expenditures and on the amounts a candidate can use of his own money to promote his own campaign. The Court also ruled that the Federal Election Commission as constituted violated the constitutional system of appointing officers of the United States. The Supreme Court did uphold, however, the contribution limits and disclosure provisions of the Act but only after carefully balancing the constitutional rights of individuals to participate in a campaign with the power of Congress to regulate elections. The Court also upheld the Presidential public financing scheme and the limits on expenditures of those presidential candidates who accepted public funding. The case did not raise, nor did the Court address, any of the issues relating to restrictions on corporate political activity.

Congress responded in 1976 to the Buckley decision by reconstituting the FEC and recodifying those provisions of the 1974 law left intact by the Supreme Court:

- Individuals could contribute only $1,000 to a candidate per election; $5,000 to a political committee; and $20,000 to the national committee of a political party, so long as the annual aggregate of all political contributions did not exceed $25,000.

- Multi-candidate committees (PACs) could contribute only $5,000 per candidate per election, with no overall aggregate limit. Affiliated committees were deemed to be a single committee for purposes of applying the contribution limits.

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2 Corporations and unions were permitted to use funds from their treasuries to defray administrative expenses of their political committee, thereby undercutting to some extent the notion in 1907 that corporate directors should not use stockholders' money for political uses.

o Political party committees were given higher contribution and expenditure limits based on various formulas.

In its 1976 action, Congress further restricted the ability of corporate and labor political action committees to solicit contributions by limiting the class of persons who could be solicited. But on March 1, 1983, the Federal Election Commission issued proposed amendments to their regulations that would, among other things, greatly expand the permissible class of persons unions may solicit to include not only their own union members, but also the union's executive and administrative personnel and their families, many of whom are members of another union or no union at all. Such a proposed change in favor of the unions is clearly contrary to the current law which limits solicitations only to the union's own members. At the same time, the proposed regulations would sharply limit the rights of corporations to engage in activity that heretofore was thought to be permitted by the First Amendment.

Unless vetoed by either House of Congress within 30 legislative days, i.e. mid- to late April, the proposed FEC regulations would:

o Make it illegal for a corporation to invite a Congressman who is a candidate to visit the factory or plant and meet with company officials and employees or attend a company picnic or function unless the company offers "the same opportunity" to all other candidates for the seat held by that Congressman. The rule could be triggered even if the Congressman is primarily invited to attend for reasons relating to his legislative capacity. This absurd and constitutionally defective rule is akin to the Federal Communication Commission's "equal time" rules that are fraught with regulatory and bureaucratic dangers. Should the Socialist Worker's Party candidate invoke his right to the "same opportunity" to appear, does that mean the company must hold another company picnic or convention, or conduct the same plant tour as the Congressman had, meeting the same people, and for the same length of time? Yes, according to the reading of the proposed regulation.

o Make it illegal for a corporation to have a representative of a political party, such as a county chairman, to "meet employees" of the company unless "the same opportunity" is given to representatives of all other political parties, even those fringe political parties who do not have candidates on any ballot, as long as they "are actively engaged in placing" a candidate on a ballot in some state.

o Make it illegal for any employee--executive or rank and file--to "support or oppose any candidate, group of

candidates or political party" before, during, or after i.e. "in conjunction with," the Congressman/candidate's appearance at the company. Mere applause for the speaker could be considered showing "support."

o Make it illegal for corporations to publish views expressed by candidates on issues unless "equal time" is given to all candidates, and the questions posed to the candidates pass FEC censors to insure that the "wording of the questions presented does not suggest... any position on the issues covered." For example, a defense contractor would probably not be allowed to ask the candidate whether he favored building the B-1 bomber.

o Allow for unions to engage in "nonpartisan," get-out-the-vote" drives, including donating compulsory dues monies to nonprofit groups such as Planned Parenthood to conduct voter registration drives. Ostensibly, corporations are given the same right, but experience clearly shows that such regulations will benefit organized labor and activist organizations. Indeed, the Commission expressly stated in its alleged "justification" for these regulations, that the proposed rule allowing nonprofit corporations to conduct voter registration was designed to codify an earlier FEC ruling given to Planned Parenthood of New York City allowing them to register their patients and families. Even that ruling had forced a dissenting Democrat Commissioner to label it "specious ratiocination."

