

Statement of
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Chairman of the Center for Competitive Politics
And former FEC Chairman
Before the Hearing of the
Illinois Reform Commission
With Respect To
Campaign Finance

Springfield, IL

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Testimony to the Illinois Reform Commission:

Thank you, Chair Collins and members of the Commission for inviting to testify on campaign finance reform. My name is Brad Smith. I am Professor of Law and Capital University Law School in Columbus, Ohio, formerly Commissioner and Chairman of the Federal Election Commission, and currently Chairman of the Center for Competitive Politics, headquartered Alexandria, Virginia, and on whose behalf I appear today. The Center mission is to educate the public on the role of money in politics and to protect the First Amendment rights of speech, assembly, and petition. I congratulate Governor Quinn on taking steps to examine corruption in Illinois and I thank you for your time and civic commitment in serving.

INTRODUCTION

Reporting on the first public forum held by this Commission just last week, the Daily Herald led with the question, “Could public financing of political campaigns be the silver bullet that stops the legacy of corruption in Illinois?”

Let me suggest to you first that efforts to find a “silver bullet” are doomed to fail. There is no silver bullet available to slay public corruption. Public corruption has always been with us, and always will be. I hope that the members of Commission recognize that there will always be some corrupt politicians, and some corrupt members of the public hoping to gain from illegitimate government favors. Anyone who claims to have a silver bullet – whether they claim it will single handedly put an end to corruption, or whether they claim that no reform can work without adoption of their solution, is either lying to you or, at best, seriously in error.

This does not mean that nothing can be done to improve the political climate and reduce corruption in Illinois. But it does suggest that reforms should be enacted only after careful scrutiny, and that after weighing not only the alleged benefits, but the likely costs.

In particular, I would urge the Commission to be wary of those promoting one size fits all analysis and solutions. Two years ago, for example, the New York-based Brennan Center for Justice issued a report on Illinois campaign finance laws, funded by the Joyce Foundation. The Center’s conclusions were short and to the point: “Illinois [sic] campaign finance system is broken and badly in need of reform,” and called Illinois’s laws the worst in the region.¹

¹ Brennan Center for Justice, “Report Finds Illinois Campaign Finance Laws Worst in the Midwest,” Feb. 22, 2007, available at http://www.brennancenter.org/content/resource/report_finds_finds_illinois_campaign_finance_laws_worst_in_the_midwest.

Certainly a damning indictment, and one that would lead one to think that prompt, aggressive action is required. The report went on to recommend a policy of regulation including limits on contributions and government financing of campaigns.

Two months later, the Brennan Center issued a similar report for Minnesota, a state which has strict limits on contributions and government financing of campaigns. The report's conclusion: "Minnesota's campaign finance system is broken and badly in need of reform." It added that, "Minnesota's campaign finance system is lagging behind other states in the region." The Center went on to recommend more limits on contributions and more government financing of campaigns.² In between Illinois and Minnesota, the Brennan Center issued reports on Ohio, Michigan, and Wisconsin. On Ohio, which has contribution limits and limited state funding of parties, the Center concluded, "Ohio's [sic] campaign finance system is broken and badly in need of reform." In fact, according to the Center, Ohio "is lagging behind other states in the region." Surprisingly, the report recommended more restrictions on contributions and more government financing of campaigns.³ The Michigan report concluded that – you guessed it – "Michigan's [sic] campaign finance system is broken and badly in need of reform." Michigan has limits on contributions to candidates but not on contributions to parties, and also has a system for government funding of gubernatorial campaigns. Nevertheless, the report concluded that Michigan needs more limits on contributions and more government funding of campaigns.⁴ And the Wisconsin report? Well, it concluded that despite Wisconsin's contribution limits and a government funding system for legislative as well as executive campaigns, "Wisconsin's [sic] campaign finance system is broken and badly in need of reform." The Center also expressed its concern that Wisconsin is, "lagging behind other states in the region." And it called for more contribution limits and more government financing.⁵ Is there any state in the region that is not

² Brennan Center for Justice, "Report from NYU's Brennan Center Finds Minnesota's Campaign Finance Laws Lacking, Urges Reform," April 25, 2007, available at http://www.brennancenter.org/content/resource/report_from_nyus_brennan_center_finds_minnesotas_campaign_finance_laws_lack/.

