CAMPAIGN FINANCE REFORM SERIES

A SURVEY OF EXISTING EFFORTS TO REFORM THE CAMPAIGN FINANCE SYSTEM

BY BURT NEUBORNE

Copyright © 1998 by the Brennan Center for Justice at New York University School of Law. All rights reserved. No part of this book may be reproduced or transmitted without permission in writing from the publisher, Brennan Center for Justice, 161 Avenue of the Americas, 5th Floor, New York, New York 10013.

Brennan Center Board of Directors

William J. Brennan, III, *Chair*
Smith, Stratton, Wise, Heher & Brennan

E. Joshua Rosenkranz, *Executive Director*

Nancy Brennan
Executive Director, Plimouth Plantation

Murray H. Bring
Vice Chairman & General Counsel, Philip Morris Companies Inc.

David W. Carpenter
Sidley & Austin

Professor Peggy C. Davis
NYU School of Law

Peter M. Fishbein
Kaye, Scholer, Fierman, Hays & Handler

Professor Martin Guggenheim
NYU School of Law

Hon. A. Leon Higginbotham, Jr.
Kennedy School of Government; Paul, Weiss, Rifkind, Wharton & Garrison

Professor Thomas M. Jorde
University of California, Berkeley School of Law; President, LECG, Inc.

Edward J. Kelly, III
Managing Director, J.P. Morgan & Co.

Professor Larry Kramer
NYU School of Law

Anthony Lewis
The New York Times

Professor Nancy Morawetz
NYU School of Law

Professor Burt Neuborne
Legal Director, Brennan Center; NYU School of Law

Ronald L. Olson
Munger, Tolles & Olson

Dwight D. Opperman
Chairman, Key Investment, Inc.

Daniel A. Rezneck
General Counsel, District of Columbia Financial Responsibility & Management Assistance Authority

Dean John E. Sexton
NYU School of Law

Walter J. Smith, S. J.
President & C.E.O., The HealthCare Chaplaincy, Inc.

Clyde A. Szuch
Pitney, Hardin, Kipp & Szuch

Jeannemarie E. Smith, *Treasurer*
C.F.O., NYU School of Law

Steven A. Reiss, *General Counsel*
Weil, Gotshal & Manges

Affiliations are for identification only.

About the Brennan Center for Justice

The Brennan Center for Justice is a nonprofit institute devoted to discourse and action on issues of justice central to the jurisprudence of Justice William J. Brennan, Jr. The Center was founded in 1995 by Justice Brennan's family, friends, former law clerks, and admirers, in partnership with New York University School of Law. The Democracy Program is one of the Center's primary program areas. In keeping with its mission to enhance the openness of our democracy, the Brennan Center is a public education and litigation resource for campaign finance advocates, local and national public officials, and journalists. The Brennan Center has also worked on ballot access rules. In 1996 it participated in a successful lawsuit challenging New York's Republican presidential primary ballot rules; and subsequently published *Voter Choice '96*, a 50-state survey of state ballot access laws.

About the Campaign Finance Reform Series

This paper is one of a series that explore reform alternatives. The following titles are part of the series:

Campaign Finance Reform and The Constitution: A Critical Look at *Buckley v. Valeo*
By Professor Burt Neuborne

The Values of Campaign Finance Reform
By Professor Burt Neuborne

A Survey of Existing Efforts to Reform the Campaign Finance Sytem
By Professor Burt Neuborne

The Workings of Money in Politics: The Flow of Campaign Cash
By Kenneth N. Weine

For more information, or to order a Brennan Center publication contact:

Brennan Center for Justice
161 Avenue of the Americas
5th Floor
New York, New York 10013
(212) 998-6730
Fax: (212) 995-4550

Cover design by Jennifer Eisenpresser

About the Author

For 20 years, Burt Neuborne has been one of the nation's most active civil liberties lawyers. A nationally renowned scholar, Professor Neuborne is the John Norton Pomeroy Professor of Law at NYU, where he has taught since 1974. He received the University's Distinguished Teaching Award in 1990.

Professor Neuborne worked as a tax lawyer on Wall Street until becoming staff counsel for the New York Civil Liberties Union in 1967. As National Legal Director of the American Civil Liberties Union (1982-86) and Assistant Legal Director (1972-74), Professor Neuborne litigated a wide range of landmark cases in the Supreme Court of the United States and other federal and state courts. His cases have influenced the law on such diverse topics as political contributions, executive non-acquiescence in judicial precedent, commercial and corporate speech, academic freedom, the Vietnam War, CIA mail-opening, immigration, and federal jurisdiction. Professor Neuborne has authored or co-authored four books, including *The Rights of Candidates and Voters*, and two volumes of *Political and Civil Rights in the United States*, as well as seventeen law review articles, on a wide range of topics including free speech, legal theory, separation of powers, legal procedure, and comparative law.

Acknowledgments

This paper was funded by a generous grant from the Joyce Foundation, which is not re sponsible for its content. The Center is grateful for the skillful editing of Kenneth Weine and for Dan Rothchild's layout and cover design. Weil, Gotshal & Manges provided proofreading services.

The following people and law firms contributed valuable background papers, many elements of which were incorporated into this series: F. William Brownell and Davis S. Harlow of Hunton & Williams; Gregory E. Bylinsky and Dean Garfield of Kaye, Scholer, Fierman, Hays & Handler; Robert Mauriello and Elizabeth J. Sher of Pitney, Hardin, Kipp & Szuch; Steven M. Duane and Roger Witten of Wilmer, Cutler & Pickering; Mare De Leeuw; C. Barr Flynn; and NYU law students Richard Brosnick and Janet Meissner Pritchard.