o For the first time, the meaning of "corporation" first used in the 1907 law referring to large economic entities, will be expanded in these rules to encompass any entity that is technically incorporated, that is, "corporations without capital stock" such as nonprofit organizations. Thus, a presidential or other candidate could not speak to or meet students at a University, or members of a church, without triggering all the labyrinthian rules applicable to business corporations, such as "equal time" and the like.

These proposed regulations clearly demonstrate all that is wrong with the FEC controlling political activity. To the extent that these proposed changes are intended to incorporate earlier FEC advisory opinions and rulings, that in itself is an admission by the FEC that those rulings were illegal since the law expressly forbids the FEC to issue opinions without first proposing them to Congress as regulations. In other words, the FEC is engaging in a post hoc justification for their misguided rulings. Thus, there are ample procedural and substantive reasons why Congress would do well in vetoing the proposed rules.

PACS: THE MYTHS AND REALITIES

Despite the attention they receive, PACs play a relatively minor role in campaign finance or in influencing legislation. Examples:

- Of the approximately $300 million raised by candidates in the 1981-1982 election cycle, all PACs--labor, corporate, trade/membership, and ideological--accounted for less than 27 percent.

- Corporate PAC contributions accounted for less than 10 percent of candidate receipts for the 1982 election.

- Of the 3,371 PACs registered with the FEC as of December 31, 1982, approximately 700 raised and spent no money; 50 percent of all PACs raised and spent less than $10,000 during 1981-1982.

- The average corporate PAC contribution is approximately $500 which is only 0.04 percent of the average cost of a successful Senate campaign and 0.25 percent of the cost of a House campaign.

- Less than .06 percent (6/10,000) of all corporations have PACs.

- The average contribution to a PAC is $10-$20.[3]

Rather than representing a monolithic force as is sometimes charged, PACs reflect the multitude and variety of interests that compose a democratic and pluralistic society from agriculture, building trades, environment to education, energy, defense. Through PACs, Americans can exercise their constitutional rights of freedom of association and speech. There are conservative PACs and liberal PACs. There are PACs that favor abortion and those in opposition. The list goes on and on. So varied and diffuse is PAC power that PAC influence seems marginal.

In Senator Dave Durenberger's (R-Minn.) 1982 race, for example, all PAC contributions together comprised approximately 25 percent of the funds for his $4 million campaign, but the average PAC contribution amounted to only 3/100 of 1 percent of his total campaign expenditures. As he told the Senate Rules Committee this past January:

> Under no circumstances could these legally limited contributions be deemed significant enough to make any Senator "beholden" to the contributor, or for that

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3 The average contribution to three of the largest PACs is as follows: American Medical Association PAC--$30; Fund for a Conservative Majority--less than $25; Realtors PAC--$12.33.

matter, any more thankful to the PAC than to any of the 34,200 individual contributors who also supported the campaign.

Nor do I believe there is a qualitative difference between PAC contributions and individual donations. PAC funds come from individual large numbers of individuals who contribute to their political action committees. I do not understand why a $1,500 contribution from the ACME PAC can be deemed pernicious, while a contribution of equal size from the President of ACME or several of its stockholders is not.

It is no wonder that, of the hundreds of votes cast in Committees and Congress, critics can point only to a couple of examples that indicate a hint of PAC money influence.

The favorite case study purportedly showing vote buying that is often cited by Common Cause, an advocacy organization critical of PACs, is the action of Congress last year that killed a proposed Federal Trade Commission rule that would have required used car dealers to disclose to purchasers known defects in a car. The proposed FTC rule was so vague that even lawyers had to guess at its meaning. Violators were to be subject to fines of up to $10,000, even if the dealer honestly did not recognize the so-called defect, or even if the buyer already knew of the undisclosed defect before purchasing the car.