³ Brennan Center for Justice, "Report from NYU's Brennan Center Finds Ohio Campaign Finance Laws among the Worst in the Midwest," March 19, 2007, available at http://www.brennancenter.org/content/resource/report_from_nyus_brennan_center_finds_ohio_campaign_finance_laws_among_the_/.

⁴ Brennan Center for Justice, "Report from NYU's Brennan Center Finds Michigan's Campaign Finance Laws Lacking, Urges Reforms," March 15, 2007, available at http://www.brennancenter.org/content/resource/report_from_nyus_brennan_center_finds_michigans_campaign_finance_laws_lack/.

⁵ Brennan Center for Justice, "Report from NYU's Brennan Center Finds Wisconsin's Campaign Finance Laws Lacking, Urges Reforms", Feb. 20, 2007, available at

“lagging behind the region,” or has the midwest truly become the Bizarro World version of Lake Wobegon, where all states are below average? These five states have campaign finance laws that differ in myriads of ways. Some have the government funded campaigns, others don’t. They allow different levels of contributions, or have no limits at all. They place different restrictions on who can contribute. They have different disclosure regimes. Is there no combination of laws that is not, “badly broken and in need of repair?”

I take this detour merely to point out that in your mission, you can expect to be besieged by self-styled “reform” organizations claiming to have carefully studied your state, and to have that “silver bullet” that will solve the problem. Often as not, these organizations base their proposals not on serious analysis of data, but on ideology and hope. My hope is that you will examine my claims, and theirs, carefully, and craft serious, realistic measures that will benefit Illinois. Many people will ask you to adopt what I call “reactionary” legislation. By that, I mean that these proposals are reactionary in the core sense of the word – they are “reacting” to a scandal with a proposal that often has nothing to do with the underlying events that gave rise to the scandal.

Because my personal experience with Illinois is limited, I cannot claim to know how to fix the problems in this state. My goal here today will be merely to provide a few words of caution and a brief overview of some of the academic literature on campaign finance reform that is so often ignored in these discussions, in the hopes that that will help you in crafting your recommendations.

PAY-TO-PLAY AND THE PROBLEM OF REACTIONARY CAMPAIGN FINANCE REGULATION

Illinois recently implemented so-called pay-to-play legislation, a type of campaign finance legislation which pro-regulatory groups have been touting recently as the solution to the problem of government contractors and lobbyists corrupting the political system.

This legislation shows why reactionary campaign finance legislation in response to a scandal or corruption is bad policy. The legislation targets campaign donors, infringing on their rights to free speech by restricting their ability to contribute to campaigns – at least if they want to continue to bid on state business. The law may reduce some incidents of corruption, but as the case of former Illinois Gov. Rod Blagojevich shows, it is usually public officials — not donors — who instigate such schemes of fraud and corruption, which are already illegal under state and federal laws for bribery, fraud and other violations.

http://www.brennancenter.org/content/resource/report_from_nyus_brennan_center_finds_wisconsin_campaign_finance_laws_lack/

When such legislation is enacted in shotgun blast style, it punishes people for exercising their First Amendment rights to involve themselves in campaigns by supporting the candidacies of those who share their beliefs. Campaign finance regulations are a false band-aid on the festering wound of public corruption. Illinois government has developed a reputation as a corrupt political system, and change will only come through the determination of honest legislators, a media fulfilling its role as a watchdog and voters who cease to tolerate corruption among elected officials.

Consider that in the most infamous case of 'pay-to-play' in the recent scandals in this state, former Governor Blagojevich allegedly shook down an official at an Illinois hospital for campaign contributions in exchange for state funds. The problem is that the hospital in question, like many other hospitals and businesses, most unions, professional associations, and others that receive government funds, are not considered state contractors under pay-to-play laws and the law doesn't apply to them. That is to say, pay-to-play laws would not have prevented the scheme Governor Blagojevich allegedly sought to pull off.

