Political Money: The New Prohibition

Annelise Anderson

This article first appeared in the Essays in Public Policy series published by the Hoover Institution, Stanford University, in 1997. In *Political Money: The New Prohibition* I address whether or not we are spending too much on political campaigns and whether either expenditure limits or contribution limits are desirable or effective in accomplishing the purposes they supposedly serve. Rather than increase limits on spending and contributions, I recommend abolishing them but strengthening campaign finance reporting requirements and the speed with which data are made available to the public.

EXECUTIVE SUMMARY

Our system of campaign financing fosters subterfuge and corruption, favors wealthy candidates over those not so blessed, puts candidates on a perpetual fund-raising treadmill, and is slanted in favor of incumbents over challengers.

These problems are the direct result of the 1974 Federal Election Campaign Act. Although the Supreme Court has struck down significant portions of this legislation as a violation of freedom of speech, what survives has done significant damage.

The usual prescription is to limit contributions even more than we now do and to put expenditure controls on congressional as well as presidential campaigns.

Such an approach would only make things worse. In 1996 the presidential candidates of the two major parties, both of whom accepted federal funds in return for agreeing to limit direct spending, had $62 million each to spend in the general election, or 31.5 cents per person in the 1996 voting-age population—less than the price of a first-class postage stamp.

The only spending candidates control is that of their own campaigns. When that spending is limited, the spending of other groups who communicate with voters—the media and special interest groups—becomes more important. Funds that cannot be given directly to a candidate are diverted to organizations that can accept them legally and spent indirectly on behalf of the candidate.

Campaign spending in the primaries and the general election in 1995–96 for all federal offices—435 members of the House of Representatives, 33 senators, and the presidency—was about $2 billion. That's only $10 over a two-year period for each person of voting age in the United States in 1996. At the same time, the Federal Election Commission spent less than 5 percent of its funds for public disclosure of campaign contributions.

Instead of further restricting and regulating campaign financing, we should

- Abolish campaign spending limits, so that candidates themselves can communicate effectively with voters
- Abolish campaign contribution limits, so that candidates can raise more money with less time and effort, give challengers the possibility of raising the money they need to compete against incumbents, and reduce the advantage of personally wealthy candidates
- Establish real-time campaign finance reporting requirements, so that we know quickly and effectively—on the Internet in twenty-four hours—who gave what to whom

INTRODUCTION

The way America finances political campaigns seems to be in serious disarray. Candidates, often officeholders running for reelection, complain about spending more and more time and effort raising money instead of worrying about issues and attending to the jobs we elected them to do. Laws that forbid foreign contributions have been violated. Campaigns seem to be costing more, and the financial advantage of incumbents over challengers has increased. Wealthy candidates can legally spend without limit from their personal resources, but individuals cannot contribute without limit to candidates of their choice, thus handicapping candidates of modest personal means.

Together the Republican and Democratic National Committees raised, in the last election cycle, $262 million in so-called soft money. This money could be spent on party-building activities and uncoordinated candidate support outside the contribution limits on what individuals and political action committees can give to candidates and, for the presidential election, outside the spending limits. In contrast, special interest groups can raise and spend money without limit to advocate their positions on issues; and the media—television, radio, newspapers, and magazines—spend substantial sums covering campaigns.

Current proposals to reform the system are based on the idea that there's too much money involved in politics and that the people and organizations who give that money have too much influence. We would be better off, the argument goes, to limit contributions and spending even more than we now do. Most of the major campaign finance reform legislation introduced in Congress attempts to do so, ostensibly to reduce the influence of money in politics and put candidates, both challengers and incumbents, on a level playing field.

Our current campaign finance problems began in the aftermath of Watergate, when Congress put sharp limits on political activity. The 1974 amendments to the Federal Election Campaign Act limited how much an individual could give to a candidate, a political party, and in total. They also limited candidate expenditures in House, Senate, and presidential races. The 1974 legislation even limited spending by candidates on their own campaigns. Contributions by political action committees were also limited.

Those rules did not last for long. The Supreme Court came to the rescue of free political speech in its 1976 *Buckley v. Valeo* decision. "The First Amendment," the Court said, "denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign."

