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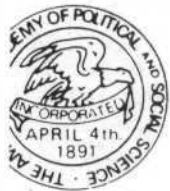
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Should There Be Public Financing of Congressional Campaigns?

By CHARLES McC. MATHIAS, Jr.

ABSTRACT: In spite of seemingly comprehensive campaign finance reforms enacted by Congress beginning in 1971, the current system of financing congressional campaigns threatens to erode public confidence in the electoral process and in government itself. The sheer volume of money in campaigns has led to the perception that those who pay the campaign bills wield disproportionate influence in the process, or at a minimum enjoy greater access to elected representatives than do individual citizens. Public funding of congressional races is a workable means of lessening candidates' reliance on private contributions. Moreover, it is the only effective means of placing reasonable limits on overall campaign spending.

Charles McC. Mathias, Jr., Republican from Maryland, has been a member of the United States Congress since 1960 and has served in the Senate since 1968. He currently is chairman of the Senate Committee on Rules and Administration, which has oversight of the Federal Election Commission and laws governing campaign finance. He is a graduate of Haverford College (B.A., 1944) and the University of Maryland Law School (LL.B., 1949).

SAMUEL Johnson once remarked that nothing is so conducive to a good conscience as the suspicion that someone may be watching.

This observation reminds us of the purpose and underlying principle of campaign finance reform. In a perfect world, there would be no need to proscribe certain behavior in the setting of political campaigns, since individuals would not seek influence through their contributions, candidates would never be beholden to large donors, and the system itself would remain an open one. In the real world, campaign finance laws are necessary rules of behavior designed to protect the political process and promote certain basic democratic values. These laws and their enforcement help ensure that elections and government itself are free of abuses that would subvert democratic society.

The dynamics of the electoral system have such far-reaching ramifications for how we conduct ourselves as a democratic nation that we cannot view campaign finance in isolation from other facets of the democratic process. Our understanding of the nature of representation and participatory democracy, what we mean by consent of the governed, and our view of the legitimate function of government are integral to any discussion of what we want campaign finance reform to accomplish. The way in which we conduct our elections must then defer to these broader principles and values.

The role of money in elections is a troubling spectacle to this nation in 1986. The first stages of reform have given us a great wealth of information on campaign finances, but the statistics also warn that the problems of big money in the process persist. The potential for abuse lingers on because of

unfinished business: the Congress's failure to provide for public financing of congressional campaigns.

The concept of public financing of elections in this country is not new. In 1907, President Theodore Roosevelt supported the concept in his state-of-the-union message. In 1907, the Progressive Republican program was seen as the only way to get corrupt money and excessive money out of elections, and that is truer than ever 79 years later. Campaign finance data of the last 14 years and the current role of money in politics demonstrate conclusively that the American public would be better served by a system of publicly funded congressional elections than by any other single campaign finance reform now under consideration.

MONEY IN CAMPAIGNS

The sheer volume of money in the political process should be sufficient to prove the case for limiting its influence. Campaign finance experts estimate that campaign spending for all elective offices reached \$1.2 billion in 1980.¹ The 1982 midterm elections saw campaign spending top \$900 million.² If the cost of congressional mass mailings in the amount of \$100 million is added to the total, we again reach the billion-dollar figure. Another record-setting year was 1984: candidates for the House and Senate spent more than \$374 million.³

1. U.S., Congress, Senate, Committee on Rules and Administration, *Hearings on Campaign Finance Reform Proposals of 1983*, 98th Cong., 1st sess., 26 and 27 Jan., 17 May, and 29 Sept. 1983, pp. 99, 124.

2. "A \$900 Million Election Stirs Reform Cries," *U.S. News & World Report*, 20 Dec. 1982, p. 28.

3. U.S., Federal Election Commission, *FEC Reports on Financial Activity 1983-1984. Final*

The costs of running for federal office have increased dramatically in the past decade or so. The 1984 total compares with approximately \$88 million just ten years before.⁴ Even discounting for inflation during this period, the overall cost of running for Congress has more than doubled since 1974.