The rule was to be applied only to used car dealers. This would have discriminated against them, for they constitute only half of the re-sale market in used cars, and would have given private sellers a built-in competitive advantage. Used car dealers would be forced to pass the costs of this regulation on to the consumer. This vague and costly rule, moreover, was proposed at a time when car dealers were suffering a business slump. It is not surprising that it was defeated by a House vote of 286-133.

Common Cause and Ralph Nader's Congress Watch have tried to demonstrate that this rule was defeated not on its merits, or lack thereof, but because of the alleged influence of contributions from the automobile dealers' PAC to the Congressmen who defeated the bill. But even their own figures show that 52 of the Congressmen who voted to kill the rule received no money from the dealers' PAC, and that 41 who did receive the PAC money voted to save the rule. The correlation between votes cast and money received fails utterly to make a case for causation.[4]

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[4] Paul H. Rubin and James B. Kau, professors of economics at Baruch College and the University of Georgia respectively, have been professionally examining the correlation between votes and contributions for a number of years using sophisticated econometric models and have concluded that "the

It is difficult to understand why direct PAC contributions to candidates are widely criticized, yet a PAC's soliciting and forwarding to the candidate "earmarked" contributions from the public are not. For example, the Council for a Livable World (CLW), a PAC larger than 99 percent of all other PACs, regularly solicits its supporters to send in contributions payable directly to suggested liberal candidates who support reduced defense spending and the nuclear freeze. CLW then forwards those contributions to the candidates. In this manner, CLW was able to contribute, for example, at least $23,200 to Senator Paul Sarbanes (D-Md.), $23,900 to Senator Howard Metzenbaum (D-Ohio), and $26,500 to Congresswoman Millicent Fenwick (R-N.J.) in 1982. If this "earmarking" procedure is regarded as beneficial as it certainly must be because the PAC acts as a catalyst to citizen involvement in the political process, then it is no different from other PACs, all of whom serve that precise function, regardless of whether contributions are earmarked or not.

If the critics of PACs are truly concerned about election financing reform, they should focus on the abuses like unaccounted expenditure by labor leaders of hundreds of millions of dollars out of compulsory union dues for "in-kind" and unreported political support as telephone banks, canvassing, and the like, in addition to the support costs of the union PACs. No union member or any other American should be forced to subsidize political beliefs they object to. A recent lawsuit in Maryland against the Communication Workers of America revealed that almost 80 percent of a worker's compulsory dues were used for the political activities of the union.[5] A proposal by Congressman William Dickinson (R-Ala.) and Senator Jesse Helms (R-N.C.) would correct this problem and protect individual rights by ensuring that political activity is funded voluntarily.

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fear of business PACs is overestimated." Their research and evidence found that ideology is a strong motivating factor that explains voting. Thus, PACs, just like individuals, make contributions to incumbents and challengers to support those candidates whose basic philosophy on government, economics, and other issues is already in concert with the supporters of the PAC.

5 The amount expended by corporations from their treasuries for political activity is but a small fraction of that spent by labor unions. And in response to those who argue that the union's use of compulsory dues for political purposes is no different than a corporation's use of stockholder's money, Justice Brennan of the Supreme Court accurately observed: "[W]hile a stockholder acquires his stock voluntarily and is free to dispose of it, union membership and the payment of union dues is often involuntary because of union security and check-off provisions....It is therefore arguable that the federal interest in the relationship between members and their unions is much greater than the parallel interest in the relationship between stockholders and state-created corporations." Cort vs. Ash, 422 U.S. 66, 81, n.13 (1975).

