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MONEY IN POLITICS 2009: NEW HORIZONS FOR REFORM

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"Political Spending by Publicly Funded Entities" – a Letter to Elizabeth Warren from the Brennan Center for Justice, March 30, 2009.

"A Brewing Court Battle," Michael Waldman, *Newsweek*, Mar. 23, 2009.

"Will Courts Allow More Transparency?" Laura MacCleery, *Politico*, Feb. 25, 2009.

“Illinois has much to teach Pa.,” Ciara Torres-Spelliscy, *The Philadelphia Inquirer*, Feb. 25, 2009

“Auction Block Politics,” Laura MacCleery, *The Huffington Post*, Dec. 18, 2008.

“Back to the Future for the RNC,” Laura MacCleery, *The Nation.com*, Dec. 12, 2008.

“Counting Heads, Not Dollars: A New Campaign Finance Context,” Laura MacCleery, *Personal Democracy Forum: TechPresident.com*, Dec. 12, 2008.

“The $200 Campaign Finance Fix,” Fred Wertheimer, *The Washington Post*, Nov. 13, 2008.

“Bailout Backlash: Congress Must Examine Its Own House,” Kelly Williams and Laura MacCleery, *The Hill blog*, Oct. 2, 2008.

“Supreme Court Justices Should Know by Now – Money Is Not Speech,” Ciara Torres-Spelliscy, *Seattle Post-Intelligencer*, June 6, 2008.

Open Letter to Democratic Representatives From Democratic Donors Regarding the Fair Elections Now Act

May 6, 2009

Dear Representative,

We are writing to encourage you to cosponsor **H.R. 1826, the Fair Elections Now Act.** This bipartisan legislation was introduced by Reps. John Larson and Walter Jones on March 31st. We believe, when passed, it will reduce the amount of time members of Congress spend raising money, and will free up your time and attention for addressing the critical matters before the nation. A companion bill has been introduced in the Senate by Sens. Dick Durbin and Arlen Specter.

The current system of campaign financing requires an enormous investment in pursuing a relatively small number of Americans who can contribute or raise significant amounts of money. This proposal would allow candidates the option of running for Congress with funds raised entirely from small donors – the ordinary citizens at the heart of our democracy – along with matching public funds.

Under this legislation, candidates would raise a significant number of contributions of $100 or less in order to qualify for a set amount of public funding. Candidates would receive additional public funds to remain competitive by continuing to raise small donations. Self-funding would be prohibited for those receiving public funds.

It is modeled on successful laws in several states and cities. Nearly 400 candidates at the state and local level were elected under these laws in 2008. Elected officials and voters alike report they prefer this new system to the existing one.

High-dollar fundraising has become symbolic in the minds of many voters as the reason why Washington isn't addressing their concerns. A February national bipartisan poll conducted for a coalition of campaign reform organizations found that 73% of Americans believe that campaign contributions to members of Congress are partly to blame for the financial crisis, and that 79% of Americans worry that fundraising pressures will impede progress on health care, energy, and global warming legislation.

With so much at stake in Washington today, we believe it is shortsighted to continue down the present unsustainable path of skyrocketing campaign spending. **The Fair Elections Now Act is a common sense idea whose time has come, a change that will set us on a better path in the years ahead.**

over

For more information contact David Donnelly at Public

We hope you agree with us, and offer your support by co-sponsoring this important legislation.

Sincerely,

Naomi Aberly
Grant Abert
Elaine Attias
Amb. Elizabeth Bagley
Smith Bagley
Robert Bowditch
William Budinger
James Kimo Campbell
Peter Copen
Rosemary Faulkner
Ron Feldman
Christopher Findlater
Murray Galinson
James Gollin
Lee Halprin
Francis W. Hatch
Arnold Hiatt
John Hunting
Greg Jobin-Leeds
John S. Johnson
Wayne Jordan
Craig Kaplan
Michael Kieschnick
Steve Kirsch
Arthur D. Lipson
Henry Lord
Anna Hawken McKay
Rob McKay
Sally Minard
Alan Patricof
Susan Patricof
Doug Phelps
Steve Phillips
Drummond Pike
Rachel Pritzker
Abby Rockefeller
Charles Rodgers
Marsha Rosenbaum
Manny Rouvelas
Vin Ryan
Deborah Sagner
Guy T. Saperstein
Dick Senn
Steve Silberstein
Alison Smith
William Soskin
Martin Stevenson
Pat Stryker
Ellen Susman
Steve Susman
Margery Tabankin
Kate Villers
Philippe Villers
Scott Wallace
George Wallerstein
Marc Weiss
Al Yates
Joe Zimlich

Deep-pocketed donors want campaign finance reform

Posted: 06:45 PM ET, May 5, 2009

From CNN Political Editor Mark Preston

Democratic donors are seeking to limit campaign donations.

WASHINGTON (CNN) - After giving more than $16 million in political contributions, a group of Democratic donors is saying enough is enough - it's time for Congress to scrap the current campaign funding system and encourage a new hybrid model of small dollar donations and public financing.

The 58 deep-pocketed donors, under the umbrella of the **Public Campaign Action Fund**, will make their plea in a letter Wednesday to be delivered to every Democratic member of Congress, CNN has learned.

"With so much at stake in Washington today, we believe it is shortsighted to continue down the present unsustainable path of skyrocketing campaign spending," the donors write in the letter obtained by CNN. "The **Fair Elections Now Act** is a common sense idea whose time has come, a change that will set us on a better path in the years ahead."

The legislation would require candidates, who opt into this voluntary program, to collect contributions capped at $100 from a minimum number of in-state donors to prove viability. Once a candidate achieves viability, the candidate would receive a 4-to1 match - which varies from state to state - from the federal government. The candidate would still be able to raise money, but only in $100 or less increments.

Bottom line, a donor would only be allowed to contribute $300 per candidate, per election: $100 for candidate viability, $100 for the primary, and $100 for the general election.

In the Senate, Majority Whip Richard Durbin, D-Illinois, and Sen. Arlen Specter, D-Pennsylvania, are sponsoring the legislation, while Rep. John Larson, D-Connecticut, and Rep. Walter Jones, R-North Carolina, have a similar bill in the House.

(list of signers)

THE HUFFINGTON POST

Banks Think They "Own" Congress? Wrong -- We're Taking Congress Back

By Lawrence Lessig– 05/05/09

If you think special-interest influence in Congress perverts our public policy, last week saw an outrage that vindicates that belief entirely.

Sen. Dick Durbin offered a bill that would allow families at risk of losing their homes -- but with an ability to pay their mortgage if their monthly rates were lower and extended over more years -- to legally get that option.

The very banks that taxpayers kept alive with billions in bailouts had the audacity to spend millions lobbying Congress to oppose this bill. They also showered politicians with campaign contributions.

The bill was defeated. Senator Durbin declared that banks "frankly own the place." Will you continue to support politicians who support this corrupt system? Or will you demand that any politician you donate to support reform?

Please join Change Congress's political "donor strike" today.

Thousands of people are telling members of Congress they won't get a dime from us unless they co-sponsor Senator Durbin's Fair Elections Now Act to overhaul congressional campaign financing. It would replace our broken system with citizen-funded elections, a hybrid of public funding and small-dollar donations.

Already, our strike has withheld over $1.25 million from politicians (based on contributions last cycle). It's also been featured by ABC, NBC, the Associated Press, Politico, Huffington Post, and others.

Now is the time to send politicians a message that we absolutely demand they change the system.

Can you help take back Congress by joining the "donor strike" today?

Then, please forward this post to your friends who may have missed last Friday's vote, or are looking for some constructive way to respond. Ask them to join the fight for reform.

Together, we can fight back. We need to fight back.

Thanks for helping to Change Congress.

http://www.huffingtonpost.com/lawrence-lessig/banks-think-they-own-cong_b_195972.html?view=screen

Democracy 21

Mayday, Mayday at the Federal Election Commission: A Report on the Unprecedented Campaign by the Republican FEC Commissioners to Shut Down Enforcement of the Campaign Finance Laws

Friday, May 01, 2009

By Fred Wertheimer
President, Democracy 21
May 1, 2009

The Federal Election Commission (FEC) was created in 1974 to administer and enforce the campaign finance laws. It has three Democratic and three Republican Commissioners.

During the first six months of 2008, the FEC was inoperative when a clash over the confirmation of President Bush's nominees to serve on the Commission left the six-member agency without the four-member quorum necessary to take any enforcement action. The inability of the FEC to function in the middle of a national election was its own campaign finance scandal.

Now, here we are a year later and once again we have an FEC incapable of enforcing the campaign finance laws. This time, however, the FEC enforcement failures are being caused by the three Republican Commissioners who were confirmed last summer to serve on the agency and who are engaged in a concerted ideological campaign to shut down enforcement at the Commission.

Three Commissioners can block any formal action by the six-member FEC and that is the path the Republican Commissioners have chosen to take on enforcement matters.

Unlike 2008, furthermore, when the lack of a quorum at the FEC simply delayed decisions from being made, the enforcement cases being pursued by the FEC professional staff are now being formally killed by the Republican Commissioners.

A *Washington Post* editorial last year (December 28, 2008) noted the new problem at the FEC stating, "The latest crew of Republican Commissioners seems to have little respect for election law and equally little inclination to enforce it."

The editorial described the approach of the three Republican Commissioners as "less a matter of partisan protectionism" than "ideological obstructionism."

This is just the latest in a long line of problems that has plagued the FEC during its existence and has resulted in a failed enforcement agency in need of structural reform and a new approach to appointing FEC Commissioners.

But the concerted campaign by the three Republican Commissioners to block enforcement of the laws is unprecedented and has taken the agency to a new level of irresponsibility.

As a recent *New York Times* editorial noted (April 17, 2009), "The commission has never been energetic or fastidious. But in recent months it has become a model of repeated dysfunction as its three Republican members vote together to block major enforcement efforts affecting violators - from either party - producing 3-to-3 standoffs."

It is clear beyond a reasonable doubt that the Republican Commissioners are engaged in an ideological campaign that has shut down enforcement at the FEC. This cannot be allowed to stand.

The obvious ring leader of the Republican Commissioners' anti-enforcement campaign is Commissioner Don McGahn, who became Chairman of the FEC immediately after his appointment last summer and who served in that position until the end of 2008.

Prior to joining the Commission, McGahn served as counsel to the National Republican Congressional Committee, the fund raising arm of the House Republicans, and as a campaign finance and ethics lawyer for former House Majority Leader Tom DeLay (R-TX).