The Supreme Court struck down expenditure limits unless those limits were voluntary. The Court has stayed consistent over the past twenty years, and in its most recent case on campaign financing—*Colorado v. Federal Election Commission*, issued in the summer of 1996—it invalidated limits on what a political party could spend to support a candidate if that spending were independent of the candidate. Four members of today's Court—one shy of a majority—went further: they view such limits on spending by political parties as unconstitutional even if that spending is coordinated with the candidate.

In contrast, the Court has left in place contribution limits but not without dissent. In the 1976 *Buckley v. Valeo* case, Chief Justice Warren Burger argued that "limiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity and debate that the Government will permit to take place." Burger found it illogical that the Court distinguished between the right of a candidate to spend his own money on his campaign and the right of an individual to contribute unlimited sums to a candidate. In the 1996 Colorado case Judge Clarence Thomas, in a partial dissent, took the position Burger had twenty years earlier, expressing the view that "contribution limits infringe as directly and seriously upon freedom of political expression and association as do expenditure limits."

ASSAULT ON THE FIRST AMENDMENT

Thirty-eight U.S. senators—thirty-four Democrats and four Republicans—would like to put control over political speech in the hands of Congress rather than the people. On March 18, 1997, they voted to gut the First Amendment to the Constitution by empowering Congress to set limits on contributions and expenditures "by, in support of, or in opposition to" candidates for federal office. That constitutional amendment would have given Congress sweeping authority to limit political speech. It failed by a vote of sixty-one to thirty-eight.

The failure of this ploy leaves only one route open to limiting campaign expenditures: voluntary agreement. And the only route to voluntary agreement is institutional bribery: guaranteed funding in exchange for expenditure limits. This is the ruse under which expenditures of presidential campaigns are controlled. The majority decision in *Buckley v. Valeo* left voluntary expenditure limits in exchange for federal money intact, in spite of Burger's strong dissent that "we are confronted with the Government's actual financing, out of general revenue, a segment of the political debate itself. In my view the inappropriateness of subsidizing, from general revenues, the actual political dialogue of the people—the process which begets the Government itself—is as basic to our national tradition as the separation of church and state also deriving from the First Amendment." He could have quoted Thomas Jefferson: "To compel a man to furnish contributions for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical."

Limiting expenditures is precisely what the most publicized of the campaign reforms bills, the Bipartisan Campaign Reform Act of 1997, introduced by Senators John McCain (R-Ariz.) and Russell Feingold (D-Wisc.), proposes to do. It would limit spending on Senate races ($1.5 million to $8.5 million) and on House races ($600,000). It would also limit the use of funds from political action committees, place geographic requirements on individual contributions, prohibit bundling individual contributions, ban so-called soft money, and regulate "express advocacy" speech by independent groups.

The main bribe in McCain-Feingold is not federal funds but privately owned resources: thirty minutes of free, prime-time television for Senate candidates (House and Senate candidates could also purchase television time at 50 percent of the lowest rate). The secondary bribe is to be paid for by the taxpayers via an appropriation to the Postal Service:

Senate candidates would be able to send two statewide mailings paying only third-class rates; House candidates would get three third-class districtwide mailings.

But Senators McCain and Feingold found that their bill was unpalatable so they scaled it back. Gone are spending limits and the bribes that went with them: free and reduced-rate broadcast time and postal subsidies. But soft money is still banned in federal races, independent advertising is regulated, contribution limits remain in place, and candidates who spend more than $50,000 of their own money are punished: political parties would be forbidden to support their campaigns. The senators have added a provision that would require unions to refund money they spend on political issue ads that has been raised through the dues members are required to pay. Republicans are proposing stronger legislation—a requirement that unions first get a member's permission before spending dues money on issue ads.

DO WE SPEND TOO MUCH?

The purpose of political campaigns is to communicate with potential voters about the candidates—their policy views, their records, their character, their vision for the future. That is the essence of free speech. In a country the size of the United States, that communication is expensive.

During the 1996 election, the official estimate of the voting-age population in the United States was 196.5 million people. This far-flung population resides in 211 major broadcast television markets; 65 percent of households receive cable television. These people read more than one hundred daily newspapers with circulations of more than 100,000, three major news magazines, and a variety of journals of fact and opinion. They listen to radio in 261 metropolitan markets. They receive millions of pieces of direct mail a year and look at thousands of billboards. They visit an untold number of web sites on the Internet. In a presidential election year, tens of millions of them watch televised debates among the candidates.