The following people also made helpful comments on earlier drafts and papers in this series, for which we are very grateful: Marsha Berzon; Lillian Be Veir; Lawerence N. Hansen; Marty Jezer; David J. Leviss; Ellen S. Miller; Alan B. Morrsion; Robert M. O'Neil; Trevor Potter; Lisa Rosenberg; Roy A. Schotland; and Bradley Smith.

The Brennan Center is grateful for the ongoing support of the following foundations, which fund the Center's Democracy Program:

Carnegie Corporation of New York
Deer Creek Foundation
Ford Foundation
Joyce Foundation
Open Society Institute
Florence & John Schumann Foundation

Table of Contents

Introduction 7

Disclosure Requirements 9

- How Much Disclosure? 9
- Models of Disclosure 10
- Pitfalls to Avoid 11

Restrictions on Campaign Contributions 11

- Who Should Be Permitted to Give? 11
- How Much Is Too Much? 11
- How Should Party Money Be Regulated? 12
- What's a Contribution? 12
- What About Candidate Spending? 12
- Models of Contribution Caps 13

Restrictions on Campaign Expenditures 15

Campaign Subsidies 16

- What's the Cost? 16
- Why Support Politicians? 17
- Who Gets Subsidized? 17
- How to Pay? 17
- What Strings to Attach? 17
- What About Variable Caps? 17
- The Federal Model 18
- Some State Models 19

Enforcement as Reform 21

Proposals for New Federal Legislation 23

Conclusion 24

Introduction

Money and politics are a volatile mix. When the mix gels properly, it funds the enormous amount of speech and information needed by voters in a complex democracy. When the mix sours, it decays into corruption, undue influence, and political inequality. Not surprisingly, the debate over campaign finance reform revolves around three principal concerns: (1) assuring that enough money is available to finance a broad array of political speech, especially by challengers; (2) preventing wealthy interests from exercising too much influence over elected officials; and (3) providing less wealthy candidates a fair opportunity to compete in the marketplace of ideas.

Opponents of campaign finance reform have many worries. Most often stated is a concern that excessive government regulation of campaign financing will dry up the money needed to fuel political speech at a time when what we really need is more, not less, serious discussion of political issues. Why, opponents ask, should we make it even harder to finance the democratic process adequately — especially challenges to entrenched incumbents — when the combined political spending of all candidates for public office is still less than the annual advertising budget for deodorants?

According to reformers, campaign finance regulation is necessary, first, to prevent wealthy contributors from buying favorable treatment from public officials; and, second, to "level the playing field" by equalizing the political power of rich and poor voters. How, reformers ask, can we tolerate a campaign finance system that allows wealthy donors and special interests to play a disproportionate role in electing and influencing our public officials?

At one end of the campaign finance spectrum, opponents of reform argue for an unregulated system, with no limits on private campaign contributions, and no ceilings on campaign spending. They fear that excessive government regulation will harm democracy by making it harder, especially for challengers, to raise the money needed to run for office. Since incumbents generally have built-in advantages, opponents of reform argue, limiting campaign spending will simply make it that much harder to unseat them. They dismiss claims of unequal influence, arguing that a candidate's ability to attract contributions from private individuals is a valuable barometer of the strength of her ideas. Some opponents of reform are willing to concede, at most, that public disclosure of extremely large contributions may serve as a check on corruption and undue influence. A better check on corruption, they argue, would be vigorous enforcement of bribery and extortion laws.

At the other end of the spectrum, one set of reformers argues that campaign spending is a necessary cost of running a democracy, like buying voting machines, operating polling places, and printing ballots. Rather than relying on private contributions to finance the necessary political debate, these reformers contend that government should pay for political campaigns from tax revenues, just as it pays for juries and the military. The *status quo*, in which we refuse to acknowledge campaign expenses as an "above the line" cost of democracy, has relegated political money to a gray area, where massive corruption and undue influence are inevitable. It is no coincidence, these reformers note, that every major democracy has suffered a significant campaign funding scandal in the recent past.

Public funding of elections, it is argued, removes the temptation for corruption inherent in candidates' reliance on contributions from wealthy, self-interested donors, and assures constituents equal access to political power.

In between retaining the *status quo* and moving to full public funding of all political campaigns, the reform landscape reflects a kaleidoscopic array of proposals, including disclosure schemes of varying intrusiveness; limits on the sources and/or amounts of campaign contributions; limits on spending by candidates, campaigns, and supporters; attempts to lower the costs of critical campaign items, like television advertising; and numerous varieties of public funding systems, often including requirements that candidates receiving public funds limit their spending.

Further complicating discussion of campaign finance reform is the Supreme Court's firm insistence that any scheme respect a First Amendment which, according to a majority of the Justices, equates campaign spending with political speech. Finally, reformers of all stripes agree, reform measures are meaningless unless the enforcement mechanisms are sufficient to ensure compliance.❑

Disclosure Requirements

Disclosure requirements tend to generate the least controversy, as a matter of both policy and constitutionality. In principle, the Supreme Court has ruled that compelled disclosure of large campaign contributions does not violate the First Amendment, as long as the amount triggering disclosure is not unreasonably low and some accommodation is made to exempt donations to controversial candidates where public disclosure might provoke reprisals.