As of today, May 1, 2009, the terms of three of the six Commissioners on the Federal Election Commission have expired and those seats are available for new appointments to be made by President Obama. This includes the seat of Commissioner McGahn whose term has ended and who is not eligible for re-appointment to the agency.

The McGahn vacancy provides President Obama with a golden opportunity to begin to address the Republican Commissioners' non-enforcement campaign and to start remaking the FEC into a real enforcement agency.

If the President fails to nominate and get confirmed a replacement for Commissioner McGahn, however, McGahn will be free to remain as a Commissioner indefinitely and the Republican Commissioners' campaign to shut down FEC enforcement will continue unabated.

In the past, FEC Commissioners have generally been selected by congressional leaders and party officials and chosen for their partisan and/or ideological views.

President Obama has an opportunity to choose new Commissioners based on their qualifications, experience and commitment to impartial and fair administration and enforcement of the laws. It is essential that President Obama expeditiously replace the term-limited McGahn on the FEC.

The Republican Commissioners' Anti-enforcement Campaign

A *BNA Money and Politics Report* earlier this year (January 5, 2009) noted that "the FEC's three Republican Commissioners had voted to reverse the agency's course on key issues."

The *BNA Report* stated that "The recent votes represent a sharp break with the past. In late 2006 and throughout 2007, for example, different casts of FEC commissioners voted unanimously to impose some of the largest FEC fines ever in key cases involving controversial issues, such as restrictions on 527 groups."

The evidence of enforcement "obstructionism" by the three Republican Commissioners is detailed by a series of articles in the *BNA Report* and demonstrated by the fourteen cases cited below.

Two of the enforcement cases involved matters where the respondents had already agreed to conciliation agreements, or "plea bargains," and to pay civil penalties. Nevertheless, the three Republican Commissioners voted to reject the "plea bargain" agreements and instead killed the enforcement actions altogether.

In one of these cases, involving The November Fund, which was a 527 group created by the Chamber of Commerce, the FEC professional staff entered into a conciliation agreement with The November Fund group regarding soft money expenditures it made to influence the 2004 presidential election in support of President Bush. The 527 group agreed to pay a civil penalty as part of the agreement.

The three Republican Commissioners, however, refused to accept the "plea bargain" agreement and instead killed the enforcement action entirely.

Democratic Commissioners Ellen Weintraub and Cynthia Bauerly challenged their Republican colleagues "refusal to enforce the law," as a "dramatic departure...from the Commission's prior enforcement efforts and the laws itself."

In the second case, involving a Democratic congressional candidate, the candidate's campaign committee entered into a conciliation agreement with the FEC professional staff, regarding the committee's failure to provide full disclosure information for nearly 90 percent of its contributors giving more than $200. The candidate's committee sent in a check to pay for the civil penalty imposed by the

agreement.

Despite the "plea bargain" agreement, and despite the support of the Democratic Commissioners for an enforcement action against the committee of a Democratic candidate, the three Republican Commissioners rejected the conciliation agreement and instead killed the enforcement action entirely. The check was returned by the FEC to the campaign committee.

There are other cases, as well, where the FEC professional staff, supported by the Democratic Commissioners, attempted to pursue enforcement action against Democrats only to be blocked by the three Republican Commissioners.

In a case involving a former employee of the Washington State Democratic Central Committee who admitted to a "knowing and willful" violation of the law by embezzling $65,000 from the Democratic party committee, the FEC professional staff, supported by the three Democratic Commissioners, recommended an enforcement action against the former Democratic party employee.

The three Republican Commissioners rejected the enforcement effort and instead killed the enforcement action entirely. "This result was at odds with other similar cases which resulted in large fines and in some cases jail terms," according to the *BNA Report* (January 5, 2009).

In a case involving the Democratic Congressional Campaign Committee, the FEC professional staff, supported by two Democratic Commissioners (the third Democrat recused herself), recommended that the Commission find "probable cause" that the DCCC had violated the disclaimer requirement in the law.

The three Republican Commissioners voted to dismiss the complaint and killed the enforcement action entirely.

In a case involving the Arizona Democratic party, the FEC professional staff, supported by the Democratic Commissioners, wanted to pursue a complaint filed by the Arizona Republican party against the Arizona Democratic party for illegally laundering soft money.

The three Republican Commissioners voted to dismiss the complaint and killed the enforcement action entirely.

In a case involving billionaire Democratic supporter George Soros, the FEC professional staff, supported by the Democratic Commissioners, wanted to pursue an enforcement lawsuit against Soros for failing to disclose independent expenditure activities attacking President Bush and supporting Senator Kerry in the 2004 presidential election. The three Republican Commissioners rejected the lawsuit and killed the enforcement action entirely.

The Republican Commissioners have also demonstrated they are equal opportunity non-enforcers.

In a case involving Republican presidential candidate Mitt Romney, the FEC professional staff, supported by the three Democratic Commissioners, wanted to pursue an enforcement action against the Romney presidential campaign for accepting an illegal in-kind contribution of $150,000 from a campaign supporter. The Romney supporter chartered an airplane to fly a group of Romney supporters from Salt Lake City to Boston for a fundraising event.

The three Republican Commissioners voted to reject the complaint and killed the enforcement action entirely.

Democratic Commissioners Weintraub and Bauerly stated that this "was not a difficult case" under long-established law.

In a case involving a Republican congressional candidate, the FEC professional staff recommended the Commission find "probable cause" that the candidate violated the "personal use" prohibition in the law after the candidate took $70,000 from the sale of the campaign's contributor lists to a vendor. The three Democratic Commissioners voted to pursue the enforcement action.

The three Republican Commissioners rejected the professional staff's recommendation, and killed the enforcement action entirely.

In a case involving another Republican congressional candidate, the FEC professional staff, supported by the Democratic Commissioners, wanted to pursue an enforcement action against the candidate for illegally using his mother's money to finance his campaign.

Two Republican Commissioners voting against taking the action and the third Commissioner recused himself. This resulted in killing the enforcement action entirely.

In five other recent decisions, the Republican Commissioners again blocked enforcement action.

In a case involving the American Leadership Project, a 527 group, a complaint was filed that the group illegally spent soft money to promote Senator Hilary Clinton's presidential campaign during the 2008 primary election. Two Democratic Commissioners voted to find "reason to believe" that a violation had occurred and to pursue the case. The third Democratic Commissioner recused herself.

The three Republican Commissioners voted to dismiss the complaint and killed the enforcement action entirely.

In a case involving Americans for Job Security, a 501(c) group, a complaint was filed that the group illegally spent soft money to promote or attack federal candidates. The Democratic Commissioners voted to find "reason to believe" a violation had occurred and to pursue the case.

The three Republican Commissioners voted to dismiss the complaint and killed the enforcement action entirely.

In a case involving American Future Fund (AFF), a 501(c) group that ran television ads that praised Senate candidate Norm Coleman in Minnesota, the three Democratic Commissioners supported the FEC general counsel's recommendation to investigate whether the group had made illegal corporate contributions.

The three Republican Commissioners voted against taking any action in the case and killed the enforcement action entirely.

In a case involving Protect Colorado Jobs, a 501(c) group that conducted a direct mail campaign in the Colorado Republican congressional primary in 2008, the three Democratic Commissioners supported the general counsel's recommendation to find reason to believe the group had violated the ban on corporate contributions.

The three Republican Commissioners rejected the staff recommendation and killed the enforcement action entirely.

In a case involving a question of whether a corporation illegally coerced contributions from its employees to its PAC, the three Democratic Commissioners voted in favor of the general counsel's recommendation to investigate the allegations. The Republican Commissioners opposed any investigation and, as a result, the case was never investigated by the FEC. The matter, however, was subsequently resolved by alternative dispute resolution.

The repeated killing of enforcement actions by the three Republican Commissioners is sending a clear message to one and all: do what you want and don’t worry about the campaign finance laws because the FEC is not going to enforce them.

Conclusion

The FEC has been taken over by three Republican Commissioners who have established an overwhelming record of ideological opposition to enforcing the campaign finance laws.

It is making a mockery of the nation's campaign finance laws and setting the stage for participants in the 2010 congressional elections to ignore the laws as they so choose.

The first opportunity to address this problem now exists, with the expiration of Commissioner McGahn's term on the FEC. It is essential to replace McGahn with a Commissioner who believes in carrying out the FEC mandate to enforce the campaign finance laws.

Citizens are entitled to have the campaign finance laws enforced with the same kind of commitment and impartiality that apply in the case of laws applicable to them. Members of Congress and other federal candidates should not benefit from a double standard when it comes to enforcing the campaign finance laws.

President Obama should seize the moment and begin remaking the FEC to help ensure that we have fair and effective enforcement of the campaign finance laws in the future.

Democracy 21 - phone: 202-429-2008 - fax: 202-293-2660 - info@democracy21.org - 1875 I St. NW Suite 500 - Washington, DC 20006

Public Citizen 35 YEARS
Protecting Health, Safety & Democracy
Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group

April 30, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

RE: Deadlock on the Federal Election Commission

Dear Mr. President:

Tomorrow you will have an opportunity to repair the damage to the enforcement of federal campaign finance law that has been done by a series of highly partisan and politically charged appointments to the Federal Election Commission (FEC) by the Bush Administration. The terms of three of the Commission's six members expire on May 1, affording you the chance to break the deadlock that has immobilized the FEC over the past year by appointing new leaders to the agency.

Since the Commission was reestablished in mid-2008, partisan 3-to-3 deadlocks on important enforcement matters have increased dramatically. A principal force behind these deadlocks is Commissioner Don McGahn, a former ethics advisor to Rep. Tom DeLay who resigned from Congress under criminal indictment. McGahn has coalesced the Republican members of the FEC into a voting bloc committed to reversing established regulations to implement the law and preventing critical enforcement actions. The reconstituted Commission in 2008 has produced the largest percentage of dismissed enforcement cases and the lowest percentage of substantive enforcement actions in recent history.[1]

At least a dozen key enforcement actions have been stymied by deadlocked votes under the current FEC, undermining several crucial regulatory policies. The FEC's three Republican commissioners have voted in unison to block staff-recommended enforcement actions against, for example, a Washington state party official who allegedly embezzled party funds; a Section 527 group charged with soliciting unlimited "soft money" used in the 2008 presidential primaries; and Mitt Romney's 2008 presidential campaign, which allegedly accepted illegal in-kind contributions. The Republican bloc even rejected two conciliation agreements to which the parties had already agreed, which is tantamount to a refusal to enforce the law.