Despite this voracious consumption of information, advertising, and opinion, it is not an easy population to reach. The diversity of the media is staggering. Gone are the days of the 1950s, when the average household received three television channels; today the average is forty-five. The available radio spectrum has increased enormously, and cable television and the Internet have come into being.

These 196.5 million potential voters have three basic sources of information in a campaign:

1. The "free" media. Most media coverage is free to the candidates and provides news and opinion on the candidates and the issues. The candidates speak; reporters and editors decide how to cover it. They even decide what questions to ask during presidential debates.
2. The independent spenders. This category includes unions and associations of unions such as the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the National Education Association; corporations and trade associations; and special interest groups such as Common Cause, the National Rifle Association, the Sierra Club, and the Christian Coalition. They communicate with the public in a variety of ways—through the news coverage they get, through paid advertising, through direct mail, through talk shows. To the extent that they spend independently rather than giving to candidates, political action committees and political parties also fall in this category.
3. The candidate's own communications. The most important communication with the voters is paid advertising—television and radio spots, direct mail, brochures passed out at local and national campaign headquarters, billboards, posters, and buttons.

Of the three sources of information, a candidate's own communications are the only ones under his or her direct control and are an important source of information for voters. Not that the information isn't there, in the newspapers and magazines and on the talk shows, but often the news stories, especially on television, are about the horse race—whether it was or was not a good week for this or that candidate. The time television reporting gives to the candidate as a sound bite has gotten briefer; the reporter's commentary has gotten longer. The candidate gets about eight seconds, the reporter, fifty-two. Much of what potential voters read and hear is selected and filtered by strangers.

A MODEL BUDGET FOR A NATIONAL CAMPAIGN

A candidate must be able to communicate his or her own views—and, in that process, something about character and vision for the future, about an approach to problems and policy as well as stands on specific issues. In the presidential race the time from the nomination to the election is relatively brief. In the approximately sixty-four days between Labor Day and election day, there are about 200 million people to reach. That takes money. In addition to the campaign expenses for renting space, furniture and equipment, travel, telephone, and fax, a reasonable, even modest, communications program—not limited by government regulations—could easily cost hundreds of millions of dollars. A reasonable communications program in a presidential campaign might try to do the following:

- Reach as much of the adult population as possible with television advertising—network, local broadcast, and cable—say, ten times each with thirty-second ads. There's ample proof that repetition is important in communicating a message.
- Present three or four thirty-minute televised "Fireside Chats" with the candidate, possibly on cable television.
- Reach commuters and others by radio in all major markets, with

the goal of communicating with 80 percent of listeners at least five times each.

- Take one or two full-page ads in all newspapers with more than 100,000 circulation.
- Send out at least two pieces of direct mail (brochures) to each potential voter.
- Advertise on billboards and produce pins, buttons, bumper stickers, and the like.
- Send all households a videotape about the candidate.

The television advertising and direct mail would cost about $100 million each; we will allow another $400 million for radio, newspapers, billboards, and bumper stickers; possible fireside chats; and all personnel, office, equipment, phone, fax, and travel expenses. That's at least $600 million—or about $3 for each person in the country of voting age. This does not seem to be an unreasonable sum, and yet the amount of money each major presidential candidate could spend for everything except required accounting and legal expenses was $62 million—or 31.5 cents per person, less than the price of a first-class postage stamp, about 10 percent of what a reasonably effective campaign might cost.

If the amount a candidate can spend directly is limited, the relative influence of the free media, the special interest groups, and the national parties themselves increases. It is only the expenditures of the candidate's own campaign organization that are under the direct control of the candidate. With the exception of the presidential debates, other communications are filtered through third parties—through the selective judgment of reporters and editors on a sound bite to use on television or a quote from a speech to print; through independent expenditures; through the focus of a special interest group, whether its concerns are gun control, saving the Northern spotted owl, or abortion policy. Even in debates where candidates obviously speak for themselves, the topic and framing of the questions are determined by others.

Limiting expenditures limits the ability of candidates to communicate with the electorate. As this capability is limited, the free media, special interest groups, and the presidential debates become relatively more important.