How Much Disclosure?

Even skeptics agree that public disclosure of large campaign contributions to serious candidates inhibits corruption or the appearance of corruption. Debate centers on precisely how much public disclosure is necessary to prevent corruption. Among the questions that must be answered in developing a disclosure system are:

- At what point is a contribution large enough to raise a concern that it may result in undue influence?
- In selecting a minimum figure, is there a risk that a large, reportable contribution will be divided into small segments to avoid disclosure?
- Does compelling disclosure of relatively small donations inhibit political participation?
- On the other hand, does disclosure actually coerce contributions from public employees and government contractors who may be afraid of not contributing?
- How should contributions be tabulated and made available to the public?
- Should independent expenditures in support of a candidate, as opposed to direct campaign contributions, also be disclosed?
- Should soft-money "party building" contributions and expenditures be disclosed?
- Should in-kind volunteer assistance to a campaign be covered by disclosure laws?
- What about other discretionary acts that benefit a campaign, like a decision to lend money or equipment, or to permit the use of an apartment for a fundraiser?
- Should public disclosure be required for contributions to third-party candidates or independents who have no real chance of winning an election?
- How can contributors to controversial candidates or groups be shielded from the fear of reprisal?
- Whose job is it to do bookkeeping and reporting?
- What sanctions should be imposed for failure to disclose?

Models of Disclosure

The stringent disclosure provisions of the Federal Election Campaign Act (FECA) provide one model. Under FECA, all contributions (whether cash or in-kind) to a candidate for federal office in excess of $50 must be recorded by the candidate's campaign, except for volunteer work, which is not viewed as a reportable contribution. The exemption of volunteer work is noteworthy because it shields volunteer efforts of labor union members from reporting and disclosure laws. According to FECA, once a

donor's total contribution to a candidate reaches $200, the donor's identity, occupation, and employer must be disclosed to the Federal Election Commission (FEC), which makes the information public. Access to disclosure information — some of this data is on computers — facilitates searching for contribution patterns and wide public dissemination. For example, from the occupation and employer data one can calculate the aggregate contributions of lawyers, or IBM employees, or even lawyers at IBM.

Disclosure of these details is thought to help diminish the potential for corruption of the political process. Unfortunately, many political candidates do not disclose their donors' employment and occupation data, and the FEC has failed to exact a price for their intransigence. In 1994, the Center for Responsive Politics, which conducts the nation's most thorough analysis of political contributions, was unable to categorize $81 million, almost 30%, of the receipts of federal candidates.

Contributions to all candidates for federal office are covered by the disclosure laws, even third-party and independent candidates who have no real chance of winning. The extension of disclosure requirements to these candidates is justified on the theory that they could drain votes from major party candidates, and therefore play a determinative role in an election. If controversial, these candidates may obtain a disclosure exemption if they can demonstrate that contributors have a real fear of reprisal.

Independent expenditures in support of a candidate must also be reported and disclosed if they exceed $200. FECA also requires the reporting and disclosure of contributions to, and expenditures by, political parties. Political action committees (PACs), which pool the contributions of individuals and attempt to affect the outcome of federal elections by advocating for candidates or contributing money to their campaigns, must also report the contributions they receive and make and their expenditures. Of course, the line between supporting a candidate (which must be disclosed) and spending money to educate the electorate on an issue (which need not be disclosed) is not always easy to identify.

Every state now requires disclosure of large campaign contributions and expenditures. The contribution amount triggering disclosure requirements varies by jurisdiction, from $50 to $1,000. The bulk of states use FECA's $200 figure, requiring that contributors at or above this level disclose their identity, profession, and employer.

States vary more widely in requiring disclosure of independent expenditures. A minority of states require no disclosure. In the majority of states that do require disclosure of independent expenditures the threshold is set high enough, from $100 to $5,000, to exempt individual political activity that poses little threat of corruption.

Pitfalls to Avoid

State disclosure schemes often have three serious flaws. Most importantly, the disclosed information in many states is poorly maintained and is inaccessible. For example, the New York legislature recently voted against a proposal to place its disclosure information in an on-line format. Second, states generally lack a procedure exempting donations to highly controversial candidates from public disclosure. Finally, many states ignore the pressure that disclosure places on public employees, and government contractors, who may feel compelled to contribute to the campaigns of persons exercising discretionary power over their jobs. This issue arises, as well, in judicial elections, where non-disclosure creates fear of undue influence, but disclosure raises questions of voluntariness.❑

Restrictions on Campaign Contributions

Campaign contribution caps are more controversial than disclosure rules because opponents of government regulation argue that political contributions are so closely linked to political expression that they are protected by the First Amendment. The Supreme Court agrees that political contributions are First Amendment activity, but has ruled that the compelling interest of preventing the appearance or reality of corruption justifies a degree of regulation. However, the Supreme Court does not permit regulation of campaign contributions in the name of equalizing political power, reasoning that strong speakers may not be silenced to protect weak speakers. According to the Court, the only constitutional remedy for political inequality is to strengthen weak voices by providing campaign subsidies.

Within the anti-corruption parameters the Court accepted, debate over regulating campaign contributions turns on whether the regulation is necessary to prevent real or apparent corruption.

Who Should Be Permitted to Give?

Drafters of campaign regulations concerned with corruption often start with several questions relating to the source of campaign funds.