But it would punish honest government contractors who merely seek to participate in politics. Remember that making campaign contributions is, next to voting itself, the most common way that citizens get directly involved in elections and campaigns. Pay to play legislation uses a shotgun approach to penalize thousands of honest citizens so as to stop the occasional corrupt politician – if, unlike the hospital case, it would even apply to really stop them.

Additionally, the recent implementation of pay-to-play legislation in Illinois could cost the state millions of additional taxpayer dollars as the regulation punishes honest contractors stuck wading through the complicated rules to bid for transportation, IT, energy and other projects in Illinois' share of the recently passed \$787 billion "stimulus" bill. Under most pay-to-play laws, if a company official — or her husband — contributed to a state candidate for the 2008 election, and then the company applies for a contract stemming from the stimulus plan (most of the money is likely to be distributed through state and local governments), that company will be rejected even if it provides the lowest bid.

This is in fact what happened in New Jersey, where that state's pay-to-play law threw out the winning, lowest-cost bid from a road contractor who had contributed to his local county Republican party.

There's no magic bullet solution to stopping the age-old problem of government corruption. The best prevention measures are a system of transparent, merit-based state contracting, a vigilant public that doesn't tolerate a culture of corruption, a vibrant free press to expose wrongdoing, and a campaign finance system that allows for aggressive challenges to incumbents who abuse the

power of their offices. Pay-to-play laws provide a false solution to the problem of corruption and delay real reform.

Illinois has already made the mistake of passing pay-to-play legislation. Legislators shouldn't make the same mistake by passing contribution limits or enacting taxpayer financing of campaigns.

CONTRIBUTION LIMITS

Unfortunately, contribution limits tend to make it more difficult for challengers to raise funds to take on incumbents. Challengers have long been more reliant on large donations than incumbents, and higher overall campaign spending tends to benefit challengers more than incumbents.⁶ There are many reasons for this, but primarily it is due to two dynamics. First, incumbents usually begin with a significant advantage in name recognition. As such, their added spending buys them relatively little, at least as compared to the challenger. Secondly, incumbents, due to their name recognition and past campaigns, are more likely to have large numbers of contributors. Challengers historically must rely on a smaller number of donors. (By analogy, consider how a large, established company can raise dollars by a public stock offering to thousands of buyers, whereas a start up company in the same industry will typically rely on a handful of venture capitalists). By insulating incumbents from challenge, contribution limits can actually make it harder for voters to become aware of and root out corrupt politicians.

Forcing donors to abide by strict contribution limits or taxpayers to fund candidates who they disagree with is not a silver bullet to end corruption. The respected *Governing* magazine, a publication of Congressional Quarterly, in conjunction with the Pew Center on the States, periodically grades all 50 states on the quality of their management. In 2008, three states tied for the top ranking with grades of A-: Utah, Virginia, and Washington. Utah and Virginia were also at the top of the magazine's last prior ranking, in 2005, with grades of A-.

Washington has limits on the sizes of contributions, but it allows corporations and unions to contribute and has no taxpayer funding for political campaigns. More interestingly, Utah and Virginia have no limits on the size or source of contributions – corporations and unions, for example, can contribute unlimited sums to campaigns, subject only to public disclosure.

⁶ See Bradley A. Smith, "Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," 105 *Yale Law Journal* 1049, 1072-1075; 1081-1082 (1996).

Meanwhile, the two states that have embraced so-called “clean elections,” Arizona and Maine, fared poorly. Under these plans – now urged by some on Illinois, the government subsidizes campaigns. Participating candidates are not allowed to raise private funds (beyond a few small contributions that initially “qualify” them for the tax subsidy), and candidates who choose not to participate are subject to severe restrictions on their fundraising. But despite having adopted “clean elections” over a decade ago, these “clean election” states received, respectively, a B- (the national median, for Arizona) and a C (Maine). Moreover, both states’ grades have declined since 2005. In terms of government management, they are going the wrong way – “clean elections” and all.

I have attached to this testimony as Appendix I the ten best and least well managed states and a simple summary of their source and amount limits (if any) on contributions. You will see that five of the 10 best rated states for government management (including neighboring Indiana) permit unlimited individual contributions. Meanwhile, nine of the 10 least well governed states include limits on the size of campaign contributions.⁷ Illinois is the lone exception in that second group. But it is hard to argue that lack of limits is what has caused Illinois’s “culture of corruption.” The point is that there is no correlation, let alone evidence of causation, that strict campaign finance laws promote better government.