Even more striking than the totals are the growing number of House and Senate candidates who are spending astronomical sums of money. In 1974, 10 candidates for the House spent more than \$200,000. By 1978, 128 candidates exceeded that amount, and in 1982, the number climbed to 353.⁵ In 1974, no House candidate exceeded \$500,000 in expenditures; 7 candidates reached that level in 1978, and 67 did in 1982.⁶ Let us go one step further. In 1978, we saw the first \$1 million House candidate. There were 2 at that level in 1980 and 5 in 1982.⁷

Looking at Senate races, one finds striking expenditure increases in the elections just completed compared with the same races six years before. In 1978, 21 Senate candidates spent more than \$1 million in the general election; in 1984, at least 30 candidates spent that much. In 1978, 6 candidates spent more than \$2 million, and in 1984, at least 16 did. Finally, there were 2 candidates who

spent more than \$4 million in 1978. 7 candidates exceeded that income sum in 1984. The latter year, 1984 saw one record-breaking \$26 million Senate race.⁸

There is another noteworthy development allied with these huge increases in campaign costs. The system seems to be attracting more people with personal wealth, who are uniquely able to bear the high cost of seeking political office. In 1982, for instance, half of the candidates for the U.S. Senate reported to be millionaires.⁹

What do these figures suggest about the current state of campaign financing? The views of candidates and other observers provide one perspective. Senator Alan Cranston, Democrat from California, testified before the Senate Committee on Rules and Administration in 1981:

To raise my \$3 million campaign fund in 1980, I averaged a fundraiser every 2 1/2 hours every 60 hours, for two straight years. The demand of such a strenuous fundraising schedule substantially decreased the amount of time I was able to spend meeting with talking with, and listening to people who are not prospective contributors, and reduced my ability to do many other things that I normally associate with a political campaign in a democratic society.¹⁰

Report. *U.S. Senate and House Candidates* (Washington, DC: Federal Election Commission, 1985), p. xii.

4. Common Cause, *Campaign Finance Monitoring Project: 1974 Congressional Campaign Finances*, vol. 1, *Senate Races* (Washington, DC: Common Cause, 1976), p. vi.

5. Norman J. Ornstein et al., *Vital Statistics on Congress*, 1984-85 ed. (Washington, DC: American Enterprise Institute for Public Policy Research, 1984), p. 67.

6. *Ibid.*, p. 68.

7. "House Seat Can Cost \$1 Million," *Washington Post*, 25 Oct. 1984.

8. U.S., Federal Election Commission, *FEC Reports on Financial Activity 1977-1978*, interim report no. 5, *U.S. Senate and House Campaign Finances* (Washington, DC: Federal Election Commission, 1979); *idem*, *FEC Reports on Financial Activity 1983-1984*.

9. "Elections: It Doesn't Hurt to Be a Millionaire," *U.S. News & World Report*, 15 Nov. 1982, p. 8.

10. U.S., Congress, Senate, Committee on Rules and Administration, *Hearings on the Application and Administration of the Federal Election Campaign Act of 1971, as Amended*, 97th Cong., 1st sess., 20 and 24 Nov. 1981, p. 96.

spent more than \$4 million in 1978, and 7 candidates exceeded that incredible sum in 1984. The latter year, 1984, also saw one record-breaking \$26 million Senate race.⁸

There is another noteworthy development allied with these huge increases in campaign costs. The system seems to be attracting more people with vast personal wealth, who are uniquely able to bear the high cost of seeking public office. In 1982, for instance, half of the candidates for the U.S. Senate reportedly were millionaires.⁹

What do these figures suggest about the current state of campaign finance? The views of candidates and officeholders provide one perspective. Senator Alan Cranston, Democrat from California, testified before the Senate Committee on Rules and Administration in 1981:

To raise my \$3 million campaign fund in 1980, I averaged a fundraiser every 2½ days, every 60 hours, for two straight years. The demand of such a strenuous fundraising schedule substantially decreased the amount of time I was able to spend meeting with, talking with, and listening to people who are not prospective contributors, and reduced my ability to do many other things we normally associate with a political campaign in a democratic society.¹⁰

8. U.S., Federal Election Commission, *FEC Reports on Financial Activity 1977-1978*, interim report no. 5, *U.S. Senate and House Campaigns* (Washington, DC: Federal Election Commission, 1979); idem, *FEC Reports on Financial Activity 1983-1984*.