- Should certain particularly suspect sources of funds be sealed off from the electoral process, such as foreign governments and citizens of foreign countries, whose contributions are often prohibited out of a fear that they might improperly influence a candidate or might not have the nation's best interests at heart?
- Should similar source restrictions apply to campaign contributions from corporations or labor unions?
- Are such restrictions justified under an "anti-corruption" rationale?
- What about source restrictions for contributions from individuals residing in a different state, county, or congressional district than the candidate?
- Should aggregate contributions from a particular type of source, such as PACs or out-of-district donors, be limited?

Once again, as with disclosure, FECA provides one possible model. FECA designates certain sources of funds as off-limits for campaign contributions. Corporations, labor unions, federal employees, and federal government contractors are forbidden to contribute funds to a candidate for federal office. No limits exist for out-of-state or out-of-district contributions.

Mitigating, and perhaps eroding, FECA's source ban are PACs. While corporations, labor unions, and federal contractors cannot contribute from their treasuries, the employees of each of these forbidden entities can contribute up to $5,000 each to a PAC, which in turn can contribute up to $5,000 per candidate or independently spend unlimited amounts on a candidate's behalf.

How Much Is Too Much?

A second set of questions drafters must ask in regard to the Court's anti-corruption rationale has to do with the permissible size of contributions:

- Should the law cap the amount that one person or group may contribute to a single campaign?
- To all campaigns?

- Should the same rules govern campaign contributions to incumbents and challengers?
- Should the same caps apply to all types of contributors?
- To all types of recipients?
- Should contributions to third-party candidates and independents be regulated at all, since they are unlikely to win their elections?

FECA allows individuals to contribute up to $1,000 per election to any candidate, regardless of incumbency or minor party status. Since a primary and a general election are treated as separate elections, the de facto ceiling for a contribution to a federal candidate is $2,000 per election cycle.

There is also an overall annual contribution limit for individuals. Separately, individuals may make $1,000 contributions to campaigns, $5,000 contributions to PACs, and $20,000 contributions to the "hard money" accounts of political parties (discussed next). However, these contributions may not exceed $25,000 a year in the aggregate.

How Should Party Money Be Regulated?

Regulation drafters must also examine political party funds.

- Should contributions to and from political parties be subject to regulation?
- At what level?
- From what sources?
- Should the answers depend on the purpose to which the party will devote the funds, such as promoting its candidates or generic party building?

FECA has two categories for contributions to political parties. "Hard money," the money the party raises in smaller contributions from individuals ($20,000 per year) and PACs ($15,000 per year), is the only money the party is permitted to pass on to candidates or to use to promote them.

"Soft money" can be raised in unlimited amounts from any source, including corporations and labor unions. The party cannot spend this money to support candidates but can spend it on so-called "party building" activities that benefit the party's entire slate, such as voter registration or get-out-the vote drives. Not surprisingly soft money has grown into an enormous pipeline for corporations and wealthy contributors to pour millions of dollars into the political process. While soft money may not be used to support candidates for federal office expressly, critics argue that activity designed to strengthen political parties obviously benefits these parties' candidates and that parties are increasingly flouting the prohibition with advertising campaigns blatantly designed to influence voters to support or defeat identified candidates.

What's a Contribution?

Once ceilings are determined, the drafters must ask:

- What should count as a contribution?
- Cash, of course, but what about in-kind services?
- Volunteer assistance?

In the federal system, aside from traditional volunteer activities (*e.g.,* stuffing envelopes, door-to-door canvassing), contributions of any kind count toward an individual's limit. On the other hand, loans made in the ordinary course of business by a bank or a wealthy supporter are not contributions, as long as the campaign is bound by a good faith duty to pay the loans back with reasonable interest.

What About Candidate Spending?

The next set of questions relate to the candidate's spending:

- How much may a candidate spend on behalf of his or her campaign?
- Should contributions or loans from family members be restricted?
- Should a candidate be permitted to loan the campaign money (to be recouped from later contributions) and, if so, how much?

As the Constitution requires, FECA allows wealthy candidates to spend unlimited amounts of personal money in support of their candidacies. Contributions or unsecured loans to the campaign from family members (other than a spouse or a child) are treated like contributions from any other source and are therefore regulated.

Models of Contribution Caps

With all its complications, some believe that the federal model prevents powerful contributors from exercising undue influence over candidates for federal office. Critics of existing federal law attack it from two sides. One body of criticism argues that the regulations make it too difficult to raise money, especially for challengers and third-party candidates. Even if money can be raised in adequate amounts, critics note that the expense of raising funds in small amounts from large numbers of contributors imposes unnecessary transaction costs, and merely shifts power from individual contributors to special interests that have the resources and expertise to "bundle" small contributions.

A contrasting body of criticism argues that FECA's loopholes allow powerful donors to exercise undue influence over federal candidates. Critics point to soft money as a gigantic flaw — a $263 million loophole in the 1996 elections — that permits massive corporate influence over the political process. Critics also single out the increasing influence of PACs, arguing that PACs should not be permitted to contribute to federal candidates or, at a minimum, that the $5,000 ceiling should be lowered to $1,000. Finally, some argue that candidates' excessive reliance on out-of-state funding erodes confidence in the electoral process.