HOW THE FEC ENFORCES THE LAW

The Federal Election Commission has added to the problems and confusion of campaign financing by selected overzealousness in enforcing complicated and vague laws. A number of FEC actions make this point:

FEC v. CLITRIM

The FEC spotted what it regarded as a violation of the election laws in New Jersey and New York where citizens' groups had spent $135.00 circulating handbills describing the voting records of incumbents on tax and spending issues. The FEC spent over $50,000 prosecuting this group. After several years of litigation, the entire panel of the U.S. Court of Appeals for the Second Circuit dismissed the case, with Chief Judge Kaufman observing:

> [T]he insensitivity to First Amendment values displayed by the Federal Election Commission (FEC) in proceeding against these defendants compels me to add a few words about what I perceive to be the disturbing legacy of the Federal Election Campaign Act (FECA), 2 U.S.C. §§431, et seq.
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> I find this episode somewhat perverse. It is disturbing because citizens of this nation should not be required to account to this court for engaging in debate of political issues.
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> Our decision today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility.

FEC v. Reader's Digest and The Pink Sheet

In two separate 1981 lawsuits, the FEC attacked the Reader's Digest and The Pink Sheet on the Left, a conservative newsletter published by Phillips Publishing, Inc. Their alleged offense was publishing statements critical of Senator Edward Kennedy (D-Mass.) during the 1980 election. In the case of the Pink Sheet, the FEC issued subpoenas and sought their enforcement in court demanding the names and addresses of all the editorial staff of the Phillips Publishing, Inc., as well as all its bank accounts. In both cases, it took federal courts to rein in the FEC. As in CLITRIM, tens of thousands of taxpayer dollars were spent on this assault against the First Amendment.

FEC v. Massachusetts Citizens for Life

The FEC has filed a federal suit against a pro-life citizens' group that distributed a brochure indicating various candidates' positions on abortion. This nonprofit group is incorporated as a not-for-profit corporation, as are most charitable, religious, and educational institutions and associations. The FEC claims that this citizens' group is violating the provisions of the law that prohibit corporate contributions and expenditures. This case clearly assaults the First Amendment rights of individuals as well as corporations, whether the corporation were concerned as here, with a social issue or whether in another context, it were concerned with economic issues.

Dozens of such questionable lawsuits have been brought. In addition, there are hundreds of cases where citizens or candidates have been forced to capitulate to FEC demands. Furthermore, these examples do not include the thousands of pages of confusing regulations and advisory opinions that the FEC has issued restricting the legitimate expression of views and other lawful political activity.

A rule that has caused the most regulation and confusion among corporations, trade associations, membership organizations, and unions alike sharply limits the class of persons that a corporation, membership, or union PAC can solicit for voluntary contributions and the method of such solicitations as well. Currently, they can solicit only their stockholders, executive employees, or members. And yet the law allows anyone else to contribute to those PACs so long as they are not solicited first.

The FEC thus clearly impedes the political process and serves no valid public interest other than as a repository of campaign reports. It should be abolished or its enforcement powers transferred to the Justice Department, which already has responsibility for enforcing laws on bribery and obstruction of justice. These laws were enacted to protect the integrity of the political process. They were the basis for the indictments and convictions of those involved in the Watergate and Abscam cases, the attempted bribery of former Senator Howard Cannon by a Teamsters' official, and the case of a feminist who tried to bribe an Illinois legislator to vote for the Equal Rights Amendment. What the U.S. does not need is an FEC law that makes criminals of citizens who engage in legitimate political activity.

THE CASE AGAINST TAXPAYER FINANCING OF ELECTIONS

Together, the 1976 and 1980 presidential elections cost the taxpayers approximately $175 million. Because of built-in cost-of-living increases in the public financing law, the Office of Management and Budget has estimated that approximately $140 million of the taxpayers' money will be given away for the 1984 election. Indeed, presidential aspirants for the 1984 election

already have begun to line up. Some want public financing extended to congressional and senatorial races. Yet such financing schemes do not serve the public interest well and should not be substituted for the current voluntary financing system.