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10. U.S., Congress, Senate, Committee on Rules and Administration, *Hearings on the Application and Administration of the Federal Election Campaign Act of 1971, as Amended*, Cong., 1st sess., 20 and 24 Nov. 1981, p. 96.

Senator Thomas Eagleton, Democrat from Missouri, related the following in 1983 testimony:

When I ran for the Senate in the 1968 general election, I spent \$200,000. By 1974, it had grown to \$513,000. By 1980, it had grown to \$1,456,000. By 1986, under existing trends . . . it will be \$2 million plus. . . . There is no way I could raise such an amount from small contributors within Missouri.

What has changed . . . is that money, always a necessary tool of waging a campaign, has now become the be-all and end-all of the political campaign. Fundraising has gone from a campaign ingredient to an all-pervasive campaign obsession. Senators start raising their war chest sometimes three or even four years before their reelection date.¹¹

Another witness, a political consultant, commented after listening to Senator Eagleton's remarks that the senator's estimate of the cost of his next campaign was probably off by about half—it was more likely to cost \$4 million.¹²

Concern with campaign fund-raising is not a partisan affair. Senator Barry Goldwater, Republican from Arizona, has spoken out strongly on the topic:

Unlimited campaign spending eats at the heart of the democratic process. It feeds the growth of special interest groups created solely to channel money into political campaigns. It creates an impression that every candidate is bought and owned by the biggest givers. And it causes elected officials to devote more time to raising money than to their public duties.¹³

Senator Goldwater goes so far as to call the present state of campaign finance a "crisis of liberty."

11. U.S., Congress, Senate, Committee on Rules and Administration, *Hearings on Campaign Finance Reform Proposals of 1983*, p. 50.

12. *Ibid.*, p. 145.

13. *Ibid.*, p. 400.

These concerns cannot be lightly dismissed. When we have reached the point at which an officeholder says, "Yes, I am troubled by what I have to do to raise campaign funds; yes, the process is time consuming and detracts from my ability to perform the duties of an elected representative; and yes, the public perception of the process may undermine confidence in the system," all of us should ask whether more remains to be done.

Fund-raising is as burdensome—in some respects, more so—for a challenger. It is a safe bet that many, many qualified men and women decide not to run for office solely because of the prospect of having to raise the enormous amounts of money the experts say are necessary to run a competitive race. Quite simply, the need to attract great financial resources has become a formidable barrier to those contemplating running for federal office. The price tag of campaigns, and the necessity of raising these huge amounts from private sources, should cause us to have grave doubts about how open the system remains. While the ability to attract vast sums of campaign contributions may be one means of testing a candidate's appeal, it should not be the only one, and certainly it should not be the single most important factor in determining a candidate's qualifications for higher office.

Compounding a challenger's fund-raising problems is the increasingly common practice of incumbents' accumulating substantial campaign war chests far in advance of the next election.¹⁴ In part an understandable response to the

14. As of 31 Dec. 1982, nine Senate incumbents up for reelection in 1984 had raised over \$100,000, and three of these had raised in excess of \$600,000.

prospect of costly campaigns, campaign war chests are also, in the candid assessment of one member of Congress, "one of the opportunities incumbents have to frighten off opponents," with the result, he remarked, of "reduc[ing] the possibility of viable choices, which is what democracy and freedom are all about."¹⁵

While difficulty in raising money and the deterrent effect of incumbents' war chests keep many prospective challengers out of the race, they do not discourage candidates able to make substantial contributions from their personal funds. As the statistics presented before suggest, the incidence of very wealthy candidates seeking political office is on the upsurge. In 1982, 15 Senate general-election candidates contributed \$100,000 or more to their campaigns.¹⁶ Preliminary figures for 1984 show that 12 Senate candidates lent their campaigns \$100,000 or more.¹⁷ In what seemed certain to be an all-time record, a losing Senate candidate spent over \$6.8 million of his personal funds in 1982.¹⁸ Two years later, however, 1984 proved to be another record-breaking year, when a winning Senate candidate spent \$10 million on his own campaign.¹⁹

15. U.S., Congress, House, Committee on House Administration, Task Force on Elections, *Hearings on Campaign Finance Reform*, 98th Cong., 1st sess., 9, 16, 21, and 23 June, 8 July, 22 and 23 Aug., and 12 Oct. 1983, p. 197.