State laws regulating campaign contributions to state elections vary widely. Some states make no effort to limit contributions, relying on public disclosure laws and laws forbidding bribery and extortion to prevent corruption. Several states impose a lower contribution ceiling than the federal limit of $1,000, ranging from $500 down to $100, though lower courts have been striking low contribution limits on the ground that small contributions are not corrupting. Most states impose limits in the $1,000 range. Several states exceed the $1,000 federal figure, with ceilings ranging up to $25,000 for candidates for governor. Commonly, unlike the federal limits, state ceilings vary depending on the office.

States also commonly place an aggregate annual ceiling on all contributions to state candidates. The aggregate ceilings vary dramatically, from $2,560 in Arizona to $150,000 in New York.

State source restrictions also vary widely. Corporations and labor unions are permitted to make campaign contributions in many states, subject to the same ceilings that govern individuals, or, occasionally, subject to a special ceiling. Many states ban corporate and labor contributions. A few states ban corporate contributions, but permit limited contributions from labor unions. PACs are generally permitted to make at least the same size contributions as individuals. While no state seeks to ban PAC contributions entirely, several states prohibit corporate sponsors of PACs from absorbing the PAC's administrative costs. No state has

States have, however, adopted a bewildering array of regulations designed to shield government employees and contractors from undue pressure to contribute, ranging from so-called "little Hatch Acts" that ban government employees from engaging in partisan electoral politics, to restrictions on the solicitation of contributions from public employees and government contractors, and even regulated industries. The practical effectiveness of these protections is open to serious doubt.

Many state contribution limits suffer from the same soft money loophole that limits the effectiveness of FECA. Contributions to political parties for "party building" are often not deemed campaign contributions, and fall outside both the source restrictions and the contribution ceilings.

Finally, like the federal law, no state contribution limits attempt to distinguish between incumbents and challengers, or between major and minor parties.❑

Restrictions on Campaign Expenditures

The Supreme Court has forced legislatures to treat campaign expenditures very differently from campaign contributions. While campaign contributions create a risk of *quid pro quo* corruption justifying regulation, the Court has reasoned, campaign expenditures do not pose a similar risk. Thus, efforts to impose a ceiling on total campaign spending, or a limit on the amounts that individual candidates can spend on their own campaigns, or a maximum on the amounts that wealthy individuals (or PACs) can spend on their own efforts to support a favored candidate, have been declared unconstitutional.

By upholding contribution limits and invalidating expenditure caps, the Court placed federal candidates between a virtually unlimited demand for money and severe restrictions on supply. The predictable results are a frenzied effort to find loopholes in the federal law, and the increased power of participants who can supply large amounts of money without violating federal law. Participants capable of such a transaction include: (1) wealthy individuals, willing to spend their own money independently or willing to spend heavily to support a candidate through indirect sources; (2) special interest PACs with the ability to collect large numbers of small contributions and the willingness to spend this money by contributing up to $5,000 to favored candidates, or by independently spending unlimited funds supporting candidates; (3) fundraising professionals with the expertise needed to reach large numbers of small contributors; and (4) soft-money donors willing to make very large contributions to political parties under the guise of "party building."

At the state level, except for record-keeping requirements, and occasional efforts to regulate what happens to surplus campaign funds, no state directly regulates campaign expenditures. Legislation pending in several states, however, would cap expenditures. Cincinnati has imposed a cap on expenditures in city council races, but a federal court recently struck the cap.

The Supreme Court has held that voluntary limits on campaign expenditures can be demanded as the price of receiving a campaign subsidy. Thus, it is impossible to treat regulation of campaign expenditures separately from public subsidies.❑

Campaign Subsidies

Government campaign subsidies can take several forms: direct cash grants to a campaign; matching grants that supplement a campaign's private contributions; targeted subsidies that can be used only for designated purposes; and efforts to lower the cost of important items in the campaign budget, like television advertisements. As with any subsidy proposal, public financing of campaigns raises several threshold issues.

What's the Cost?

First, of course, is cost. The most expensive subsidy is a program that fully funds candidates with direct, unrestricted cash grants. These costs can be significantly lowered by keying a subsidy to private contributions via a matching program, thus shifting a percentage of campaign costs to the private sector. Costs are also lowered when subsidies are focused only on specified important activities.

Even if we adopt the most expensive form of subsidy, the unrestricted cash grant, the actual out-of-pocket cost of subsidizing campaigns is surprisingly low, since campaign expenses can be capped as the price of receiving the subsidy. Experts estimate that the cost of subsidizing all House and SenA major fear of those who endorse full public financing is that legislatures will not allocate sufficient funds to campaigns to ensure vigorous and effective campaigns.

Why Support Politicians?

Cost aside, proponents of public funding must explain to skeptics why a single penny of public money should go to politicians. In an era of scarce resources, why should candidates receive money that could be spent on important public needs, like rebuilding our infrastructure or helping the poor?

The short answer is that the money must come from somewhere. Democracy turns out to be an expensive form of government. Without money, you cannot have effective campaigns. Without effective campaigns, democracy becomes a shell. The alternative to public funding is the time-honored solicitation of private contributions. But using private money to fund democracy poses serious problems of undue influence, and is blatantly unequal, as it gives the wealthy disproportionate influence over the political process. The costs of political corruption, and the price of tilting politics towards the rich may be far greater than the cost of a public subsidy. For example, the savings and loan crisis — at heart a campaign finance scandal — cost taxpayers $300 billion, enough to fund all congressional campaigns for 600 years.

Who Gets Subsidized?

The next set of issues relates to the difficult problem of allocation:

- Which candidates should be eligible for campaign subsidies?
- How can we safeguard against the risk that undeserving candidates could make a career of losing elections at public expense?
- Is there any way to promote choice without empowering truly marginal candidates?