Where does this money come from? Even before indicating his filing status, the American taxpayer is asked by the Internal Revenue Service on the individual income tax return whether he wants one dollar to go to the Presidential Election Campaign Fund.[6] The impression given is that only those taxpayers who earmark their dollar to the fund are paying for the system. In fact, the dollar "check-off" is merely an accounting mechanism for computing how much money is to be appropriated each year out of general treasury revenues for the presidential election campaigns thereby reducing receipts available for other budget items. Thus, all taxpayers bear the burden of funding the campaigns even of those candidates whom they may oppose. Only 28 percent of the taxpayers checked "yes" on their 1980 returns and 27 percent, in 1981. Over 70 percent of American taxpayers apparently do not approve this financing scheme. This amounts to a referendum that indicts the system and manifests the public's rejection of paying for elections out of the the U.S. Treasury. It is reason enough for abolishing rather than extending the public financing of elections.

Where does this money go? Under the current system, any candidate running in a presidential primary election, after meeting a minimum threshold of fundraising, can receive matching funds for each campaign contribution received, the matchable portion of which cannot exceed $250.00. Candidates of the major parties in the general election automatically receive complete and full public financing, approximately $30 million dollars each in 1980. The major national party committees are each given $4.4 million dollars to pay for the costs of their nominating conventions. Minor or new party candidates are eligible to receive a percentage of what the major parties receive. A variety of minor party and fringe candidates can qualify for this federal funding. Socialist, Communist, and Nazi Party candidates are all eligible and welcome to apply for and receive taxpayer funds if they meet the threshold requirements.

Should the American taxpayer be forced to pay for political campaign expenses? Clearly not, for it requires a taxpayer to

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6 The first line of IRS Form 1040 asks, "Do you want one dollar to go to this fund?....Checking 'yes' will not increase your tax or reduce your refund." A more informed request, however, should be cast in terms of something like, "Do you want over $100 million dollars of taxpayers' money to be given to political candidates and political parties not of your choice for their campaigns?....Checking 'no' may <u>decrease</u> your taxes next year." Such an inquiry could only engender a resounding negative response to public financing.

subsidize political beliefs that he or she may oppose. Experience shows that grass-roots efforts in the presidential general election have been substantially curtailed since candidates, as a condition for receiving full public funding, are prohibited from receiving any kind of private support. Moreover, public financing injects the federal government into the sensitive area of regulating the political and electoral process.[7] Rather than more public financing of partisan activity, the nation needs relaxation of such strict controls to allow more private voluntary contributions from persons, either as individuals, or together as political action committees.

"Public Financing Will Reduce the Influence of Private Contributions"

A principal reason advanced for government financing of elections is that such public funding would eliminate the alleged pernicious influence of private funds on the candidate.

A common feature of all the proposals is a system of matching funds. Under such a system no more than half of a candidate's campaign funds can be publicly financed. At least 50 per cent must come from voluntary private sources.[8] Since the current sources of private financing represent hundreds of various and often competing interests, rather than a monolithic force singular in purpose, what difference is there in the amount of influence that is allegedly "bought" by a $500 dollar private contribution (whether it be from an individual or a PAC) in a system that is completely private and voluntary, as opposed to that same $500 dollar private contribution given in a public financing matching system? If the $500 dollar private contribution in a private system is so pernicious, why is not that same $500 dollar contribution pernicious in the matching fund system. Indeed, if the degree of "perniciousness" is measured by the amount of money given, then a $500 contribution in a matching fund system is twice as pernicious since that $500 is really worth $1,000 to the

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7 For example, does public financing of a candidate who advocates prayer in schools or the advancement of religious principles, violate the Establishment Clause of the First Amendment? Could such a candidate purchase and distribute Bibles or other religious materials or literature with the public funds received? Are recipients of public funds for campaigns subject to the myriad of laws and regulations applicable to other "grant" recipients of public funds, such as affirmative action rules and the like? The possibilities of government interference in the electoral process are limitless.

8 Experience with public financing of presidential primary elections reveals that approximately two-thirds of the $95 million dollars spent for the presidential primaries in 1980 were from private sources and less than one-third came from Treasury matching funds.

candidate, on the basis of the matching portion from the Treasury funded by anonymous taxpayers.[9]

And even if PAC contributions were not matchable or were limited in an aggregate or percentage amount under some of these proposals, a $500 contribution, the average contribution given by a PAC today, would still be permitted. Further, nothing prevents the president of a corporation, union, or trade association from giving a personal and matchable contribution to the candidate. In fact, under any of the proposed matching financing systems, most candidates would still be able to receive roughly the same amount of PAC contributions that they receive under the current system, if not more.