16. Richard E. Cohen, "Giving till It Hurts: 1982 Campaign Prompts New Look at Financing Races," *National Journal*, 18 Dec. 1982, pp. 2146-47.

17. U.S., Federal Election Commission, "Aggregate Loans from the Candidate as Reported by Major Party General Election Senate Campaigns, 1983-84 Election Cycle" (Data generated from a computerized data base, Federal Election Commission, 1985).

18. Cohen, "Giving till It Hurts," p. 2146.

19. Federal Election Commission, *FEC Reports on Financial Activity 1983-1984*, p. 331.

This trend poses the danger that the voices of the affluent will be heard disproportionately on the campaign trail and in the halls of government. Fairness—not to mention the health of representative government—dictates that the political arena be open to all, irrespective of personal wealth. It is a travesty to perpetuate a system of campaign finance that permits the unlimited expenditure of a candidate's personal funds at the same time that it significantly limits sources of funding for other participants.

The contributor's view

There is yet another perspective from which to view campaign fund-raising—that of the contributor. On the positive side, those who contribute may feel they have a stake in the outcome of an election and so may be motivated to greater participation. Giving may also reinforce a sense of group ties or identity, since through association or pooling of resources individuals have a greater collective impact on the process. As they reflect the attitudes and the intensity of feeling of individuals toward a candidate, contributions may also provide some indication of how broadly based support for a candidate is. Knowledge of who his or her supporters are also probably leads to a greater appreciation by a candidate of what the supporters' needs are and promotes responsiveness in meeting those needs, if there are not other countervailing interests at stake.

We have seen in the evolution of campaign giving under the current law, however, an erosion of the positive character of contributions. Most noticeable is the diminution of the role of the individual small contributor. This reduction in importance occurred simply

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We have seen in the evolution of campaign giving under the current law, however, an erosion of the positive character of contributions. Most noticeable is the diminution of the role of the individual small contributor. This reduction in importance occurred simply

because the scale of campaign expenditures has come to dwarf the resources available to most individuals. In contrast to the individual giver, the highly organized and well-funded interest group has the means not only to survive but to thrive. It is this picture of campaign giving that should concern us.

Under current law, multicandidate political committees, commonly known as political action committees (PACs), are allowed to contribute up to \$5000 to a candidate per election. The development of PACs in response to the law has been one of the most striking side effects of campaign finance reforms. Since 1974, the number of PACs has risen dramatically, from 608 to 4000.²⁰ Not surprisingly, as campaign spending has risen, so has the amount of PAC money contributed to congressional candidates, from \$34 million in 1978 to over \$105 million in 1984. The percentage of PAC money as a part of overall campaign receipts also has edged steadily upward.²¹

Perhaps more disturbing is the pattern of PAC giving. There is, for instance, a demonstrable bias in favor of incumbents in PAC contributions. Figures for the 1984 election showed that House incumbents received \$81 million in PAC funds compared to \$19 million for challengers.²² In the eyes of some, PAC giving suggests an ominous trend—an ever increasing dependence by officeholders on highly organized special interests for campaign funds. That groups in the private sector have an important stake in the decisions of

government and will seek a voice in formulating governmental policy is understandable. The growing presence of PACs, however, has raised fears that these special interests have come to play a disproportionate role—a role that may carry with it the seeds of actual or potential corruption.

In response to concern about PAC giving, some have called for an increase in the limits on individual contributions, an argument strengthened by the fact that no adjustment has been made since the limits were set in 1974. The \$1000 limit, however, is even now beyond the reach of the vast majority of individual contributors. Raising limits on individuals might not awaken fears that candidates will once again become beholden to individual large contributors, but it would continue to shift the basis of campaign support toward those with greater financial resources. It would not solve the basic problem of how to keep the system open and fair.