In one of the more recent deadlocks, preventing the investigation of a Public Citizen complaint charging that Americans for Job Security is evading federal disclosure requirements and contribution limits, the three Republican commissioners wrote of their disdain for established FEC regulations implementing federal campaign finance laws. They questioned whether the regulation that defines

[1] Federal Election Commission, OGC Enforcement Statistics for Fiscal Years 2003-2008 (Jan. 13, 2009).

when a group becomes a "political committee" subject to the disclosure requirements and contribution limits is constitutional, noting that they plan on issuing another statement to address the regulation itself, and then dismissed the complaint contrary to the general counsel's recommendation.

On February 12, 2009, Public Citizen joined with the Brennan Center for Justice, Campaign Legal Center, Common Cause, Democracy 21, League of Women Voters and U.S. PIRG in calling for the Obama Administration to modify the appointment process for the FEC. Under the Constitution, the President appoints members of the Commission, with the advice and consent of the Senate. The letter observed, however, that in reality past presidents have "simply served as a pass-through, receiving names provided by congressional and party leaders, and passing them on to the Senate as nominees for confirmation as FEC commissioners."[2] The result has too often been the appointment of commissioners who adhere to a very truncated view of the law, reflecting the interests of congressional or party leaders.

Public Citizen repeats that call today, asking you take this opportunity to fix the FEC. The Obama Administration need not function as a mere pass-through on FEC appointments. Instead, it should select independent experts dedicated to implementing and enforcing the law.

The Republican bloc on the Commission shows no sign of letting up in its obstructionism. It seems that the immediate future of the FEC will follow one of two paths: either current federal campaign finance laws will be largely torn asunder by a deadlocked FEC, or you will appoint commissioners who are committed to carrying out the agency's mission.

We encourage the Administration to pursue the latter path of appointing commissioners who will pursue their regulatory duties responsibly and professionally – and we encourage you to make these appointments soon.

Sincerely,

David Arkush
Director of Congress Watch,
Public Citizen

Craig Holman, Ph.D.
Government Affairs Lobbyist,
Public Citizen

[2] Letter to the Federal Election Commission, Re: Notice 2008-13, Rulemaking on Agency Procedures (Feb. 12, 2009)

SAM WATERSTON

The Boston Globe

Reforming pay-to-play politics

By Sam Waterston | April 30, 2009

BASED ON the success of campaign finance reform in several states, the Fair Elections Now Act is moving forward at the federal level. Massachusetts citizens should speak up in favor of the act, which restructures the way we finance elections to move away from the expensive cycle of pay-to-play politics that now distorts public policy debate - and the flow of tax dollars - in Washington.

The state would have been on the list of successful policy incubators if not for the actions of recalcitrant Beacon Hill lawmakers who refused to implement a voter-passed initiative in 1998. In Maine and Connecticut, which both passed Fair Elections programs, candidates for the legislature participated in their states' systems in droves, with more than 80 percent of the current legislative offices filled by those who didn't raise a dime from wealthy interests.

While much has been made of the surge in small donations to Obama's campaign last year, big money soared as well. It represents by far the largest share of federal campaign money to both presidential and congressional candidates, and those who can make or bundle the largest campaign donations always seem to be the ones getting the vast majority of political favors.

We need to replace that big money and create a system that relies on small-dollar donors. This will bring in citizens who have long felt unwelcome because they didn't have the cash or the connections to participate. We need a simple, straightforward solution that will pass constitutional muster, and prevent "gaming the system."

The good news is that just such an alternative exists and is already in use in states and cities across the country. In addition to Connecticut and Maine, similar programs are in place in Arizona, New Mexico, North Carolina, and elsewhere. The Fair Elections Now Act is modeled on these laws.

Obama signaled his support in candidate questionnaires and campaign statements, and it has bipartisan sponsorship.

Under the proposal, candidates must get a set number of modest donations from people in their community to receive limited Fair Elections funds, coupled with additional small donations matched on a four-to-one basis. That means the donation from the teacher is as important as the one from the corporate CEO. It frees the candidate from the constant need to ask for big donations, from attending the $2,400 a-plate fund-raisers, and from the need to request money from all manner of interest groups. Candidates can spend time discussing the issues with voters, not asking for money from the wealthy. Our political leaders' duty to represent the will of the people is made a little easier.

More important, democracy itself gains new strength. The wisdom of the people, on which democracy depends, can't be heard - and we can't change the results we've been getting - without changing the way we fund our elections. Simple, voter-centered public financing will take the taint out of campaign donations and invite ordinary citizens into the political process. The results are in: Where laws on public financing of elections are in place, the public comes in, the special-interest money goes out.

Sam Waterston is an actor on "Law and Order." ■

Reform Groups Strongly Praise President Obama's Government Integrity Reform Measures during First Hundred Days

Statement Issued by Common Cause, Democracy 21, League of Women Voters, Public Citizen and U.S. PIRG

April 28, 2009

Our organizations strongly praise President Obama for the unprecedented steps he has taken during the first hundred days of his Administration to strengthen ethics, lobbying and transparency rules for the Executive Branch.

Equally important, we believe, is the larger effort by President Obama embodied in these initial actions to challenge the way business is done in Washington and the special interest, lobbying culture that influences government decisions at the expense of the American people.

We recognize that this is a long term battle and that the toughest fight to change the way Washington works still lies ahead – the need to address the role of influence money in Washington by repairing the existing presidential public financing system and creating a new congressional public financing system.

Nevertheless, we believe the President has demonstrated in his first hundred days through words and deeds that he is serious about changing the rules of the game in Washington and increasing the voice of citizens in the governing process.

Our organizations believe President Obama deserves great credit and recognition for the groundbreaking government integrity reforms he has put in place during the first hundred days of his Administration. We look forward to working with President Obama on future government integrity reform efforts and, most importantly, on the essential battle to fundamentally reform the nation's campaign finance laws.

The Ethics Executive Order issued by the President at the outset of his Administration contains precedent-setting revolving door provisions. These provisions are designed to prevent potential conflicts of interest for incoming government officials involving their former employers or clients, and to prevent improper trading on government service for personal gain by outgoing government officials.

The Executive Order contains the first-ever "reverse revolving door" provisions for incoming presidential appointees, which are designed to prevent new appointees from importing the interests of their former employers and clients when they enter government and to help assure citizens that the public interest will come first. The Executive Order requires all appointees to recuse themselves from matters that significantly affect the interests of anyone who was a former employer or client of the incoming official within the two years prior to joining the Administration.

In addition, former lobbyists who actively lobbied a specific agency or department during the previous two years are generally precluded from receiving a presidential appointment to that agency or department for the following two years, unless a waiver from the restriction is determined to be justified.

The revolving door provisions also prohibit departed presidential appointees from coming back to lobby any senior executive branch official in the Administration for the full length of the Obama presidency. These are the toughest revolving door provisions ever established.

The Executive Order further prohibits all presidential appointees from accepting any gifts from lobbyists or lobbying organizations, other than token gifts of *de minimis* value, and instructs the Office of Government Ethics to develop a similar gift ban for all executive branch employees.

Under the Executive Order, all presidential appointees are required to sign a binding "ethics pledge" to abide by the revolving door restrictions, recusal arrangements and gift ban, and the Office of Government Ethics is required to report on the effectiveness of the Executive Order and how it might be modified to enhance its purpose.

The Obama Administration also has taken unprecedented transparency steps during its first 100 days.

In a pilot project adopted for the economic stimulus package, the Administration for the first time requires registered lobbyists working to influence Executive Branch decisions on specific grants and contracts to submit their lobbying requests in writing. This information is then posted by the Administration on the Internet and made available to the public. Each agency is also required to post on their web sites lobbying contacts by

registered lobbyists with the agency on all other general issues related to the stimulus package.

The pilot project for the stimulus package opens the door to establishing a government-wide policy for public disclosure of all lobbying contacts by registered lobbyists with Executive Branch officials. This would greatly expand existing lobbying disclosure requirements.

The Administration also has made an important change regarding the Freedom of Information Act (FOIA) by ordering agencies and departments to adopt a presumption of disclosure for information requested under FOIA. This should make it far easier for citizens and the media to obtain information under FOIA.

The Administration has undertaken numerous other efforts to provide the public with access to Executive Branch information, including making financial disclosure reports by White House officials available to the public by immediate electronic access for the first time, providing information on how stimulus package funds are being spent on the Internet and placing various White House events and documents on the White House website.

In a reversal of an Executive Order adopted by President Bush, the Administration also restored the practice of having only a sitting President, and not past Presidents, able to restrict citizen and media access to presidential records by claiming executive privilege over these records.

President Obama also ordered a group of federal agencies, including the Office of Management and Budget, to develop recommendations for a new Open Government Directive to be issued by the President.

All of these steps add up to unprecedented action taken by President Obama on groundbreaking government integrity measures that begin to rebalance the interests in Washington of the American people with the influence in Washington of special interests.

THE Nation.

Fair Elections Now!

By Nick Nyhart & David Donnelly

This article appeared in the April 13, 2009 edition of The Nation.
March 26, 2009

The 2008 elections were the most expensive in history, costing a record $5.3 billion. Although the next election is twenty months away, the pressure to raise even more money for 2010 is already bearing down on incumbents. The economic crisis demands immediate and effective Congressional action, yet at this critical moment our politicians are being distracted by the need to fill their campaign war chests. Vulnerable House freshmen have been told by their party's campaign leaders to put $1 million in the bank before their first year is done. That's $20,000 each week without letup.

Fortunately, there's an alternative. Illinois Democrat Dick Durbin, Senate assistant majority leader, and Pennsylvania Republican Arlen Specter are introducing the Fair Elections Now Act, a measure that would turn the campaign fundraising system upside down. Set to move forward in the House are Democratic Caucus chair John Larson of Connecticut and North Carolina Republican Walter Jones, the lead sponsors of the Senate bill's companion measure. With powerful backers from the majority party leading the fight, a friend in the White House and an angry public demanding action, the moment is ripe for a major structural reform that changes whose voices are heard in Washington.

Senator Durbin, known for his pragmatic progressivism, has termed the campaign finance system "unsustainable." As fundraising demands have steadily increased, lawmakers have spent more time dialing up well-heeled donors, the vast majority of whom live nowhere near the lawmakers' districts, and less time gaining in-depth understanding of leading issues, crafting effective legislation with their colleagues or listening to their constituents.

Under Fair Elections, the rules are reversed. The measure would require Congressional candidates to seek support from constituents back home, not from those in Washington or in wealthy enclaves around the country. Participants would prove their viability by gathering large numbers of local supporters, not a large amount of money from the political class. House candidates who raise 1,500 small contributions from people in their state would qualify for a grant large enough to run a competitive campaign. Senate candidates would qualify by raising a specific number of contributions, determined by a formula that takes into account the number of Congressional districts in their state. The more populous the state, the higher the initial grant. If candidates want additional funds to address independent expenditures against them or to keep pace with a well-financed opponent, they can continue to raise donations of $100 or less, which are matched four times over with public money, up to a ceiling.