Thus, if the advocates of public financing are truly concerned about eliminating what they claim are the abuses of private financing, they must disavow any concept of a mixed or matching system and advocate a full 100 percent system of public financing. Perhaps realizing this inherent inconsistency, Common Cause and other proponents of partial public financing argue that matching funds can "magnify the importance of small individual contributors." But this is precisely the function of PACs, which receive and collect many small contributions from individuals--at no cost to the public Treasury. To accept the argument that a matching fund system is good because it enhances the value of private contributions is to reject the concept of complete or full public financing because such a system flatly prohibits any kind of private contribution to the candidate. Advocates of taxpayer financing cannot have it both ways.

"Campaigns Cost Too Much"

Many advocates of public financing believe campaign costs are too high and should be limited. Yet public financing does not decrease the cost of a campaign. Television or newspaper advertisements cost the same whether they are paid for by taxpayers' funds or by private voluntary contributions. What proponents of public financing believe, however, is that overall limits on campaign spending can be imposed by legislation if the recipient decides to take public funds. The Supreme Court in Buckley v. Valeo so ruled with respect to limits on presidential campaigns that are publicly financed.

Whether the costs of individual campaigns are too high or not is a relative question, which hardly seems appropriate for consideration by the federal government. As an aggregate amount, the $300 million dollars spent on all 1982 federal elections may

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9 This is assuming that the $500 is fully matchable. Whatever the exact formula devised for matching, the principle is the same: a private contribution is worth more in a matching fund system than in a strictly private system.

seem high, but may be modest in comparison, for example, to the $600 million dollar annual advertising and public relations budget for Procter and Gamble. Surely, the promotion of views of candidates and the education of the electorate on political issues is at least as valuable as the promotion of the commercial products of one company. Even such supporters of public financing as the American Bar Association reject limiting the amount of campaign expenditures.

Will the imposition of spending limits on those who accept public financing lower the aggregate costs of campaigning? Review of the various matching fund proposals indicates that there would be little, if any, reduction. A wealthy candidate, such as Minnesota's Mark Dayton, who lost a costly bid for a Senate seat, could afford to forego public funds and spend his own money which cannot be constitutionally limited. Meantime, marginal candidates will be encouraged to line up for public funds. Accordingly, under a public financing scheme, the aggregate costs of campaigning could well increase rather than decrease.

"The Public Already Pays For the Cost of Elections"

In his opening statement during hearings held before the Senate Rules Committee on January 26, 1983 concerning campaign finance, Chairman Charles McC. Mathias (R-Md.) said:

> No one should be so naive or so foolish as to think that the public isn't already paying for this billion-dollar election.[10] If the money is contributed on behalf of some large economic interest, the odds are 100 to 1 that much of that contribution ends up, directly or indirectly, as a deductible expense. And if I am wrong about that, it is bound to end up as one of the overall costs of doing business which are passed along to consumers. So either as taxpayers or as consumers, the public pays that billion-dollar cost.

This observation is dead wrong. In the first place, PAC funds consist of voluntary contributions given by individuals. Corporations have been barred since 1907 from making contributions to campaigns. Therefore, a contribution made to the candidate by the PAC in no way is or can be considered a "deductible expense" to the PAC's sponsoring corporation under the tax laws. A PAC contribution simply is not a "cost item" to the corporation passed on to the consumer and no accountant would ever consider

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[10] Senator Mathias estimated that $1 billion was the total cost of the 1982 elections, counting $300 million for federal elections and approximately $600 million for state and local races.

it one.[11] Corporate PACs, moreover, account for only a small share of campaign receipts.