If campaign contributions carry their own political message, as we must acknowledge they do, the missing element in today's campaigns is the unarticulated view of those who are not well organized, who lack the financial resources and perhaps the motivation to be active participants in the process. If they are to be represented in government and their interests taken into account, their presence should be acknowledged at the stage at which the issues are framed and the agendas set for making future public policy—in campaigns for elective office. The current system of campaign finance has made it increasingly difficult to accomplish this goal.

20. U.S., Federal Election Commission, "PAC Numbers Show Slight Drop in 1985" (Press release, Federal Election Commission, 1985).

21. U.S., Federal Election Commission, "FEC Final Report for '84 Elections Confirms Majority of PAC Money Went to Incumbents" (Press release, Federal Election Commission, 1985).

22. *Ibid.*

CONGRESSIONAL POWER TO
REGULATE MONEY
IN CAMPAIGNS

Congress, in attempting to regulate the role of money in campaigns, faces a difficult question: the degree to which money in politics is entitled to protection as speech under the First Amendment. The Supreme Court in *Buckley v. Valeo*²³ reviewed the constitutionality of limits on campaign contributions and expenditures enacted by Congress in the Federal Election Campaign Act of 1971, as amended in 1974. The Court's analysis began, significantly, with its observation that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."²⁴

The Court saw contribution limits as only a marginal restriction on the contributor's ability to engage in political communication, characterizing contributions as mere speech by proxy.²⁵ While the Court found that contribution limits worked a more significant restraint on freedom of political association, it upheld the limits, citing an earlier decision that "even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."²⁶ The Court found such justification by looking to the act's primary purpose of preventing the fact or appearance of undue influence. "To the extent that large contributions are given to secure political *quid pro quos* from current and potential officeholders, the integrity of our system

of representative government is undermined."²⁷

On the other hand, the Court found that limits on expenditures by candidates and their supporters imposed direct and substantial restraints on the quantity of political speech. Moreover, since the expenditure limits, unlike limits on contributions, did not serve the purpose of eliminating the reality or appearance of corruption, the Court found no justification for such a restriction.

Following this analysis, the Court struck down a \$1000 limit on expenditures by individuals that were totally independent of the candidate's campaign. The Court reasoned that such independent expenditures provided only limited assistance to a candidate and could even prove counterproductive to a candidate's campaign. Thus the Court concluded that independent expenditures did not pose the danger of eliciting improper commitments from a candidate. In reviewing the Federal Election Campaign Act's limit on a candidate's expenditures of his or her own personal funds, the Court noted that a candidate using his or her own funds would be less dependent on contributions from others and consequently more immune to the risks of undue influence.

The Court specifically found that neither equalizing the relative ability of individuals and groups to influence the outcome of elections nor equalizing the relative financial resources of the candidates was a sufficient or even permissible governmental interest to justify the serious First Amendment intrusions represented by expenditure limits. Thus, the Court held, limits on overall campaign expenditures, on independent

23. 424 U.S. 1 (1976).

24. *Ibid.*, p. 19.

25. *Ibid.*, p. 21.

26. *Ibid.*, p. 25.

27. *Ibid.*, p. 26.

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27. *Ibid.*, p. 26.

expenditures, and on expenditures by a candidate from personal funds were unconstitutional.

The *Buckley* decision fails to recognize that the integrity of the electoral process is threatened if the only effective participants are those with vast financial resources. *Buckley* thus represents a giant step backward in the effort to reform campaign finance. As Judge J. Skelly Wright notes in a persuasive critique of the Court's ruling, congressional regulation of campaign spending can be a powerful tool to enhance, not limit, First Amendment liberties.²⁸

Even if Congress continues to be limited by the *Buckley* holding, however, an important means to limit excessive campaign spending still remains. The Court also held that Congress may impose limits on overall spending and on the expenditures of personal funds by a candidate in the context of a publicly financed campaign.

Why public finance?