Everyone agrees that public finance systems need qualifying rules to assure that public money is not wasted. A common approach is to match private contributions or (if the state wishes to encourage certain types of contributions) to match private contributions of a particular size from particular sources. Another possible approach is to require a

candidate to demonstrate broad public support. This can be done by presenting petitions or by raising private money in small amounts from a large number of supporters. Some argue that any candidate who satisfies the state's rules for getting on the ballot — which usually requires some showing of popular support — should be entitled to public funding. Another approach keys the amount of the subsidy to a candidate's electoral success, either in a past election or, retroactively, in the election for which the candidate seeks funds. Efforts to prevent abuse must be tempered by a concern that dissenting voices receive a fair share of subsidy funds. It would be unfair to allocate all subsidy funds to major party candidates, since minor parties would be unable to compete effectively. The best plan, therefore, is one that screens out frivolous candidates, but permits fair subsidies to minor parties.

How to Pay?

How to pay for campaign subsidies is another knotty set of issues. Several methods are possible. Most straightforward is a payment directly from general tax revenues. A second method uses a fund created by voluntary tax check-offs, where the taxpayer gets no tax benefit from the check-off. A third method also uses the check-off device, but links it with a tax credit or a tax deduction. Both forms of check-off can be designed to permit the contributor to earmark the funds for a particular candidate or party. Finally, direct contributions to a political campaign can be deducted from taxable income, a method used in several states.

What Strings to Attach?

Many reformers believe that the greatest value of a subsidy approach is that it permits the government to place strings on the candidates who accept the subsidy. The Supreme Court has ruled that certain strings are permissible, such as a requirement to limit campaign expenditures, but the courts have yet to resolve what types of strings are permissible. Here are some of the questions that arise with regard to strings, keeping in mind that some of the approaches have yet to be judicially approved:

- Should a participating candidate be required to cap expenditures?
- Should subsidies be tied to voluntary ceilings on campaign contributions, or to the refusal to accept money from certain sources, such as PACs?
- Should a subsidy trigger a voluntary duty to appear in campaign debates or a promise to refrain from short or negative television advertisements?

What About Variable Caps?

Once a subsidy is provided, there may be events that could lead to an increase in the subsidy or a lifting of a cap on fundraising. Here are some of the issues that a draftsman might consider:

- Should the subsidy depend on whether the election is contested or on whether it is competitive?
- Should subsidies be increased when a candidate has faced a primary, or a competitive primary?
- Should a subsidy be increased to respond to an opponent's exorbitant spending?
- Should a subsidy be increased to respond to independent expenditures?
- If so, should the subsidy go up only for the candidate targeted?
- How can the law ensure that a candidate's allies cannot trigger extra subsidies by issuing phony and ineffectual "negative" ads?

Disagreement exists about whether an increased subsidy can be triggered by an opponents' spending. In Kentucky, for example, a candidate who agrees to spending limits receives added subsidies if his opponent's expenditures exceed a set amount. Minnesota had a plan, which was struck by a court,

that provided candidates with subsidies to offset substantial independent expenditures against them. The court held that such schemes "chill" the speech of those who wish to attack the candidate and is, thus, unconstitutional. Others argue that merely making it possible to answer an opponent's or an independent speaker's charges does not penalize their speech within the meaning of the First Amendment.

The Federal Model

The subsidy program with which we have the most experience is the presidential system. Federal law uses several subsidy techniques. The presidential primary process is subsidized through a matching grant program. Once they qualify, candidates for the presidential nomination of any political party (major or minor) are eligible for dollar-for-dollar matching grants for each campaign contribution up to $250. In order to qualify for this subsidy, a candidate must demonstrate a broad base of support by raising at least $5,000 in each of 20 states in contributions of not more than $250. The subsidy is cut off if a candidate fails to garner 10% of the vote in two consecutive state primary elections. Candidates may, however, elect not to run in certain primaries to avoid jeopardizing their subsidies. The regulations provide no nominating subsidy for independent candidates seeking a place on the presidential ballot without party designation.

Federal law also subsidizes the major party nominating conventions. Each major party, defined as a party that received at least 25% of the vote in the preceding presidential election, receives a cash grant — in 1996, it was $12.4 million — to subsidize its nominating convention.

Finally, the government uses direct campaign cash grants to subsidize the presidential general election. The candidates of the major parties (again, those that polled at least 25% of the vote in the last presidential election) receive cash grants at the commencement of the general campaign. In 1996, it was $62 million. Candidates of minor parties (parties that polled between 5% and 25% of the vote in the preceding presidential election) receive a proportionate subsidy at the beginning of the campaign keyed to their prior electoral showing. So-called new parties (parties that polled less than 5%) receive no subsidy until after the election, when they can receive a retroactive subsidy based on their electoral success if they receive more than 5% of the vote. Perhaps the most noteworthy aspect of the general election subsidy is the string that goes with it. As a condition of receiving the subsidy, candidates must promise to limit their campaign expenditures to the amount of the subsidy.

The federal subsidy system has been criticized on three levels. First, critics argue that the subsidy process unfairly favors the Republican and Democratic parties. They point out that no third party has ever qualified for convention subsidies, and that the general election subsidies provide the major parties with a built-in advantage over challengers. The discrimination against new parties is particularly acute, since a new party candidate receives nothing until after the general election, while the major party candidates each receive $62 million at the beginning of the campaign. Independent candidates are treated even worse, since, by definition, they do not qualify for primary election or nomination convention subsidies.