The proposal--modeled on elements of successful systems in Arizona, Connecticut, Maine, North Carolina and elsewhere--has profound implications for political organizing. For voters of average means, the benefits are compelling. Their small check, whether it's $10, $25 or $50, would be essential to a candidate's success. No longer would they worry that their elected officials are indebted to deep-pocket funders with interests entirely separate from their own. Community leaders with strong grassroots support would become more important and would help redefine the pool of potential candidates. The bill would create tremendous incentives for lawmakers to maintain a dialogue with their constituents; it would encourage participation by new faces in the electoral process and give citizens the ability to hold lawmakers accountable, even in heavily gerrymandered districts.

Fair Elections would be attractive to incumbents as well, in two ways. First, the Capitol Hill fundraising grind would be replaced by increased contact with constituents. Second, the questions about conflicts of interest that inevitably follow big-money fundraising would disappear.

Supporters of Fair Elections will likely find a strong ally in the president. As a senator, Barack Obama was the first co-sponsor of the 2007 version of the Durbin-Specter bill. His extraordinary success in raising small donations during the 2008 campaign demonstrated the possibility of a fundraising system that puts regular people ahead of inside-the-Beltway special interests. Now, as he presses forward with an expansive agenda for change, he could well be a leading beneficiary of a policy that would undercut the moneyed opposition to many of his proposals while re-energizing grassroots organizing.

The most critical matter before Congress and the White House is the economy, but other pressing issues demand attention as well: healthcare, energy, the global climate crisis, tax policy and government spending decisions. Without exception, these are concerns over which longstanding vested interests stand to gain or lose hundreds of billions of dollars. As the Obama administration and Congressional leaders grapple to find a delicate balance between quick fixes and savvy long-term policies--with a dose of smart politics--campaign donors have a heavy thumb on the scale. Over the past two decades the financial sector has invested more than $5 billion in lobbying and campaign contributions to both parties, paying out the largest amount ever in the 2008 cycle. Energy interests and the medical industries have not been far behind, spending $455 million and $784 million, respectively, advancing their bottom-line interests over the same period.

The fierce policy battles ahead in Congress will draw clear lines between the narrow concerns of big contributors opposed to change and policy solutions that serve the broad public interest. The Fair Elections bill, a bold initiative for ordinary citizens, offers a way out for lawmakers who for too long have been caught between the campaign money chase and the desire to serve their constituents. More important, it will increase voters' say over decisions that will have enormous consequences for their lives and for generations to come. In a democracy, we should demand no less.

Nick Nyhart and David Donnelly

Nick Nyhart is president and CEO of Public Campaign. David Donnelly is national campaigns director of Public Campaign Action Fund.

THE HUFFINGTON POST

News Flash: Greed and Stupidity Can Coexist!

By Monica Youn – *04/07/09*

Last week columnist David Brooks of the *New York Times* published an op-ed setting out two explanatory narratives of our current economic crisis, which he dubbed the "greed narrative" and the "stupidity narrative." Brooks describes the greed narrative (as detailed in Simon Johnson's *Atlantic* piece "The Quiet Coup" as an explanation of how the growing political power of Wall Street enabled it to write its own rules with minimal governmental oversight or regulation. Brooks then describes the stupidity narrative as the story of the intellectual hubris of bankers who thought that statistical modeling and complex financial instruments allowed them to disregard systemic risk. After describing these two narratives, however, Brooks makes an inexplicable and bizarre move - insisting that we must choose either one narrative or the other, rather than benefitting from the insights of both. "[O]ne has to choose a guiding theory," he asserts without explanation, before stating that he finds the stupidity narrative "more persuasive." However, discarding the greed narrative in favor of the stupidity narrative is the old tale of the blind men and the elephant - a refusal to recognize that both trunk and tail are parts of the same animal.

Both greed and stupidity contributed to the crisis in which we find ourselves, and only a solution that addresses both aspects of the problem has any chance of fixing it. The greed narrative could also be called the political side of the story, while the stupidity narrative could be described as the economic side. The dichotomy between the two is false - it is precisely the political success of Wall Street in enacting its deregulatory agenda that enabled the financial stupidity of a relative few to have such disproportionate consequences - consequences that now threaten the global economy. Indeed, Johnson lists the accumulating political successes won by Wall Street in recent decades that, in hindsight, allowed relatively minor errors in financial judgment to wreak such catastrophic harm: the insistence on free movement of capital across borders; the repeal of Depression-era regulations separating commercial and investment banking; a congressional ban on the regulation of credit-default swaps; major increases in the amount of leverage allowed to investment banks; a minimal SEC role in regulatory enforcement; an international agreement to allow banks to measure their own degree of risk; and an intentional failure to update regulations so as to keep up with the tremendous pace of financial innovation.

A crucial function of government is to protect us from the consequences of the stupid decisions of other people - we should not have to worry that a nuclear power plant operator will decide that certain safety precautions simply aren't profitable or necessary. In the nuclear example, were the government to succumb to industry pressure and repeal certain safety regulations on nuclear plants, any resulting accident would be the result of policy as well as stupidity. In other economic sectors, regulations exist to prevent the profit-maximizing incentives of various industries from creating unacceptable levels of public risk. That such safeguards were

systematically dismantled across the financial services industry demonstrates the power of crony capitalism to create a regulation-free zone in which stupidity could flourish.

The reasons for Brooks' unexplained dismissal of the political causes of the current economic crisis become clearer as we come to the policy conclusions of his piece. As a free-market conservative, he wants to argue that only minimal regulation is necessary to fix the current situation, and he seems to fear that recognizing the systemic, political causes of the crisis will justify more aggressive intrusion into the financial sector than he is willing to support. However, although Brooks advocates making banks "more transparent, straightforward and comprehensible" in the short term, in a longer view, the profit-maximizing incentives of banks and bankers will always lead them into complexity and opacity. Banks and bankers have every reason to continue with their practices of brinksmanship - to create the new financial instrument, to make the new market that will give them an edge over their competitors. There is nothing wrong with such behavior, so long as sufficiently robust oversight prevents financiers from imposing unacceptable risks on other people's pensions and 401(k) plans. Only a political system that is not captive to the financial services industry can guarantee such safeguards.

In a democracy, we have put our faith in the prediction that the free market of ideas - in which policy proposals are assessed on their own merits, rather than according to the financial influence of their proponents - will prevent stupid policies from gaining ascendance in the political sphere, just as a free-market economy should prevent stupid economic decisions from surviving in the economic sphere. Crony capitalism creates distortions in both the market of ideas and - as influence is enacted into policy - in the market economy. In both politics and finance, such an oligarchical distortion will prevent the best ideas from being disseminated and properly valued, and will allow bad ideas to prevail irrespective of their policy or economic merit. Short-term fixes will do nothing to prevent this year's crisis from recurring unless we also address the systematic influences that make governmental officials beholden to monied interests rather than to their own constituents. If government officials are in the pocket of Wall Street, how can we expect them to identify and defuse problems before they turn into catastrophes?

Monica Youn is Counsel at the Brennan Center for Justice at NYU School of Law.

http://www.huffingtonpost.com/monica-youn/news-flash-greed-and-stup_b_184240.html

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March 30, 2009

Chair Elizabeth Warren
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Mailstop: COP
Washington, DC 20401

Re: Political Spending by Publicly Funded Entities

Dear Chair Warren,

The recent outpouring of public indignation over AIG's bonuses makes clear that public interest in how taxpayer dollars are being spent is acute. As you investigate how to improve the accountability of TARP and other bailout recipients,[i] we urge you to consider another area in which greater transparency is warranted: the potential use of taxpayer funds for political purposes, including campaign expenditures and lobbying. We think that such political spending should be fully disclosed to the Treasury.

Disclosure of relevant information is a lynchpin of a functioning democracy. As President Lincoln once said, "If given the truth, the American People can be depended upon to meet any national crisis. The great point is to bring them the real facts." While campaign finance principles typically presume corporate entities to be private actors, the new role of federal taxpayers in substantially funding these corporations, and the public's appropriate interest in proper use of the funds, means that far greater transparency is now warranted.

Moreover, there is a governmental interest in furthering the goals of the Emergency Economic Stabilization Act, which include maximizing returns to the taxpayers and providing public accountability for the use of the funds.[ii] In sum, taxpayers deserve to know whether their investments are being spent on elections, lobbying and other partisan activity. Heightened disclosure would also allow the public to monitor the swirl of money between regulators and the regulated, helping to prevent legislative and administrative capture.

Corporations and banks are restricted in how they may spend corporate treasury funds to influence *federal* elections, but there are many additional avenues for influence, including:

- Donations through separate segregated funds (SFFs) or what are commonly referred to as corporate Political Action Committees (PACs);
- Independent expenditures related to elections that are not express advocacy or its functional equivalent; and
- Grassroots and direct lobbying of the legislative and executive branches.[iii]

Moreover, corporations may spend money in many states to influence the outcome of state elections, including state elections for attorneys general and judges. In many states, corporations may spend an unlimited amount of corporate treasury money — including investments from shareholders (both private and public) — to pay for political expenditures.

We encourage the COP to request that corporations and banks that received TARP and related bailout funds disclose to the public, at a minimum, the following information in a single searchable document:

- Contributions to candidate committees;
- Contributions to political action committees (PACs);
- Contributions to political parties or political party committees;
- Independent expenditures on advertisements that mention candidates for office or office holders; and
- Expenditures to pay for registered lobbyists and lobbying activity.

While many federal and state statutes and regulatory regimes require disclosure of political spending, these are far too porous. Too frequently, disclosure is often neither user-friendly nor easily aggregated. Because political spending by corporate entities is not disclosed in a single place like a Form 10-K filed with SEC, discovering the full extent of political spending of any corporate entity takes copious research.

At the federal level, to track contributions by TARP SSFs, the public would need to know the exact names of the SSFs funded by each TARP recipient. Tracking spending becomes particularly difficult when political committees do not contain the "doing business as" names of the TARP banks.

Federal spending is only one subset of political spending. Bailout recipients may also spend on state elections and ballot initiatives. Each state has its own distinct disclosure requirements with its own definitional loopholes and architectural failings. As the Campaign Disclosure Project has demonstrated, year after year, states fail to have meaningful disclosure or accessible databases.[iv] Discerning who gave what to whom can require costly due diligence.