In view of the serious problems associated with money in campaigns and the legal restraints on congressional power to regulate, a system of public finance is the next essential reform. Partial public funding with realistic expenditure ceilings would enable candidates to run competitive campaigns in which private funding would continue to play an important but not a dominant role. A grant of public funds would free candidates from the incessant demands of fund-raising and offers the hope of shortening the seemingly endless campaign season. A system of public finance that includes a

28. J. Skelly Wright, "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" *Columbia Law Review*, 82(4) (May 1982).

limit on the amount candidates may contribute to their own campaigns would eliminate the unfair advantage enjoyed by those with great personal wealth. And most important, public financing in congressional campaigns would restore a missing equilibrium between the sources of campaign funding and give officeholders a greater measure of freedom to address issues in the broad national interest. Such results would go a long way toward renewing public belief in the integrity of the electoral process.

Some will say that such further reforms will only lead to more creative means of circumventing the limits, that "special interest money has always found its way into the political system . . . [and] always will."²⁹ All reform, however, is based on the notion that there are values at stake that make it worthwhile and, in some instances, imperative to control the potential for abuse in a system. That reforms at times have failed to achieve their stated goals, or that they have produced unintended and perhaps undesirable consequences, should not lead us to abandon efforts to safeguard the integrity of a process so vital to the preservation of democratic values.

Perhaps as important as stating what public funding would do is stating what it would not do. The most serious concern is that publicly funded congressional campaigns, with limits on spending, would divert money into other channels—specifically, into independent expenditures. The emergence of independent expenditures in the aftermath of *Buckley* reasonably could

29. Committee on Rules and Administration, *Campaign Finance Reform Proposals of 1983*, p. 107, n. 5.

lead us to expect a growth, even a surge, in independent spending following enactment of public finance legislation. Witnesses in congressional hearings have been blunt in saying so.

An example cited is the publicly funded 1980 presidential general election, in which individuals' circumscribed ability to contribute to the presidential campaign gave impetus to the creation of political committees operating independently of the major candidates' committees. A similar phenomenon is projected for congressional campaigns, which, we are told, will become battlegrounds for a kind of independent-expenditure guerrilla warfare in which "Terry Dolan . . . and anyone else with the guts, the desire, and the lists . . . [can] become the future political kingmakers."³⁰

Regulating independent expenditures

Even if independent expenditures increased dramatically, we do not have to accept as inevitable that they would wreak havoc on the political system. Instead, we should ask what means exist for regulating independent expenditures, if they become a problem.

The Supreme Court, in striking down limits on independent expenditures in *Buckley*, stated, "Independent advocacy . . . does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."³¹ Unfortunately, in a more recent case the Supreme Court again struck down limits on independent expenditures, holding unconstitutional a \$1000 limit on independent spending by political committees in support of candidates in

presidential general elections who accepted public funding. The Court in a 7-to-2 decision held that the expenditures in question were entitled to full First Amendment protection and, absent a showing of any "tendency . . . to corrupt or to give the appearance of corruption,"³² the \$1000 limit was constitutionally infirm. As Justice White notes in his dissent, the Court's continuing reluctance to defer to Congress in Congress's effort to regulate campaign finance remains a formidable barrier to achieving a system broadly designed, in his words, to "eliminate the danger of corruption, maintain public confidence in the integrity of federal elections, equalize the resources available to the candidates, and hold the overall amount of money devoted to political campaigning down to a reasonable level."³³

Even though the Supreme Court for the present appears unconvinced that there are compelling reasons for limiting independent spending, Congress can still take steps to curb the abuses associated with such spending. First, Congress should encourage rigorous enforcement of the requirement that there be no coordination with a candidate's campaign.³⁴ Second, Congress should consider new legislative means of counteracting the harmful effects of independent expenditures in more direct ways.

A question to be considered at the outset is whether the independent expen-

32. *FEC v. National Conservative Political Action Committee*, 105 S.Ct. 1459 (1985).

33. *Ibid.*, p. 1475.

34. On the adequacy of the FEC, see William C. Oldaker, "Of Philosophers, Foxes, and Finances: Can the Federal Election Commission Ever Do an Adequate Job?" this issue of *The Annals of the American Academy of Political and Social Science*.

30. *Ibid.*, p. 145.