Second, partial, not full financing of the presidential primary is criticized. Even with matching grants, critics argue, candidates must endure a money chase that inevitably leaves candidates indebted to private interests. Further, it is argued that matching grants have done nothing to relieve the connection between successful fundraising and political viability — in the previous four presidential elections the candidate with the most money raised as of January 1st of the election year went on to win the primary.

Third, critics point to two loopholes in the federal scheme that render it ineffective in curbing excessive campaign spending and special interest influence. Most importantly, the soft money loophole permits

wealthy contributors and corporations to contribute enormous sums to the major parties free of any restriction. While the major parties are prohibited from directly supporting their nominees with soft money contributions, they are permitted to engage in so-called "party building" activities. Even the most generic activities, such as get-out-the-vote drives, undoubtedly assist the presidential candidates, but lately parties have been using the money to pay for advertisements that promote their candidates. In addition, independent expenditures (and more recently "issue ads" that are thinly veiled campaign ads) by supporters of a presidential candidate fall outside the law's coverage, making it possible for wealthy supporters and PACs to drive campaign expenditures far beyond the hoped-for spending ceiling.

Finally, the funding mechanism for the presidential subsidies is unstable. Even though it does not affect a taxpayer's actual liability, participation in the voluntary check-off program, now $3, has been steadily declining.

No subsidies exist for House or Senate candidates. Twenty-one states have enacted some form of public financing for state candidates. Some states deliver the subsidy by permitting taxpayers to deduct contributions to political campaigns. Several states, notably Minnesota and Wisconsin, operate elaborate tax check-off programs — permitting taxpayers to direct the money to candidates, or designated parties — as well as a general subsidy fund. Other states attempt to use subsidies as carrots to induce candidates to limit their spending, to reduce the number of contributions received, and even to deter large independent expenditures. The three states with the most extensive subsidy systems are Minnesota, Kentucky, and Wisconsin.

Some State Models

Minnesota's system begins with a qualifying threshold. The state provides a subsidy to candidates for governor who have demonstrated public support by raising $35,000 in $50 contributions. Qualification thresholds for state senate candidates are $3,000; $1,500 for state representative candidates. As a condition of receiving a subsidy, a gubernatorial candidate must agree to limit campaign expenditures to $1,626,691; state senate candidates may spend $40,669; state representative candidates may spend $20,335. Candidates who receive a subsidy must promise to cap personal spending at $5,000 in an election year, and $1,000 in non-election years. However, if only one candidate agrees to the expenditure limit, he is allowed to exceed this cap in the event of excessive spending by an opponent. Moreover, expenditure limits are increased by the sum of independent expenditures made by supporters of the opponent. Newcomers to politics may spend 10% more than the usual limit. Finally, if a candidate has a closely contested primary, her general election expenditure limits are raised by 20%.

Minnesota's subsidy scheme is funded by a voluntary tax check-off. In recent years, participation in the Minnesota check-off has fallen to 12%, leaving the fund able to pay only about 1/3 of the potential $1.6 million gubernatorial subsidy, and 1/3 to 1/2 of the legislative subsidies — or a total of approximately $4 million. Most taxpayers who use the check-off designate payments directly to the party of their choice. Minnesota also provides for refunds of up to $50 for individuals, and $100 for joint filers, to reimburse taxpayers for contributions to candidates who agree to abide by expenditure ceilings. In 1994, the state refunded approximately $3.9 million to 60,000 participating taxpayers. Thus, in 1994 the total cost of the subsidies to Minnesota was approximately $8 million.

Not all aspects of Minnesota's campaign system survived judicial scrutiny. One unique aspect of the plan was a grant given to a candidate in the event he was attacked by an independent expenditure committee. As noted above, a federal appeals court ruled that this effort to offset independent spending was unconstitutional because it penalized protected expression. The court also struck the plan's effort to provide subsidies for federal House and Senate

elections, reasoning that FECA blocked all state efforts to expand the presidential subsidy program.

The Wisconsin campaign subsidy plan is funded by a voluntary $1 tax check-off. In order to qualify for a general election subsidy, a candidate must have obtained at least 6% of the vote in the primary and raised a substantial amount of money from private contributions. Qualifying candidates must promise to limit personal expenditures and agree to cap campaign expenditures at $1,078,200 for governor; $34,500 for state senate candidates; and $17,250 for candidates for the lower house. The maximum subsidy is set at 45% of the expenditure ceiling.

Unfortunately, participation in the Wisconsin check-off, which had no effect on a taxpayer's liability, has fallen to about 8% of the population, causing a serious shortfall in the state's ability to pay the subsidies. Once the diminished fund is divided among all the eligible candidates, only a fraction of the subsidy is available. Since the subsidy is a carrot designed to induce candidates to cap expenditures, the shrinking of the actual subsidy payments has caused many candidates, over 40%, to forego the subsidy.

Kentucky has enacted the most successful state subsidy system. Candidates for governor receive a 2-1 match for all private contributions up to $600,000. In return for the subsidy, candidates must promise to cap expenditures at $1.8 million, and limit their personal expenditures to $50,000. In order to qualify, a candidate must raise $300,000 privately in amounts of $500 or less. No more than 50% of the qualifying contributions can come from the same congressional district. Moreover, qualifying candidates must promise to participate in a number of public television debates, which are made available free of charge to the commercial media.