Some political spending does not directly support candidates or parties. Instead, supporters make independent expenditures which are underreported in most states. One 2007 study from the National Institute on Money in State Politics found that only five states make information about independent expenditures readily available to the public. As this report noted, "holes in the laws — combined with an apparent failure of state campaign-finance disclosure agencies to administer effectively those laws— results in the poor public disclosure of independent expenditures. The result is that millions of dollars spent by special interests each year to influence state elections go essentially unreported to the public."[v]

Corporate entities can also spend money lobbying without fully disclosing their activities to the public because lobbying reports are so frequently sites for subterfuge. As the Center for Responsive Politics noted in a recent report, many lobbyists flout the spirit of the law by turning in lobbying forms that are blank. "[N]early 19,000 reports totaling at least $565 million in payments to lobbying firms for activity that was almost entirely unaccounted for. Last year, more than one in 10 filings were the equivalent of a single page — no issues listed, no lobbyists named, no government agencies contacted."[vi]

There is a basic asymmetry of information that needs to be addressed. Unraveling all of the ways a single bank — let alone hundreds of banks — spent money on lobbying, independent expenditures or gave directly to federal and state candidates, political parties and PACs would require a prohibitively large investment in research spanning all 50 states and federal regulators. This is not a workable way to get meaningful, digestible disclosure from TARP recipients. The banks know the full information concerning political expenditures. Consequently, banks should aggregate and disclose their own political spending, as Citigroup has done on its corporate webpage.[vii] Other banks have not been so transparent.

We propose that this aggregated reporting be given to the Treasury, which can publish it on the Web for the public. Disclosures should also note whether any of the political spending was done using taxpayer funds.

The potential use of public funds for lobbying of either Congress or Treasury is of particular concern to us. Already, under existing law, the Treasury Department must ensure that appropriated public funds are not being used for self-interested lobbying by government contractors under 31 CFR 21.100, *et seq*.[viii] Yet some of the biggest TARP recipients lobbied Congress heavily in late 2008,[ix] and it appears that such lobbying continues this year.[x] The highly general nature of Congressional lobbying reports currently prevent the public from knowing whether public funds were used to lobby or not.

In late January 2009, Secretary Timothy Geithner promised that the Department would curb lobbyists' influence, stating that "[t]he Treasury Department will implement safeguards to prevent lobbyist influence over the program, including restricting contacts with lobbyists in connection with applications for, or disbursements of, EESA funds."[xi] However, it does not appear that any new regulations have yet been promulgated or implemented. The terms regarding lobbying in some of the TARP deal sheets and contracts released to the public by Treasury appear ambiguous at best.[xii] Furthermore, it

appears that most of the asset purchase agreements between Treasury and the TARP banks were silent on the matter of lobbying.

The transparency for political spending we suggest here is merely a subset of the transparency the COP already seeks from Treasury. We recommend that the COP focus on this issue and urge Treasury to use its immense power to induce banks and corporations to disclose whether TARP and related bailout funds have been used to lobby. We think it would be a perverse result if money intended to unfreeze the credit markets instead ended up being spent on political expenditures.

We look forward to working with you on finding solutions to the novel issues raised by de facto public ownership of the banks and other financial institutions, and would be delighted to discuss the issue at your convenience. If you have any questions related to this letter, please do not hesitate to contact us.

Sincerely,

Susan Liss, Director, Democracy Program
Laura MacCleery, Deputy Director, Democracy Program
Ciara Torres-Spelliscy, Counsel, Democracy Program

Endnotes

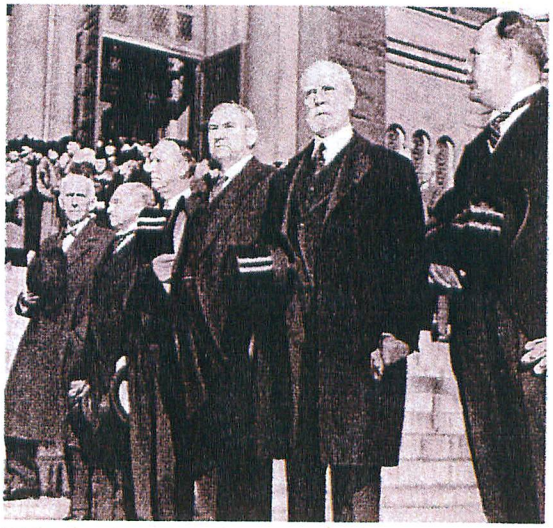
[i] TARP and related bailout funds include the Capital Purchase Program ("CPP"), the Targeted Investment Program ("TIP"), the Systemically Significant Failing Institutions ("SSFI") and the Automotive Industry Financing Program ("AIFP").
[ii] Emergency Economic Stabilization Act of 2008, Sec. 2, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1424enr.txt.pdf.
[iii] FECA prohibits corporations, labor organizations and banks from making direct contributions or expenditures in connection with federal elections. 2 U.S.C. §44lb. These organizations may, however, sponsor a separate segregated fund (SSF), which collects contributions from a limited class of individuals and uses this money to make contributions and expenditures to influence federal elections. 11 CFR 100.6.
[iv] *See* Campaign Disclosure Project, Grading State Disclosure 2008 at http://www.campaigndisclosure.org/gradingstate/index.html. The Campaign Disclosure Project is a collaboration of the UCLA School of Law, the Center for Governmental Studies, and the California Voter Foundation.
[v] Linda King, National Institute on Money in State Politics, *Indecent Disclosure Public Access to Independent Expenditure Information at the State Level* 4 (Aug. 1, 2007) https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1.
[vi] Lindsay Renick Mayer, *Empty Disclosure*, (Mar. 19, 2009) http://www.opensecrets.org/news/2009/03/empty-disclosure.html.
[vii] Citigroup, *U.S. Political Contributions January 1 - December 31, 2008*, http://www.citigroup.com/citi/corporategovernance/data/uscontribs08.pdf.
[viii] 31 CFR 21.100 (a) states "No appropriated funds may be expended by the recipient of a Federal contract… to pay any person for influencing or attempting to influence an officer or employee of any agency, [or] a Member of Congress, … in connection with …: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract…."
[ix] *See* lobbyist reports on file with the Clerk of the House of Representatives, http://lobbyingdisclosure.house.gov/ and Secretary of the Senate, http://www.senate.gov/lobby.
[x] Elizabeth Williamson & Brody Mullins, *Firms Keep Lobbying as They Get TARP Cash*, WALL ST. J., Jan. 23, 2009, http://online.wsj.com/article/SB123267702062508887.html?mod=googlenews_wsj#printMode.
[xi] Treasury, Press Release, *Treasury Secretary Opens Term Opens With New Rules to Bolster Transparency, Limit Lobbyist Influence in Federal Investment Decisions* (Jan. 27, 2009).
[xii] Letter from Neel Kashkari to Elizabeth Warren (Dec. 30, 2008), http://www.treas.gov/press/releases/reports/123108%20cop%20response.pdf; Treasury, TARP AIG SSFI Investment Senior Preferred Stock and Warrant Summary of Senior Preferred Terms (Nov 10, 2008), http://www.treas.gov/press/releases/reports/111008aigtermsheet.pdf; Section 4.11 of American International Group, Inc. ("AIG") Fixed Rate Cumulative Perpetual Preferred Stock Offering dated November 25, 2008, p. 35, http://treasury.gov/initiatives/eesa/agreements/AIG_Agreement_11252008.pdf; Section 4.10(d) of the Securities Purchase Agreement between the United States Department of the Treasury and Citigroup dated December 31, 2008, pp. 33-34, http://treasury.gov/initiatives/eesa/agreements/Citigroup_12312008.pdf; Treasury, Summary of Terms Preferred Securities Issuer: Bank of America ("BofA") (Jan. 16, 2009); Securities Purchase Agreement between the United States Department of the Treasury and Bank of America (Oct. 26, 2008), http://treasury.gov/initiatives/eesa/agreements/BOA_10262008.pdf.

A BREWING COURT BATTLE

Obama's ambitious agenda will be scrutinized and second-guessed by conservative federal judges.

By MICHAEL WALDMAN

AS THEY CHARGE THROUGH THE EVENTFUL FIRST 100 DAYS, President Obama and his allies are racking up legislative victories. Soon they will have to win the votes of a new audience: men and women in black robes. As the former constitutional-law professor surely knows, that can be a tough crowd. Here's the core constitutional fact: a progressive president and Congress now face a conservative judiciary, for the first time since 1937. Obama's ambitious agenda, if enacted, must go before federal courts—where judges can rewrite or strike down key provisions. From the TARP bank bailout, to climate change "cap and trade," to health-care reform, new laws could face an array of judicial doctrines recently honed by conservative lawyers. We can't know for sure, and carefully crafted laws usually withstand judicial scrutiny. Still, imagine if Hillarycare had passed in 1994. Does anyone think the Rehnquist Court would not have vivisected those parts it found unpalatable?



YEARN TO OVERTURN: *Even Franklin Roosevelt met resistance to his New Deal laws from conservative federal judges, including these Supreme Court justices in 1939*

In fact, for most American of history, this alignment has been the norm. From the time Thomas Jefferson faced an array of Federalist judges, the unelected third branch has tended to be more conservative, more protective of private property, than the elected branches. ("The Federalists have retired into the judiciary as a stronghold," he moaned.) In the early 20th century, the Supreme Court blocked Progressive Era laws, such as the minimum wage for women and limitations on working hours. It began to strike down key New Deal laws, too, until Franklin Roosevelt threatened to pack the bench by expanding the number of justices. When the court abruptly started to uphold FDR's laws, wags dubbed it "the switch in time that saved nine." The era marked by Chief Justice Earl Warren, when liberal federal judges sometimes raced ahead of the public and political leaders, was something of a fluke that lasted only about two decades.

For the past quarter century, the courts have been conservative, but so has the government. Few new sweeping regulatory schemes became law. Now the Roberts Court has tilted markedly more conservative than the Rehnquist Court—at the same time the voters elected a more liberal set of politicians than they had in half a century. Republican presidents appointed seven of nine Supreme Court justices, as well as two thirds of the federal appeals judges who make most key rulings. Of course, party labels aren't everything. Dwight Eisenhower called his appointment of Warren "the biggest damned-fool mistake I ever made." Still, a study by professor Cass Sunstein, now a top Obama legal aide, shows that the political philosophy of lower-court judges often predicts how they will rule. Constitutional conflict may loom.