Recent research by the Center for Competitive Politics also shows no link between contribution limits and corruption. The three states with the lowest corruption rates as measured by the Department of Justice — Iowa, Oregon and Nebraska — have either no or very high contribution limits (\$44,500 in Nebraska).⁸

In fact, these findings are consistent with a great deal of political science research into the effects of campaign contributions on lawmaking. In 2002, Professor Stephen Ansolabehere, then at MIT and now at Harvard, together with John de Figueiredo and James M. Snyder, reviewed the nearly 40 studies appearing in peer-reviewed journals between 1976 and 2002 and found that, “in three out of four instances, campaign contributions had no statistically significant effects on legislation or had the wrong sign (suggesting that more contributions lead to less support).”⁹ The three political scientists then conducted their own research, and concluded,

⁷ One can find all of Governing’s state report cards at <http://www.governing.com/gpp/index.htm>. Note that changes in methodology make comparisons of pre-2005 reports with 2005 and 2008 reports unreliable.

⁸ Laura Renz, “Do Lower Contribution Limits Decrease Public Corruption?,” Jan., 2009 (Center for Competitive Politics), available at http://www.campaignfreedom.org/research/resID.110/research_detail.asp.

⁹ Stephen Ansolabehere, John de Figueiredo and James M. Snyder “Why is there so little money in politics,” 17 *Journal of Economic Perspectives* 105 (2003).

“Overall, our findings parallel that of the broader literature. Indicators of party, ideology, and district preferences account for most of the systematic variation in legislators' roll call voting behavior. Interest group contributions account for at most a small amount of the variation. In fact, after controlling adequately for legislator ideology, these contributions have no detectable effects on legislative behavior.”¹⁰

In summary, while campaign contributions can raise troubling issues of conflict of interest, they are simply not the problem that causes government corruption, particularly if by “corruption” we mean bribery and scandal of the type that has haunted Illinois politics. Again, Governor Blagojevich’s recent activities illustrate the point. The Governor apparently asked some people for campaign contributions in return for possible appointments to the U.S. Senate. But the governor still could have asked (and presumably would have) regardless of the size of contribution limits in Illinois. In fact, contribution limits make it harder to raise money, thus making it more likely than a promise of contributions could be used as a quid pro quo. But even more importantly, Blagojevich’s real demands allegedly were for lucrative jobs and board positions that would benefit he and his family directly, through funds that could go directly to their private accounts. No campaign finance limitation is going to change this. Similarly, recent scandals revolving around past governors have involved direct pecuniary reward to the actors involved.

There’s absolutely no evidence that contribution limits reduce corruption. I urge you to base any decisions on curbing First Amendment freedoms with campaign finance restrictions on evidence and not on visceral reactions to recent scandals.

GOVERNMENT FUNDING OF CAMPAIGNS

Finally, some are calling for taxpayer financing of political campaigns as a way to reform the political system in Illinois.

Draft public financing legislation follows the “clean elections” model that is in effect in Maine and Arizona. It would require candidates to obtain small donations to qualify for a lump sum from Illinois taxpayers. Candidates could continue raising small donations, receiving large matching grants from the state — as much as \$3 for every \$1 raised under arbitrary fundraising and spending limits. Lawmakers are also considering a provision known as a ‘rescue fund,’ whereby participants would receive more money from candidates who opt out of the system or spend their own money on races. However, these “rescue fund” provisions are of dubious constitutionality. United States Courts of Appeals have split on the issue, with the 8th Circuit

¹⁰ Id.

holding such a system is unconstitutional, but three circuits, the First, Fourth, and 6th, holding they are constitutional.¹¹ However, last year in *Davis v. Federal Election Commission*, the Supreme Court ruled a similar mechanism aiming to “equalize races” on the federal level was unconstitutional.¹² In the first post-*Davis* case, a federal judge in Arizona, relying on *Davis*, has held that the “rescue funds” provision of Arizona’s law is unconstitutional, although the judge has yet to issue a final order in the case.¹³

Supporters of public financing tout it as a way to sanitize politics from the nefarious aims of “special interests.” But one person’s “special interests” are another’s concerned citizens organized to petition their government. Advocates of “clean elections” have themselves spent millions trying to influence government policy and sway the public.