If only one candidate accepts an expenditure limit, the candidate agreeing to this cap is permitted to exceed the limit once an opponent has exceeded this same spending limit. The excess funds are raised with the help of a 2-1 matching subsidy. Finally, contributions from PACs are limited to 25% of a candidate's total private contributions, up to a maximum of $150,000. Unlike Wisconsin and Minnesota, Kentucky does not rely on tax check-offs to fund its subsidy. The subsidies are paid from general tax revenues.

The one aspect of the Kentucky plan that was struck by the judiciary was the degree to which it linked contribution limits to the acceptance of expenditure limits. Candidates agreeing to spending limits could receive $500 contributions, candidates rejecting limits had to live with $100 contributions. A federal court thought this subsidy plan was too coercive.❑

Enforcement as Reform

Enforcement provisions, of course, accompany every local, state and federal election regulation. Nonetheless, election laws are notoriously under-enforced. For this reason, many believe that the first step in campaign finance reform should not be to create new regulations, but to enforce existing election laws effectively.

Four proposals are advanced as mechanisms to force candidates, PACs, and political parties to obey election laws.

First, enforcement agencies can be structured to avoid gridlock. One reason the FEC has such a dismal enforcement record is that Congress designed the agency to be run by six commissioners — three Democrats and three Republicans. These commissioners are notorious for deadlocking on cases that involve the illegal activities of one party, and for discovering creative ways to ignore laws that both parties are violating. This dynamic would change dramatically if a third of the commissioners had to be unaffiliated with the two major parties, or if the appointments were made on the basis of integrity rather than partisanship.

A second way to strengthen enforcement is to give citizens a role in enforcement. At present, most jurisdictions allow only the enforcement agency, but not citizens, to bring election law actions in court. By allowing citizens to sue, more violations would be detected and punished, and election enforcement agencies would feel compelled to exercise more vigilance. This formula is used in many contexts including environmental, antitrust, labor, and employment discrimination law.

Third, the penalties for violating laws can be significantly stiffened. Fines in many jurisdictions are now just a cost of doing business. Civil penalties typically require little more than disgorging the illegal contribution, or perhaps two or three times its value. For most jurisdictions, criminal penalties require what is almost impossible — proving that a political participant willfully violated the relevant regulation. By raising civil penalties to 10 or 100 times the value of the illegal contribution, or adopting a standard less burdensome than willful intent for criminal violations, election regulations would be taken more seriously.

An additional penalty, perhaps the real silver bullet, involves striking at the heart of the politician's most powerful incentive to violate campaign laws — the election victory. If candidates knew that breaking the law to win an election would wipe out their victories, election behavior would dramatically change.

The final key to enforcing campaign laws is to provide adequate funding for election enforcement agencies. Because the FEC and most state and local agencies are funded by the constituencies they regulate (the legislative and executive branches) they often find themselves without the resources with which to accomplish their missions. For example, although FECA mandates that election actions be resolved quickly, the FEC typically exceeds the prescribed time limits, claiming that scarce resources make it impossible to accomplish its assigned tasks. In 1990, for example, in 65% of the penalty settlements the FEC negotiated it exceeded the 90 day time limit specified by law.

Often, legislatures blatantly frustrate the missions of election agencies. For example, many leaders of state election agencies have explained to their respective legislatures that with a modest investment of computer technology voters could be able to analyze candidates' funding sources from their home computers. Legislatures have repeatedly voted against funding these programs, opting instead for the status quo, where interested citizens or journal-

ists must travel to obscure buildings in state capitals to rifle through piles of disorganized campaign receipts. If nothing else, the above "enforcement as reform" proposals demonstrate an important aspect of the process of changing election laws.

When a campaign regulation is adopted, discussion about its policy impact is far from over. Often more important than deciding whether to enforce a campaign regulation is the commitment to enforce it when it passes.❑

Proposals for New Federal Legislation

At the federal level, reform efforts center on enacting subsidies for House and Senate races and closing a variety of loopholes. The subsidies are almost always keyed to a per voter formula, and vary from direct cash grants to matching grants. Some cover both the primary and the general election; others focus solely on the general election. All proposals require candidates to demonstrate a threshold of support before qualifying. All proposals treat incumbents and challengers identically.

Virtually all current federal proposals require candidates to accept expenditure limits in order to receive a subsidy. Some require a candidate to cap personal spending. If only one candidate accepts the subsidy/limits, that candidate will have his limit lifted, but the subsidy will continue to be paid. Several proposals attempt to deal with independent expenditures by increasing the subsidy to enable a candidate to mount an effective response.

The current crop of federal reform proposals includes two, as yet, untried ideas. Several proposals limit support from out-of-state contributors to a fixed percentage of contributions, and put a cap on the total amount that can be raised from PACs. Other proposals follow a novel path of attempting to lower campaign costs by assuring inexpensive or free television time, and below-cost mailing rates. The below-market television time is paid for either by the government or extracted without compensation from the television broadcasters as a condition of the broadcaster's license.❑

Conclusion

There are federal, state, and local models for campaign finance reform. Each model of reform must be adapted to the particulars of the local political landscape. The best model will depend upon the values sought to be advanced, the problems that need to be addressed, the political feasibility of various proposals, and fiscal concerns. The options are many and varied. The question isnot whether effective campaign finance reform is possible; it is whether voters have the will to insist on it.❑