Nevertheless, there is some truth to what Senator Mathias says. The cost of elections is indeed paid for by the public, but it is a self-selected group who pay through voluntary donations to candidates, PACs, and party committees. Public financing would force a change from a voluntary to a compulsory system paid for by the taxpayers who have consistently and overwhelmingly rejected the notion.

"Soliciting Voluntary Contributions Is Demeaning"

Many of its proponents argue that public financing is needed because soliciting private voluntary contributions is "demeaning." Senator Mathias refers to fundraising as "the most demeaning part of the whole political process." Senator Thomas Eagleton (D-Mo.) stated that he found it to be a "degrading spectacle of elected representatives completing detailed questionnaires on their positions" on issues of great concern to various segments of our society.

Others disagree. And indeed America's Founding Fathers did not think it "demeaning" to solicit support for their cause or explain their position on issues. An elected official should explain publicly his positions on issues and seek moral and financial support for them. Those who consider it demeaning to solicit private voluntary contributions for their campaigns apparently have no qualms, however, about taking money from the taxpayers without even stating their position on important issues.

THE CASE FOR INDEPENDENT EXPENDITURES

The 1974 campaign law not only placed strict limits on contributions to candidates and committees and required full disclosure, but also sought to place a $1,000 limit on the amount that a person or group could spend for independent expenditures. Independent expenditures are simply communications, whether in the form of leaflets, television advertisements, or other media, which expressly advocate the election or defeat of a clearly identified candidate, and are made without the direction or control of the candidate to be supported. If the particular expenditure is not made independently, it is considered instead as an "in-kind" contribution to the candidate and subject to the regular contributions limits.

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11 Corporations are permitted to defray certain administrative costs of the PAC, but the Internal Revenue Service has disallowed the deductibility of this cost. Further, there are many PACs that defray most or all of their operating expenses with their voluntary PAC money rather than with corporate money.

In 1976, the Supreme Court in Buckley v. Valeo ruled that any limits on independent expenditures violated the First Amendment's guarantee of free speech and properly so. A government imposed limit on political spending is a government imposed limit on the amount of speech and communication. Whether such expenditures are viewed as "positive"--those supporting a candidate--or "negative"--those attacking or opposing a candidate--or whether in fact they harm or help the candidate is not the issue.

Although the Supreme Court has stated on many occasions that the First Amendment needs "breathing room," the Federal Election Commission and public financing champions such as Common Cause have been suffocating those rights. FEC regulations defining what expenditures can be considered "independent" are so vague and broad that they chill the legitimate expression of views. For example, assume that a citizen volunteers a weekend of his time to distribute leaflets for a campaign and is reimbursed ten dollars for expenses. Thereafter, the citizen has no further contact with the campaign, but subsequently decides to purchase a newspaper advertisement urging his fellow citizens to vote for the candidate. Under FEC regulations, 11 C. F. R. Section 109.1 (b)(4)(i)(B), the advertisement is presumed to be a coordinated and possibly illegal expenditure because the individual had at one time been reimbursed by the campaign. Such regulations stifle completely legitimate and lawful communications and activity between a campaign and the making of an independent expenditure. This is not the kind of environment that fosters free and robust debate on important issues.

Some campaign public financing advocates consider the use of independent expenditures as a "loophole" in the contribution limits of the law, because while contributions to a candidate are limited, independent expenditures intended to help that candidate are not subject to the limits. To accept this argument would be to regard the First Amendment as a loophole.

Another criticism is that those who make independent expenditures are unaccountable to the political process and free to level charges against candidates. Groups that make independent expenditures, however, are held very accountable by their supporters. If their efforts are unsuccessful, the support stops. And while it is true that those who make independent expenditures may be unaccountable to the candidate, political party, or the government, that is precisely how it becomes a genuinely independent expenditure.

Critics object to those independent expenditures that fund attacks on a candidate; these are, it is claimed, "negative" and thus should be eliminated from political dialogue. Such criticism suggests that the federal government somehow act as censor or regulator of the content of the communication--a notion wholly alien to the First Amendment.