LEVELING THE PLAYING FIELD

Expenditure limitations are sometimes justified on the grounds that having equal monetary resources levels the playing field among candidates. But the playing field is intrinsically impossible to level by controlling expenditures.

First, competing candidates are in different circumstances. One may be more well known to the voters than another. Or one candidate may need to respond to various charges from opponents or the press at a higher cost than another.

Consider the 1996 presidential campaign: President Clinton had no primary opposition and thus no need to answer the kinds of attacks from primary opponents that came Senator Dole's way. Nor was the playing field level during the primaries among the Republican contenders for the nomination. Candidates who accepted federal funds agreed, in doing so, to limitations on state spending during the primaries, whereas candidates who did not do so (Steve Forbes and Morry Taylor) could spend wherever they liked in amounts limited only by their own fortunes and their campaign strategies.

Second, money is only one of the resources important to a campaign. Support from independent groups and volunteers may vary widely among candidates, as may celebrity endorsements. But most important is the free media. As political scientist Larry Sabato notes, studies have repeatedly shown a liberal Democrat tilt in the free media, one acknowledged by members of the press themselves, which shows up in how members of the press register and vote. This bias affects not only the tone of the coverage—favorable or unfavorable—but the selection of the stories themselves.

Equal spending does not and cannot level the playing field. Perhaps the most standard difference in circumstances among candidates is the difference between challengers and incumbents: the incumbents usually have the advantage of being better known to the public. Here spending limits can be decisive. Most successful Senate and House challengers in 1994 and 1996 spent more than the McCain-Feingold limits would allow.

LIMITING CONTRIBUTIONS

The basic argument for limiting contributions is that people with greater financial resources should not have more influence in the political process than those without such resources. But again money is only one resource that gives people the power to influence others. Others include, for example, being a powerful columnist, having celebrity status, or holding a position of leadership in a well-known organization. Except in the voting booth, political influence varies widely.

Given the Supreme Court's affirmation of the right to use one's own funds for political speech, it is not possible to limit the use of individual resources in the political process. A candidate can use his own funds to advocate his own candidacy, as Steve Forbes and Ross Perot have done. And individuals can contribute at will to various special interest groups. What the affluent cannot do, under current law, is contribute unlimited amounts to a particular candidate; the limit is $1,000 per election. Total campaign contributions to all candidates, political action committees, and parties are capped for each individual at $25,000 per election cycle. Nor can political action groups contribute more than $5,000 per election to a candidate.

The Supreme Court's justification, with the exception of the Burger and Thomas dissents, for limiting contributions has been that such limitations are not as restrictive of free political speech as limitations on expenditures and are justified by an intent to reduce the existence and appearance of corruption. Here the Court, in its majority opinion, is most surely wrong. Controlling the use of resources is a fundamental method of censorship in the modern world. The Soviet Union censored the press not with a blue pencil but by controlling access to paper and newsprint. What the censors liked got printed the next day in major newspapers; what they didn't like might get printed in an obscure journal with a small print run sometime in the future.

The U.S. experience with limiting expenditures in presidential campaigns shows what happens when campaign expenditures are capped and direct contributions to candidates are limited: the money flows elsewhere, to places where it can be more freely given and more freely spent, sometimes to organizations that must report receipts, like political parties, and sometimes to organizations that are not required to do so. The Annenberg Center at the University of Pennsylvania estimates that $150 million was spent on issue ads in the 1996 elections, some of it by political parties and some of it by independent groups. The AFL-CIO spent at least $25 million. Independent ads, the Center found, were more likely than other political advertising to be attack ads.

The diversion of funds from candidates themselves makes connections less direct, less obvious. Politicians are less accountable. The candidate's own campaign is starved for funds. Independent organizations and their spending may make the crucial difference.

This approach fosters subterfuge and corruption and a perpetual need to regulate further. Thus even the scaled-back McCain-Feingold bill proposes to give government regulators power over issue advocacy by independent groups if these ads would be understood by "a reasonable person" as advocating the election or defeat of a candidate as shown by "one or more factors," including even where the communication was placed.