And such speech is constitutionally protected. “Clean elections” can’t curtail the influence of independent advocacy groups which finance political ads because such speech is clearly protected under the First Amendment.¹⁴ In short, all “clean elections” can do is channel money out of candidate campaigns and into independent groups organized under sections 527 and 501(c)(4) of the tax code. Thus tax-financed campaigns cannot end private influence in the political arena – thank goodness. What would be the point of elections – what would be the point of political activity – if private citizens could not exert influence on their government?

But what about “special interests?” In fact, in Maine and Arizona, organized interest groups continue to support their favored candidates by working to generate the qualifying donations that trigger the tax subsidies to the campaigns. This practice in Arizona is widespread enough that one recent news article notes that “Special interest groups routinely collect the necessary number of individual \$5 contributions to help candidates qualify for public funding.”¹⁵ Taxpayers then foot the bill for candidates, who are grateful for the financial backing, but also for the manpower — phone calls, door knocking, grunt work — that such groups provide.

¹¹ See *Day v. Holahan*, 34 F. 3d 1356 (8th Cir. 1994) (Unconstitutional); *North Carolina Right to Life v. Leake*, 524 F. 3d 427 (4th Cir. 2008) (constitutional); *Daggett v. Comm’n on Govt. Ethics*, 205 F. 3d 445 (1st Cir. 2000)(constitutional), and *Gable v. Patton*, 142 F. 3d 940 (6th Cir. 1998)(constitutional).

¹² *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008).

¹³ *McComish v. Brewer*, No. cv-08-1550-PHX-ROS, slip op. (D. Az., Oct. 17, 2008).

¹⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁵ “Clean Elections Institute loses national money stream, seeks donations,” Christian Palmer, *Arizona Capitol Times*, December 29 2008

New Jersey enacted a limited pilot version of “clean elections” in 2006. The Center for Competitive Politics surveyed donors to ‘clean’ candidates and found nearly half of all donors to ‘clean’ candidates were affiliated with organized interest groups, primarily from two government-employee unions, the National Rifle Association, Sierra Club, and the statewide pro-life and pro-choice groups.¹⁶

Despite this evidence, proponents still claim public financing will reduce the influence of special interests and point to the state of North Carolina’s ‘clean’ judicial campaigns as evidence of success. Yet in the 2006 North Carolina elections over \$250,000 of television ads touting three out of their four preferred candidates streamed into voters’ living rooms in the last week before the election. All three won thanks in part to the 527 group FairJudges.net, which receives funding from the Democratic Party, trial lawyers, unions and wealthy donors.

Evidence that so-called “clean elections” increases competition is at best mixed. A study by University of Wisconsin political scientists Kenneth Mayer and Timothy Werner have found some added competition, but no long term change in incumbent re-election rates.¹⁷ A study by the United State General Accounting Office found no competitive benefits.¹⁸ A 2007 experiment with taxpayer financing of campaigns in New Jersey’s failed to increase competitiveness. Every incumbent running for re-election won, and the victory margins by party actually increased in 6 of the 9 races.¹⁹

“Clean elections” programs have fallen short in other ways. Maine and Arizona have not found that taxpayer funding of political campaigns leads to a greater number of women and “ordinary citizens” being elected to office.²⁰ Business and law are generally considered “traditional”

¹⁶ Center for Competitive Politics, “Preliminary Findings Regarding New Jersey ‘Clean Elections’ Contributors,” Aug. 5, 2008, available at http://www.campaignfreedom.org/research/resID.96/research_detail.asp.

¹⁷ Kenneth R. Mayer, Timothy Werner, and Amanda Williams, “Do Public Funding Programs Enhance Electoral Competition?,” May 2004, available at <http://library.publiccampaign.org/research-pub/research/public-funding-programs-electoral-competition#>; Timothy Werner and Kenneth R. Mayer, “Public Election Financing, Competition, and Candidate Gender,” 40 PS: Political Science & Politics 661 (2007).