How will this play out? First, in the cases themselves. Challenges to TARP, which gives vague powers to the executive branch, may unfold soon. If banks are nationalized, shareholders may assert they have been unfairly deprived of the value of their investments. Other goals, such as health-care reform and climate-change curbs, inevitably involve a blizzard of new rules, mandates and taxes. These will face challenges from businesses, who have found a sympathetic hearing in many recent cases. As law professor Jeffrey Rosen points out, of 14 antitrust cases heard by the court over the past two terms, business won every time. Conservatives increasingly cite the limits of the Constitution's "commerce clause," or states rights, to blunt federal action.

Then, too, will come the looming fracas over judicial appointments. A president nominates hundreds of federal judges, and Obama is expected to unveil his first batch later this spring. Ronald Reagan and George W. Bush unhesitatingly used their picks to push the court system to the right. Will Obama press, as many of his backers hope, for "our Scalia," jurists as provocatively progressive as their conservative counterparts? Confirmation hearings long focused on social debates, such as abortion or affirmative action. Now senators may press nominees to bare their views on property rights and regulation. We can expect conservatives to fight just as fiercely to block progressive judges as their counterparts did.

In some ways, the biggest battles will be over doctrine—over the meaning of the Constitution and how to interpret it. Once, liberals like Justice William Brennan relied on what he called a flexible "living Constitution." In response, conservatives argued for relying on the original intent of the Founders and decried "activist judges." Now debates have turned topsy-turvy. Arguably the most visible advocates of a "living Constitution" are John Yoo and Dick Cheney, who claim it gives the president nearly unlimited power, while liberals are more likely to quote Madison and Hamilton on checks and balances. Justice Stephen Breyer, in his book "Active Liberty," argued that the Constitution at its heart seeks to boost the participation of citizens in their government. This deference to the idea of democracy may give room to uphold energetic new statutes. Faced with the prospect of courts far more likely to strike down liberal laws, many progressives may again embrace the virtues of "judicial restraint."

WALDMAN *is executive director of the Brennan Center for Justice at NYU School of Law.*

BETTMANN—CORBIS

POLITICO

Will courts allow more transparency?

By Laura MacCleery – *02/25/09*

As public scandals continue to erupt — from the Illinois spectacle to graft in the municipal bond marketplace — and the economy heads further south, public trust in institutions is reaching a new nadir. President Barack Obama, attentive to this souring mood, is making greater government accountability and openness a centerpiece of his approach.

Yet in federal and state courts across the country, a sudden surge of lawsuits threatens to overturn existing good government laws, including challenges to bedrock principles such as disclosure of spending on elections. Perhaps sensing a closing window on the Supreme Court, conservative lawyers are seeking to use recent high court rulings to deregulate campaign spending and contributions. If successful, such moves may make reforms far harder to craft — just when citizens are pushing for greater transparency in government.

The litigation wave comes in the wake of three Supreme Court decisions, Davis v. Federal Election Commission, FEC v. Wisconsin Right to Life and Randall v. Sorrell. For decades, the court routinely upheld limits on contributions, supported disclosure requirements and generally preserved transparency rules and limits. Most notably, in 2003, it upheld the landmark Bipartisan Campaign Finance Reform Act banning unregulated money to political parties.

But in the more recent cases, a new majority signaled its eagerness to embrace a far more ideological approach, tossing out contribution limits as too low in Randall, enlarging the areas in which corporations and unions can spend money on electioneering communications in Wisconsin Right to Life and throwing out rules providing more money to candidates who face a wealthy opponent in Davis.

This spring, the court will decide another important case, Citizens United v. FEC. It challenges the constitutionality of federal rules requiring disclosure of financial sponsors for “Hillary: The Movie,” a two-hour denunciation of the then-primary candidate. It also contests requirements that advertisements state who “is responsible for the content.” A brief filed by former Solicitor General Theodore Olsen asks the court to overturn precedents that for years justified requiring disclosure of spending by outside groups seeking to influence elections.

Another two cases were filed by the Republican National Committee the day after the presidential election. They challenge the constitutionality of bans on unlimited funds and coordinated spending supported by the GOP’s own nominee, John McCain. The RNC publicly admits that it believes it cannot be competitive in the next election without limitless donations from corporations and other deep-pocketed interests.

As Jeffrey Rosen wrote last spring, pro-business conservatives, and specifically the legal hawks for the Chamber of Commerce, have angled for influence on the court and courted members of the federal bench for more than 35 years. The current legal attacks are, in some ways, the last big stand for covert attempts to manipulate the electorate, because the window of opportunity will narrow as the federal judiciary is reshaped by Democratic appointments.

Yet the result could be pre-Watergate-era levels of public transparency and accountability for elected officials. Losing now would produce a system badly out of step with the need for more transparent government, leading to considerable public frustration.

Despite an explosion of small-donor activity and encouraging indications from the 2008 election about voter participation, large contributions still played a substantial role in this election. While Mark Schmitt's recent article in The American Prospect overlooks this point, the development is a result of BCRA's requirement that parties and candidates collect limited hard money from individuals.

BCRA cut off unregulated money to party coffers, requiring candidates to aggressively reach out to new and smaller donors. As Brian Wolff, chairman of the Democratic Congressional Campaign Committee, told The American Prospect, BCRA "forced us to do what we should have been doing all along, which was including more people in the political process."

Coupled with Internet-based solicitations that lower costs, BCRA's limits created space for small donations to matter. Moreover, limits and disclosure are important for a new wave of reforms — public funding systems — because they keep the public informed and enhance fairness and competition.

Yet opponents are pushing for constitutional rulings that could take core reforms off the table. How far the Roberts court may go in dismantling these laws is anyone's guess.

The stakes are high. The attacks — and others no doubt being planned — directly imperil the public's right to know who is paying for politics and politicians. Their success would drown out the voices of small donors, extinguish the promise of continued progress on transparency and destroy the ability to track money flowing into our elections.

Laura MacCleery is the deputy director of the democracy program at the Brennan Center for Justice at the NYU School of Law.

The Philadelphia Inquirer

Illinois has much to teach Pa.

By Ciara Torres-Spelliscy – *02/25/09*

The downfall of former Illinois Gov. Rod Blagojevich had so many lurid facets - auctioning President Obama's vacant Senate seat, pushing to get Chicago Tribune editorial writers fired, cursing like a longshoreman - that one key detail is easily lost in the mix. In the months leading up to his arrest, the governor was busy trying to get in his last big-money shakedowns before a new pay-to-play law took effect on Jan. 1.

The law, inspired by Blagojevich's own misdeeds, prohibits businesses with state contracts worth more than $50,000 from donating to the campaign of an official approving the contract. The law also makes it clear that the governor is responsible for executive-branch contracts.

In the campaign-finance arena, Illinois has long been a poster child for what not to do. It remains, for example, one of five states with no contribution limits. But the new pay-to-play law finally blocks one important avenue for abuse: unlimited campaign contributions to state officials from those seeking lucrative state contracts.

Lesson for Pennsylvania

Why should Pennsylvania care about pay-to-play laws in Illinois? Because Pennsylvania, like most states, could learn from its example as it considers similar reforms.

This month saw the introduction in Harrisburg of a package of ethics reforms that would fight pay-to-play. Pennsylvania House Bill 205 would prevent government contracts from being awarded to any person or company that has recently contributed to a political campaign.

As they consider the legislation, Pennsylvania lawmakers should take note of some of the egregious quid pro quo that's been uncovered in Illinois. As prosecutor David Ellis stressed in his closing argument in Blagojevich's impeachment trial, Obama's former Senate seat wasn't the only thing for sale. Legislation, public contracts, and other official acts were all on the auction block.

What Blagojevich usually wanted in return was a hefty campaign contribution. On FBI wiretaps, he clearly indicated that contributions must come in by the end of the year to beat the clock on the new ethics law.

Usually, the quid pro quo in politics is a little more subtle than a governor on a cell phone brazenly trolling for cash from contractors and lobbyists. And Illinois is not the only state that needs pay-to-play laws to discourage politicians from amassing campaign funds by shaking down government contractors.

Upheld by courts

Across the nation, state and federal courts have upheld pay-to-play laws as serving to prevent corruption and the appearance of it. Over the past three months, a steady parade of cases reaffirmed the value and validity of these protective measures.

In New Jersey, the recent Earle Asphalt Co. case upheld a state law prohibiting any agency from awarding a large contract to a business that has contributed more than $300 to certain political candidates. *Ognibene v. Parkes* upheld New York City's law subjecting those doing business with the city to lower contribution limits. And *Green Party of Connecticut v. Garfield* upheld Connecticut's ban on contributions and solicitations from lobbyists and state contractors.

In a way, Illinois got lucky. Its big fish got caught because Blagojevich was arrogant enough to personally orchestrate pay-to-play schemes, even when he knew he was under federal investigation. More often, though, political shakedowns are likely to take place under the radar.

That's why every state needs laws to protect the integrity of contracting as well as democracy. As the Supreme Court wrote in *McConnell v. Federal Election Commission*, sometimes "the best means of prevention is to identify and to remove the temptation."

We should not need another scandal to bring about laws that will save taxpayer dollars - and save us from the public spectacle of disgraced elected officials.

http://www.philly.com/inquirer/opinion/20090225_Illinois_has_much_to_teach_Pa_.html

THE HUFFINGTON POST

Auction Block Politics

By Laura MacCleery – *12/18/08*

The amount of political power that lawmakers wield has long been tied to their ability to make dollars rain down from political contributions. While no one would defend the crass trades sought by Illinois Gov. Rod Blagojevich, in some ways his crimes consisted of simply making the implicit arrangements that bind politicians and donors altogether too explicit. The blatant horse-trading alleged in the criminal complaint is shocking - especially Blagojevich's willingness to offer up state-awarded contracts - but is it really so different from the wink-nudge version that so often pervades politics?

For just one recent example, did the financial industry buy the votes for deregulation that led to the current economic meltdown, or did banking executives simply find a willing audience among politicians who were already inclined towards deregulation? There is a widely acknowledged symbiotic relationship between donors and politicians that tends over time merely to reinforce and reward the natural political inclinations of both, to the detriment of those outside the pay-to-play arrangements.

One tragedy of the current campaign finance system is that we will never really know how heart-felt the intentions of most politicians are. Indeed, most decisions, such as the multi-decade push to dismantle regulation of the banks, happen with little public attention. The failure to regulate is rarely covered with the rapt attention of a scandal, and so the public is only vaguely aware that the agenda has been set by forces with a line on the inside. At that level, it becomes difficult to sort out corruption from mere politics.

An article today in *The Hill* documents the high fundraising expectations for leadership within the chambers of Congress and cites the current Senate Ethics Manual, which provides the ground rules for accepting contributions from a source requesting a favor, basing its advice on an ethics report from the 1950s: "[A] decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts." This rather quaint treatment of a profound challenge to the legitimacy of official acts provides scant comfort.