THE CURRENT SITUATION

Our system of financing political campaigns is indeed in need of reform. Candidates spend too much time raising money from too many people. Candidates with their own fortunes have an advantage over those who do not, and wealthy individuals may run for office when they would prefer to support others. Expenditure and contribution limitations push political money underground, into ever more indirect channels where it is hard to follow. The links between political money and the decisions of elected officials become more obscure, and thus those holding office are less obviously accountable. Disclosure requirements do not result in timely, useful data that can be analyzed by the press and anyone else concerned.

Less than 5 percent of the Federal Election Commission's (FEC's) $26.5 million budget is spent on public disclosure; most of it is spent on compliance and litigation. The FEC cannot now require that candidates and political committees submit reports on contributions and expenditures in electronic form, and so it must reenter that data into its own computers. In 1996 it managed to do that within about thirty days, allowing little time for access and analysis during the critical period before an election and leaving the public altogether uninformed about the critical last month before the election. Furthermore, the resulting database can be accessed by the public without charge only from the FEC's office in Washington, D.C. To access the database from a computer outside the FEC office, a prepaid subscription to the service at $20 an hour is required; and only 1,241 people and organizations had such subscriptions during the 1996 election season. Getting the raw data—the reports actually filed by candidates and committees—is not really an option. The FEC replied to a June 30, 1997, inquiry about the reports filed by the Dole campaign by saying that all 27,495 pages of them could be made available in photocopied form in a month at an estimated cost of more than $2,600.

WHAT WE NEED TO DO

Abolish Campaign Spending Limits

We need to get rid of expenditure limitations in presidential elections to enable candidates to spend what they need to spend—if they can raise the money—to communicate effectively with potential voters. We need to hear more directly from them and perhaps not so much from special interest groups supporting them. We need to avoid imposing expenditure limits on House and Senate candidates.

The numbers we hear about campaign spending seem large. But the entire amount spent in the 1995–96 elections, including the primaries, by all federal candidates—presidential, House, and Senate—and by national political committees, including so-called soft money, was about $2 billion, or $10 per person of voting age over a two-year period. Compare that with whatever you like—a couple of hamburgers or movie tickets or a paperback book and a magazine or two.

Abolish Campaign Contribution Limits

We need to get rid of limitations on contributions, so that candidates can raise more money with less time and effort. This will reduce the perpetual fund-raising candidates complain about. It will give challengers the possibility of raising some seed money to make an effective foray against incumbents and reduce the financial advantage of incumbents over challengers. It will give candidates of modest means a fairer shot against personally wealthy rivals. It will help channel the funds of the wealthy to candidates where potential influence will be obvious, rather than to less-accountable special interest groups.

Establish Real-Time Campaign Finance Reporting Requirements

We need to strengthen reporting requirements to produce timely and useful information. With modern computers and the Internet, there's no reason why campaign contributions and expenditures shouldn't be reported daily and posted on the Internet in a standard format that can be easily accessed and analyzed by the press and the public. Most campaign organizations record receipts and expenditures on computers but print out hard copy to send to the FEC. They could instead simply transmit the electronic file to the FEC over the Internet, so the public can know quickly and easily who is contributing what to whom—not a month after the election takes place but on a daily basis. Full and timely disclosure is the best way to deal with the potentially corrupting effect of political money—and with today's Internet technology, that information should be available to everyone without charge. It is not the job of the FEC to point out patterns of contributions that may suggest undue influence over a candidate. That is the job of a free press and anyone else who wants to take the trouble to access and analyze the information. But it is the job of the FEC to make the information available—and that's a much more important use of its budget and its people than litigating cases about possible violations of the complex web of regulations relating to contributions and expenditures.

There's a bill in Congress that would do these three things—the Citizen Legislature and Political Freedom Act, H.R. 965, introduced by Representative John Doolittle (R-Calif.) and supported most articulately by Senator Mitch McConnell (R-Ky.) It would reverse the attempt to regulate campaign contributions and expenditures—and thus political speech—that has led to the current mess and threatens to involve us in ever more complex limitations on what we can say, when we can say it, and how much we can spend saying it.

That bill should be the top priority of the 105th Congress.

Government regulation is the main culprit distorting and corrupting our campaign finance system. The last thing we need is more of it. It's time to apply the principles of freedom to the elections of a free people.