31. 424 U.S., p. 46.

presidential general elections who accepted public funding. The Court in a 7-to-2 decision held that the expenditures in question were entitled to full First Amendment protection and, absent a showing of any "tendency . . . to corrupt or to give the appearance of corruption,"³² the \$1000 limit was constitutionally infirm. As Justice White notes in his dissent, the Court's continuing reluctance to defer to Congress in Congress's effort to regulate campaign finance remains a formidable barrier to achieving a system broadly designed, in his words, to "eliminate the danger of corruption, maintain public confidence in the integrity of federal elections, equalize the resources available to the candidates, and hold the overall amount of money devoted to political campaigning down to a reasonable level."³³

Even though the Supreme Court for the present appears unconvinced that there are compelling reasons for limiting independent spending, Congress can still take steps to curb the abuses associated with such spending. First, Congress should encourage rigorous enforcement of the requirement that there be no coordination with a candidate's campaign.³⁴ Second, Congress should consider new legislative means of counteracting the harmful effects of independent expenditures in more direct ways.

A question to be considered at the outset is whether the independent expen-

32. *FEC v. National Conservative Political Action Committee*, 105 S.Ct. 1459 (1985).

33. *Ibid.*, p. 1475.

34. On the adequacy of the FEC, see William C. Oldaker, "Of Philosophers, Foxes, and Finances: Can the Federal Election Commission Ever Do an Adequate Job?" this issue of *The Annals of the American Academy of Political and Social Science*.

ditures are in compliance with existing law; that is, are they truly independent? Current law defines an independent expenditure as

an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.³⁵

To the extent that these guidelines are observed, it was the Court's view at least that "independent expenditures may well provide little assistance to the candidate's campaign."³⁶ It is still far from clear whether independent expenditures may be able to influence, let alone decide, election results. One of the largest independent expenditure committees, the National Conservative Political Action Committee (NCPAC), established its reputation in 1980 when four out of the six liberal Senate incumbents it targeted in its negative campaigning lost their reelection bids. In 1982, however, of nine targeted House and Senate candidates against whom NCPAC spent amounts ranging from \$127,000 to \$783,000, only one was defeated. NCPAC spent over \$600,000 in the U.S. Senate race in Maryland in 1982 in a negative campaign that by most accounts helped the candidate it attacked and hurt his Republican opponent, who lost the election by a wide margin.³⁷

That independent expenditures may be unpredictable in their effect and that in some instances they have backfired

35. 2 U.S.C. § 431(17) (1979).

36. 424 U.S., p. 47.

37. *Campaign Practice Reports* (Washington, DC: Congressional Quarterly, 1982), 9(21):1.

do not mean that they cannot have harmful consequences for the political process. If these occur, Congress should consider new legislation to address the problem.

Public finance and political parties

The discussion of the consequences of public finance would be incomplete without asking what effect it would have on the political parties. In spite of early predictions, it is obvious that campaign finance regulation has not brought about the demise of the major parties. The Republican Party, in a way now being copied by the Democrats, has adapted remarkably well to both the law and the new technologies of campaigning. Within the constraints of contribution limits, the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee have all been enormously successful fundraisers, able to assist Republican candidates up to the maximum allowable limits under current law. Although parity does not now exist between the two major parties in fund-raising ability, it will no doubt come to pass before the decade is out.

Public funding need not affect the contributions and coordinated spending efforts parties are currently able to make on behalf of candidates. Ways of further expanding the parties' role might well be explored, both in the context of publicly funded congressional races and through other legislative proposals to encourage party-building efforts. As significant as the monetary contributions of parties are, considerable advantages flow from an ongoing organizational structure and a steadily growing body of expertise on

effective campaign techniques. Some, in fact, see parties taking over many of the functions of political consultants in providing campaign services to candidates, a development that would further enhance the role of parties as formidable players in campaign finance.

Proposals for publicly funded campaigns also have raised the conflicting concerns that the major parties will face an onslaught of third-party and independent candidacies and that such a system will altogether freeze out candidacies from other than the major parties. Both fears seem exaggerated.