Even out-and-out dealmakers that disregard these simple precautions only rarely get caught. Most politicians are not arrogant enough to keep cutting deals once they are aware they are under investigation, nor clumsy enough to make the tit-for-tat as obvious as Blagojevich. In some ways, as Frank Rich suggests, his farcical blundering may have done us the favor of peeling back the curtain, allowing us see politics as the auction block it sometimes is.

And even in the most egregious cases, our criminal statutes are inadequate because without the assistance of witnesses or a wire (as they had in Illinois), it is difficult to prove intent. In the

allegations concerning Sen. Stevens, for example, prosecutors charged him only with failure to report a gift. Showing that the money and the political favor -- whether a contract, earmark, tax break, public subsidy, deregulation or other action -- are causally linked is difficult for watchdog groups and media who monitor the issues as part of their jobs, much less the general public or prosecutors.

So what we have is a wide spectrum of decisions by lawmakers that occur without any meaningful oversight of their motivations, and a political system with fundraising demands that push every politician into the arms of the special interests. It is little wonder then that some particularly enterprising pols with few scruples, like Blagojevich, see politics as the money-making enterprise it can be.

The only solution to this problem is a structural one -- one that transforms the incentives of politicians and realigns their natural self-interest in their own political success and survival. A system of public financing for Congressional elections would allow a Member of Congress to vote their conscience without concern for the fundraising implications. And it would allow the public to know far more about whether a lawmaker's vote for financial services deregulation, for example, came first from their heart or their pocketbook.

http://www.huffingtonpost.com/laura-maccleery/auction-block-politics_b_152057.html

The Nation.

Back to the Future for the RNC

by **LAURA MACCLEERY**

December 12, 2008

The Republican National Committee (RNC) apparently wants to party like its 1999. It is bringing two new, overlooked lawsuits seeking to turn back the clock on campaign finance reforms in place since 2003.

Having lost the presidential election, the GOP wasted no time in challenging the constitutionality of bans on soft money and coordinated spending that were championed by its presidential nominee and signed into law by President Bush. The RNC filed one lawsuit in DC federal court that attempts to undo soft money restrictions dividing the state and national parties, and a second in federal court in Louisiana to overturn limits on coordinated spending between candidates and the national parties.

The RNC apparently has decided that it cannot compete in a political climate that limits the influence of corporate soft money. The lawsuits suggest that Republicans may seek to blame the election results on fundraising rules that require parties to cultivate many more individual donors.

Both the limits on spending coordination and the wall between the state and national parties were enacted as part of the landmark McCain-Feingold law and upheld in 2003 in *McConnell v. FEC*, albeit by a Supreme Court led by then-Chief Justice William Rehnquist. The rules assure that the ban on soft money given to the national parties is not easily circumvented, and that limits on contributions by individuals are not rendered meaningless by direct infusions of party funds to candidates. The RNC and its lawyer, James Bopp, are betting that the addition of Chief Justice John Roberts and Justice Samuel Alito to the Court will bode well for its back-to-the-future claims.

Regardless of how one might regard the validity of the attacks on well-established campaign finance principles, the optics for the RNC are not great. This election cycle saw record levels of voter turnout and engagement in campaigns, as well as an explosion of small donors who helped lead the Obama campaign to victory. The Obama campaign's much-vaunted e-mail list reportedly contains more than ten million names, or 16 percent of his national supporters in the popular vote, according to **an analysis** in *The Nation*.

While the **Campaign Finance Institute**'s **analysis** found the percentage of small donors in Obama's fundraising to be unremarkable (because repeated gifts pushed many "repeater" donors over the $200 threshold), the number of new, small donors who played a part in this election cycle remains staggering.

Campaign finance reform opponents are also trying to use Obama's fundraising success outside the presidential public financing system as a club to discredit the program. But reformers are not at all humiliated as the *Wall Street Journal* **suggested**, by the burgeoning small-donor revolution, record turnout and political voluntarism that marked this election cycle.

Indeed, this aspect of Obama's success is directly traceable to McCain-Feingold. In the primary, the new rules made it possible for an insurgent primary candidate to overcome an establishment candidate and her prodigious soft-money machine. By outlawing soft money, it pushed candidates out to the grassroots for funds. As Brian Wolff, executive director of the Democratic Congressional Campaign Committee (DCCC) **told *The American Prospect***, "[McCain-Feingold] forced us to do what we should have been doing all along, which was including more people in the political process."

Moreover, the Obama campaign also fulfilled the vast potential of the Internet as a fundraising tool, giving the candidate more time to speak to voters. Its success suggests a model for future reforms that further encourage and empower small donors, such as public funding programs that limit large donations, while allowing small donations with a four-to-one match of public funds to make them even more important to candidates.

Every few years, opponents of campaign finance reform declare it dead, pointless or worse. By going on the attack, opponents hope to embarrass president-elect Obama out of following through on his commitment, **reiterated** November 1 to the *Boston Globe* by a campaign spokesperson, to fix the problematic presidential public financing system, which has not been meaningfully updated for thirty-five years.

That system needs work, but Congress can easily re-tool it to supercharge small donors, close loopholes for so-called "hybrid ads" paid for with party funds and furnish enough money to win in the general election. All this would be complemented by allowing candidates to continue accepting small donations throughout the election.

Obama should not be distracted by the complaints of a few couch-bound curmudgeons, or the attempts to re-litigate issues long settled. The attacks reflect a view badly out of touch with the public, whose deep mistrust of big-ticket donations that slosh money around in our democracy persists in the wake of the most expensive election in history.

A recent USA Today/Gallup **poll** showed that 70 percent of Americans think there was too much money spent in the 2008 presidential election. Meanwhile, 70 percent support some form of public financing for presidential elections. Significantly, 42 percent of Republicans thought that participation in the presidential public funding system should be mandatory (although public funding systems must be voluntary to be constitutional under prevailing law); 57 percent of all Americans favored spending limits, which are also unconstitutional. The intense public support for spending limits (even for mandatory public financing) shows the deep skepticism that the public harbors about the role of money in politics.

The RNC's apparent willingness to nurture an addiction to large donations and soft money will not serve it well. The Internet age of politics is here to stay. Politicians and parties who fail to compete in grassroots politics will quickly lose legitimacy, whatever the Roberts Court decides.

The RNC has won this way before, with the 2004 election only the most recent example of its organizing prowess. Rather than trying to roll back the rules, the RNC would be better off using the next four years to form policies that attract voters and develop its own grassroots appeal.

For his part, President-elect Obama should address the concerns raised by the large donors who were a significant part of his fundraising haul.

Voters do connect the dots between the money in our politics and the failed policies in Washington. An agenda for the new administration should include a codification of the principles that the Obama campaign used to revitalize the 2008 election--principles that support a small-donor model for presidential public financing, and a similar program for members of Congress.

People-powered politics is the way forward. As we've seen, when parties and candidates return to the grassroots, the energy and investment they generate can change democracy.

About Laura MacCleery

Laura MacCleery is a deputy director in the Democracy Program at the Brennan Center for Justice at New York University. Prior to coming to the Brennan Center, she was the Director of Congress Watch at Public Citizen.

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Counting Heads, Not Dollars: A New Campaign Finance Context

By Laura MacCleery – *12/18/08*

(Laura is the deputy director of the Democracy Program at the Brennan Center for Social Justice at New York University Law School. We're thrilled to have her analysis of how we should best think about a critical component of this election cycle's fundraising landscape: small donors and small donations. -- the editors)

Ever since the Campaign Finance Institute (CFI) first published an analysis of the Obama small donor numbers several weeks ago, the ink has been flowing. CFI's central claims -- that small donor influence on Obama's fundraising is a "myth" and that the percentage of small donations in Obama's cash haul (26%) does not differ from Bush's 2004 numbers (25%) -- made a big splash. Besides the New York Times, MyDD and The Politico, Bob Bauer, Obama's election law attorney, Rick Hasen, a law professor, and Brad Smith, a campaign finance opponent, all weighed in. On the heels of the flap, Michael Malbin, the study's author, defended his conclusions as based on established categories in campaign finance analysis.

Much of the discussion in the campaign finance community centered on whether it is fair, in a long election season, to characterize the mid-range donors who gave multiple gifts that put them over the $200 mark (whom CFI calls "repeaters") as something other than a "small" donor. Malbin's defense of CFI's line-drawing centers around the indisputable fact that $200 is the reporting threshold for donors under federal law.

But whatever the nomenclature, this complaint with CFI's act of unmasking misses the forest for the trees. We may just be counting the wrong things altogether.

When it comes to small donations, analyzing them as a percentage of the overall funds as CFI does is tricky -- the smaller an average donation is, the smaller its impact will be on the amount of money collected. Imagine a room with 20 donors: 19 give $100, while 1 person hands over $2000. Of the $3900 collected, over 50% of the money is from the one large donor in the room. If the 19 give an average of $60 while the wealthy donor remains at $2000, the small donors' share of the overall pie shrinks even further -- to just over one-third of the total. This mode of analysis de-emphasizes the "long tail" in the donor distribution curve -- although that aspect of the Obama effort was one of the most interesting developments in this election cycle.

Indeed, the Obama campaign's small donor numbers are remarkable due to the sheer scale of the response his campaign received, judged both by the absolute numbers and by the multitudes of new "small" or "smallish" donors those numbers represent. Gathering 26% of $452 million

yielded an astonishing $117 million -- or nearly double Bush's 2004 total of $64 million from $200-or-below donors.

As any unlucky soul who's tried to do direct mail or online fundraising knows, it is orders of magnitude more difficult to recruit new donors than to tap existing ones. Fundraisers typically have to spend millions to make millions -- and yet the Obama campaign reports that some of its highest fundraising totals occurred during the Republican convention, without any fundraising ask at all. A base of 3.1 million donors -- and an email list of upwards of 10 million subscribers -- is an enviable political tool for any new President.

A conference at Harvard last week made clear that the Obama folks were also pros at making volunteer work for the campaign a ready substitute or supplement for monetary donations, organizing a well-coordinated on-line and field offensive. The Internet is demonstrating that fundraising is most effective when it relates to real events in real time and complements organizing efforts on the ground by providing supporters with many ways to connect to a campaign.

Instead of counting dollars, the new paradigm invites us to count heads -- and to ask what else voters can do to be part of a campaign. Using sophisticated interactive Web-based technologies, it is now possible to ask volunteers, sitting in the comfort of their living rooms, to call potential voters in other states and to log the results of those calls for use by get-out-the-vote teams on the ground on Election Day. The Web facilitated more human-to-human outreach, not less, because the campaign allowed the engine to go. Peer-to-peer communication replaced top-down talking points, and it was more effective, efficient and energizing than any campaign effort in modern times.