¹⁸ United States General Accounting Office, “Campaign Finance Reform: Early Experiences of Two States That Offer Full Public Funding for Political Candidates,” May 2003.

¹⁹ Center for Competitive Politics, “Appendix 5: Conclusions and Recommendations on New Jersey’s ‘Clean Elections’ Experiment,” May, 2008, available at http://www.campaignfreedom.org/research/resID.87/research_detail.asp.

²⁰ Laura Renz, “Do ‘Clean Elections’ Laws Increase Women in State Legislatures?,” Aug. 2008, Center for Competitive Politics, available at http://www.campaignfreedom.org/research/resID.99/research_detail.asp

occupations for state legislators. In both Arizona and Maine, the number of legislators from these “traditional” backgrounds has not declined since they adopted taxpayer funding of political campaigns. In both states, legislators identifying themselves as “homemakers” have almost entirely vanished while the number of women serving in the legislature has actually declined very slightly.²¹

It is sometimes said that by eliminating “special interest” influence, states will spend less, thanks to a reduction in boondoggles and special subsidies favoring contributors. Not so. In both Maine and Arizona, after a decade of “clean elections” state spending growth has gone from below the national average before “clean elections” to faster than the national average since “clean elections.”²² Meanwhile, “clean elections” have also not correlated with any reduction in the number of lobbyists.²³ Of course, many of these claims go beyond the anti-corruption rationale that is the primary interest of this Commission. Nonetheless, the failure of “clean elections” to meet these secondary goals that are often touted by their advocates is striking.

Most worrisome, taxpayer-funded political campaigns place caps on how much speech candidates can engage in, stifling free speech and limiting citizens’ voices from political debate while doing nothing to address the problems of real or perceived corruption and supposed undue influence by organized interest groups. Such campaigns aren’t “voter owned,” they’re government controlled. Illinois should reject this effort to limit political speech in the name of fighting corruption.

CONCLUSION

In conclusion, I would like to share with you a thought on why so many of the promises of campaign finance “reform” have failed to be realized. The core assumption of most “reform” is that the public at large all generally share identical perspectives and priorities on important public policy issues, and that absent the campaign contributions of narrow self-interested groups the government would be able to quickly and cleanly implement measures the whole of the general public supports and demands.

²¹ Laura Renz, “Legislator Occupations: Change or Status Quo After Clean Elections,” April, 2008, Center for Competitive Politics, available at http://www.campaignfreedom.org/research/resID.85/research_detail.asp.

²² Sean Parnell, “Do Taxpayer Funded Campaigns Actually Save Taxpayer Dollars?,” Sep. 2008, Center for Competitive Politics, available at http://www.campaignfreedom.org/research/resID.104/research_detail.asp

²³ Laura Renz and Sean Parnell, “Do Clean Elections Reduce Lobbyist and Special Interest Influence?,” March 2008, Center for Competitive Politics, available at http://www.campaignfreedom.org/research/resID.80/research_detail.asp.

As I mentioned previously, academic research does not support the charge that legislators vote their donors' interests, finding instead that they vote according to their constituent interests, ideology, and party affiliation.

But more than simply being incorrect, the charge is fundamentally anti-democratic. It requires you to believe the United States is a homogenous society, filled with citizens who all share roughly identical ideologies and interests, and that there is no real, honest disagreement among citizens about what constitutes good public policy.

This, obviously, is not the case, as can be seen by the fact that we are well into our third century of competitive politics with two major political parties and several smaller ones, all made up of citizens who strongly differ from one another on basic questions of what government should and should not be doing, and exactly how it should or should not be doing those things. This is the nature of political freedom, and to suggest that much of government action is determined by campaign contributions rather than the best efforts of elected officials is to ignore this reality.

The solutions to curbing corruption can't be legislated. The best ones are just common sense: enforcing bribery laws, providing transparency and merit-bidding in government contracting, making it easier, not harder, to unseat corrupt incumbents, and encouraging a vigilant press and an engaged citizenry that doesn't tolerate corruption.

I hope the information and perspective I've given today is useful to you as you consider reforming ethics and campaign finance regulations in Illinois. I will be happy to answer any questions, or provide further information at your convenience.