In 1980, Common Cause and the Federal Election Commission filed suit in federal court against three organizations which

were making independent campaign expenditures in support of Ronald Reagan. The legal basis of the suit was a provision in the public financing laws that limited independent expenditures in presidential elections to $1,000. A parallel provision in the election laws had been struck down as unconstitutional by the Supreme Court in the Buckley decision. Nevertheless, Common Cause and the FEC were arguing in the new suit that, in the context of public financing, the government can restrict independent speech of private citizens. A special three-judge district court unanimously ruled in 1980 against Common Cause and the FEC, stating that the law was unconstitutional. Common Cause and the Federal Election Commission immediately appealed to the Supreme Court. Before the Supreme Court, Common Cause and its President Archibald Cox essentially argued that citizens have only limited rights of speech and association under the First Amendment. If Americans, however, exercise their rights by contributing to a large and professional organization, they pose a danger to the electoral system. But the three-judge district court had stated that the speech of a large political committee is the speech of the thousands of small contributors. Without writing any opinion, the Supreme Court ruled 4 to 4 on the appeal, thus affirming the lower court by an equally divided vote.

Undaunted, the FEC has announced recently that it will continue to monitor independent expenditures with respect to presidential campaigns, giving the impression that they view the Supreme Court decision as not definitive. The Federal Election Commission and perhaps Common Cause are thus expected to renew their assault on the First Amendment in a future lawsuit, unless Congress repeals the provision limiting independent expenditures to conform with current rulings by the Supreme Court and the First Amendment.

CONCLUSION

The attacks by Common Cause, much of the media, and other critics of voluntary campaign financing systems against PACs and independent expenditures are actually attacks on the constitutional rights of citizens representing a variety of social, economic, and political interests to form voluntary political associations and committees. The suggested alternative of forcing taxpayers to pay hundreds of millions of dollars to candidates with whom they disagree politically would further inject federal regulation and control over political activity. This already has been rejected overwhelmingly by the taxpayers.

While most agree that disclosure has been beneficial, the restrictions on contributions and soliciting contributions have caused unnecessary regulation, limiting candidates' access to much needed financing. Through a system of disclosure only, the public can be the judge of whether a candidate is beholden to a special interest if he received $5,000 from his mother, which is currently illegal, or $500 from a corporate PAC, which is legal.

Campaign financing laws indeed need reform--not to expand the government's role but to enhance that of individuals. The current $1,000 limit to a candidate, for instance, was set in 1975 and is now worth about half that amount. Many agree it should be substantially raised. The overall aggregate annual limit of $25,000 makes no sense; if a citizen does not corrupt the system by contributing $1,000 each to 25 candidates, he certainly does not corrupt the 26th candidate by also giving him a contribution. (PACs do not have a similar limit.)

Even if the avowed purpose of contribution limits to candidates is to prevent the emergence of corruption, there is no compelling governmental interest in limiting the amount a citizen wishes to give to a PAC. PACs do not run for office or vote on legislation, and they are already limited as to how much they can give a single candidate. The limit on contributions to PACs thus should be abolished.

Some critics would like to limit the overall aggregate contributions from all PACs to a single candidate. This appears to be constitutionally suspect, however, as well as incorrectly based on the assumption that PACs are a monolithic force rather than representative of many different interests. The limits suggested, moreover, are arbitrary and fail to take into account the needs of particular campaigns.

Any attempt to limit independent expenditures would be unconstitutional. Proposals that would give candidates free media time if allegedly attacked by an independent expenditure also raise a host of constitutional and regulatory problems. Is an expenditure that describes the candidate's voting record an attack? Is a message that says "Vote for Candidate X because he is a big spender" an attack? Such a rule would discourage rather than encourage independent expenditures and would thus limit their use to those wealthy PACs who could afford not only the "attack" but the follow-up "counterattack."

The campaign laws do indeed need reforming, but the current proposals are not in the public interest. Congress would better serve the voters by opening up the system rather than imposing further restrictions, which would only add another layer to the already confusing and overly complex set of rules that regulate the financing of campaigns.

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