A system of public finance cannot constitutionally exclude independent and third-party candidates. Yet the concern that public finance would artificially bolster independent and third-party candidacies seems unwarranted. Virtually every public finance proposal discussed in Congress has imposed a threshold eligibility requirement. The requirement may consist of a specified amount of money that a candidate must raise in order to qualify for public funds or a certain number or percentage of signatures of qualified voters or of ballots cast in the election.

To the extent that third-party candidates or independents are able to meet reasonable qualifying thresholds, they are entitled to some measure of public funding, a result that should not threaten the stability of the system. While public funding may to some extent stimulate fund-raising efforts or other activity by third-party candidates in order to qualify for public funds, it is difficult to see how a system of matching grants would radically change the amount of funds available to non-major-party candidates in the process.

Incumbents and public finance

Finally, a word should be said about the alleged pro-incumbent bias of public finance. This is a subject on which reasonable men and women have disagreed and probably will continue to do so. The most commonly heard argument is that expenditure limits are likely to hurt challengers more severely, since ordinarily they will need to spend more than an incumbent simply to achieve name recognition. A companion argument suggests that spending limits fail to take into account the considerable benefits accruing to an incumbent by virtue of the perquisites of office.

Does a challenger have to outspend an incumbent in order to win? The figures show that some challengers who outspent incumbents won and that, conversely, some who were outspent by the incumbents won.³⁸ What may well be as important to a competitive race by a challenger is the certainty that an adequate level of funding will be available, to enable a challenger to develop his or her campaign strategy well in advance.

A lack of funds at a critical stage in a campaign can be devastating, and an abundance of funds so late in the campaign that planning opportunities have been lost can be of little use. The challenger who lacks funds early, for instance, cannot at the last minute produce and run television advertisements that may be crucial. In addition to improving

38. Figures showing relative campaign expenditures by incumbents and challengers in races in which the incumbent was defeated reveal that for the period 1974-82, successful challengers were outspent by incumbents in the aggregate in three out of five of these elections. See Ornstein et al., *Vital Statistics on Congress*, p. 67.

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opportunities for campaign management, public funding would introduce the concept of a level playing field in a large number of congressional races in which it would otherwise be absent—hardly a boon to incumbents.

There still may be the fear that public funding fails to take into account the obvious value of incumbency itself. Thus, in reality, challengers will be outspent in every race.

The official duties of members of Congress do encompass activities that can be factors in a member's reelection. Not the least of these is a member's voting record. The use of voting records in past campaigns suggests that this fact is not lost upon challengers or others. An incumbent's record alone may not cancel out the advantages of incumbency, but it should not be ignored when evaluating the fairness of a system of public finance.

The liabilities associated with incumbency do not justify an incumbent's using the resources of his or her office in patently political ways. Reforms undertaken by both houses of Congress in recent years reflect a concern that members of Congress not be perceived as using their position of public trust for political advantage.³⁹ Ultimately, any system of public finance must take into

39. Rule 40, Standing Rules of the Senate, currently prohibits any senator from using the frank for mass mailings in the 60 days preceding an election in which he or she is a candidate (par. 1), precludes use of Senate computer facilities for storing lists that identify individuals by any partisan political designation (par. 5), and prohibits

account concerns about the advantages of incumbency and, if necessary, must include provisions to compensate challengers for such advantages. That such adjustments may be needed should not overshadow the many positive attributes of a system of publicly funded congressional elections.

CONCLUSION

Public funding of congressional races is a workable solution to the problems that are most troubling in the current system of campaign finance. The role money plays in elections has made it increasingly difficult for the democratic process to function properly. If we continue on our present course, eventually we will reach the day when the amassing and spending of campaign money will have fatally undermined public confidence in the process and thwarted the democratic values the system is supposed to serve. The vast sums of money in contemporary campaigns already have had a corrosive effect on participatory democracy. If unchecked, the influence of money will continue to exaggerate and exacerbate an imbalance based on unequal financial resources and will further dispossess those who already have too little say in the decisions of government.

Congress 15 years ago set out to reform the role of money in politics. It is time it finished the job.

use of Senate radio and television studies in the 60 days preceding an election in which the senator is a candidate (par. 6).