Clay Shirky observed in his excellent recent book, *Here Comes Everybody*, that sometimes a difference in numbers becomes a difference in kind, producing value that is far greater than the sum of its parts, and requiring new structures, rules and systems to channel these efforts. Small donors were a part of the strategy -- but they mainly gave -- and mattered -- because the campaign was open to all kinds of collaborations with supporters, and did not treat them like an ATM.

Obama's campaign certainly had unique assets, starting with the candidate himself, yet its success points to a more universal lesson that integrating fundraising into an overall strategy for voter engagement is becoming a necessary component of effective campaigns. Even further down the ballot, the Netroots support for members of Congress this cycle on sites like ActBlue and DailyKos produced substantial additional funds from smaller donors across the country due to the targeted platforms these new, low-cost communication tools provide.

Despite a disappointing litigation assault on campaign finance rules that limit soft money, Republicans are acknowledging that Web strategies, and an embrace of technological organizing tools, is the most important new political horizon. "It would be suicide for the Republican Party and conservatives to not aggressively embrace technology," Matt Lewis, of the conservative Web site Townhall.com, told CNN.com this week.

While the "long tail" doesn't wag the dog yet, it could. Yes, the influence of large donors remains troubling, but the way forward on campaign finance is to understand all of the lessons of this election cycle. Reforms that supercharge smaller donations and require that politicians work with the grassroots -- as the new models of public financing do -- will democratize campaigns and make politicians more accountable to the many -- voters, volunteers and donors -- than they are to the wealthy few. Public funding systems in Maine, Arizona and Connecticut have been structured to put small donors first, and, as Janet Napolitano, a successful gubernatorial participant in Arizona's system, told us last spring, they are tremendously successful in changing the way that participating candidates relate to their constituents.

The campaign finance agenda also needs to be understood as a key part of a new general approach to campaigns -- and now, perhaps, to governing -- that creates a new partner in the grassroots through openness and accountability, energizing voters and citizens in a democracy that remains empowered long past Election Day.

http://techpresident.com/blog-entry/counting-heads-not-dollars-new-campaign-finance-context

The Washington Post

THURSDAY, NOVEMBER 13, 2008

Fred Wertheimer

The $200 Campaign Finance Fix

The presidential public financing system, created in 1974 in the wake of the Watergate scandal, has served the country well for most of its existence. The system became outdated and outmoded, however, as Congress failed for more than three decades to modernize it. Today it is no longer viable.

Luckily, the pathway to the future, and to a revitalized public financing system, has been provided by President-elect Barack Obama. First, there is Obama's astonishing breakthrough in raising small contributions on the Internet. He has also recognized the need for a new presidential public financing system, stating in June that he was "firmly committed to reforming the system as president." His campaign reiterated this commitment on Oct. 31.

A recent USA Today-Gallup Poll found "wide support for public financing of presidential campaigns," noting that more than 70 percent of respondents supported public financing for presidential elections and that only one in five said the system should be eliminated.

While the number of people using the tax-form check-off to fund the public financing system has shrunk over the years, the check-off results are not a poll. They do not indicate whether citizens believe the country needs the presidential public financing system. The answer to that question lies in real polls such as the one cited above.

During his campaign, Obama raised more than $300 million in contributions of $200 or less through mid-October, according to the Campaign Finance Institute, with most of those donations coming in online. (This total includes multiple small contributions made by a donor that aggregated to more than $200.)

His remarkable success, however, was the exception in the presidential race; for other major candidates, bundlers and the larger contributions they raised were the rule.

Obama himself raised more than $200 million in contributions of $1,000 and more, with bundlers playing the principal role in soliciting these funds. Nevertheless, Obama's breakthrough in small-donor Internet fundraising provides the path to a future in which small donors become the main source of private contributions for presidential candidates.

Internet fundraising promotes democracy. It allows candidates to raise large amounts of small, broad-based contributions -- not those that are tied to influence-seeking -- at almost no expense and with little or no time required from the candidates. It increases citizen involvement in the political process.

We should build on this opening by implementing four measures to create a new public financing system that presidential candidates would again see as advantageous.

- **Move the small donor to center stage for all candidates**. Presidential primary candidates should receive a match of $4 in public funds for each dollar raised, up to a maximum of $200 per donor, with no

matching funds provided for contributions from a single donor that aggregate to more than $200. This would create powerful incentives for donors to give and candidates to raise small donations online. A $200 contribution, matched 4 to 1, would become just as valuable as a $1,000 contribution, and the importance of bundlers would significantly diminish.

- **Provide realistic spending limits.** Presidential candidates stopped using the public financing system when the spending limits failed to reflect the costs of a modern campaign. Realistic spending limits remain important, however, to prevent arms-race fundraising and to constrain the role of bundlers and influence-money in presidential elections.

The spending limits in the current system should be increased for the primary and general elections from current levels -- $50 million and $84 million, respectively -- to $250 million per election. This should be accompanied by an exemption from the spending limits for aggregate contributions of $200 or less per donor to further increase the importance of small donors and to provide candidates with greater flexibility to meet the costs of their campaigns.

- **Reduce the individual contribution limit.** A presidential candidate who participates in the primary system should have to abide by a lower contribution limit than the existing maximum, $2,300 per individual, to take effect once the candidate has raised a threshold amount of seed money to get started. Under this approach, the relative importance of $200 contributions would be further increased, and the importance of bundlers further reduced.

- **Close the loophole for joint fundraising committees.** This year, both major-party presidential nominees used candidate and party joint fundraising committees to skirt the limits on contributions to candidates. John McCain solicited contributions of as much as $70,000 per individual and Obama of as much as $30,800 per individual for these committees; they raised $177 million and $172 million, respectively, according to Public Citizen.

To donors, limited by law to giving $2,300 per candidate per election, contributions to joint committees are equivalent to making the much larger contribution directly to candidates. To end this circumvention, candidates should be prohibited from setting up joint candidate-party fundraising committees.

Public financing is an optional system, and one we need to improve. Presidential candidates ought to have the choice of running competitive campaigns based on small contributions and public funds rather than having to rely on bundlers, special interests and larger contributions.

The writer is president of Democracy 21, a nonpartisan public policy organization. This column is the second in an occasional series on policy issues facing the Obama administration.

THE HILL'S Congress Blog
Where lawmakers come to blog

Bailout Backlash: Congress Must Examine Its Own House

By Kelly Williams & Laura MacCleery – *10/02/08*

It has been a long time since there has been such an outpouring of voter outrage on Capitol Hill. Although partisans are busily pointing fingers across the aisle about the defeat of the hurried, behind-the-scenes bailout deal in the House on Monday, the failures are so fundamental that it is increasingly clear that Washington will never be the same again. The bailout is stirring an intensely populist backlash across the political spectrum, and that much anger will not dissipate anytime soon.

On Monday, when Congressional leaders most needed constituents to trust them to negotiate a deal that would protect their interests, both the deal and the trust were not there. The reasons for this lack of faith are obvious: Congress snoozed through a housing boom that replaced our national economy with, as President Bush personally acknowledged last week, a house of cards.

As an institution, Congress abdicated its core job of safeguarding the interests of retirees, taxpayers and homeowners. While politicians lambaste Wall Street and blow airy kisses towards Main Street, suspicion of the K Street machinations that were on conspicuous display over the past week are equally problematic for a public largely shut out of the political process.

The economic bubble years were a time in which the members of the Senate and House banking committees – with jurisdiction over the nation's financial markets, banks, and insurance companies – allowed private equity and hedge fund barons to continue to claim preferential capital gains tax treatment of their outsized incomes, left the SEC underfunded and with a free-for-all mandate, and, perhaps most regrettably, bowed to industry pressure to leave large segments of new, complicated markets, such as the credit default swap market, unregulated.

Wall Street routinely doles out large campaign contributions to members of Congress. In the current election cycle, the financial services sector (which includes insurance and real sector), contributed more money to candidates for Congress, the presidency and political parties than did any other sector, totaling $339.6 million from 2007 through today. Both chambers' banking committees also benefit handsomely. According to the Center for Responsive Politics, PACs and employees of the securities and investment industry are the second largest source of cash for members of the Senate Banking committee. During the 2008 election cycle, these contributors raised $11.7 million for the 21 members of that Committee. Banking Committee Chairman Sen. Christopher Dodd (D-Conn) received about $4.3 million since 2003, or half of all contributions to his campaign coffers.

Does campaign cash influence legislation and regulation? When Congress last debated regulation (or rather, de-regulation) of the financial industry in 1999, a study by the Center for Responsive Politics showed that members of Congress who supported the Gramm-Leach-Bliley Act received

twice as much money from commercial banks, investment banks, and insurance companies as those who opposed the measure. The Gramm-Leach-Bliley Act was the product of many years of lobbying by the financial industry and allowed for the loosening of bank regulations that had been in place since the Great Depression.

Even more worrisome, in hindsight, is how campaign cash from generous industry donors might have influenced the lack of legislation, regulation and oversight. Since 2000, when passage of the Commodity Futures Modernization Act (CFMA) ensured that the credit default swap market would remain unregulated, the market for credit default swaps grew from $900 billion to $45.5 trillion, or twice the size of the entire U.S. stock market. Unregulated and private, difficulties valuing the instruments contributed to the current collapse and were the direct cause of the now-failed American Insurance Group's problems. Bank examiners, a few economists and others had expressed concerns, but Congress never seriously considered a proposal to allow proper oversight of the market. Passage of the CFMA was furtively pushed through by then-Senator Phil Gramm, himself a beneficiary of industry largesse while in office who, since leaving the Senate, has become vice-chairman of the investment bank UBS.

Since the bailout package was announced a week ago, industry lobbyists have swarmed Capitol Hill, a spectacle that fed the fires of public anger. As a consequence, the current bailout does not include a single proposal for greater regulation and oversight of swaps, derivatives and the other private, unregulated markets now in panic and disarray. Instead, the mainstream press is filled with stories of weekend efforts by lobbyists to forge broad changes to the recovery plan to benefit their clients – by convincing the Treasury to allow foreign banks to participate and otherwise expanding the definition of financial instruments, which will likely add billions to the cost of the plan. They also defeated a key consumer protection that would have allowed homeowners to renegotiate the terms of their loans in bankruptcy court and prevented a tax on banks to pay for part of the costs of the bailout.

Lobbyists for groups like the American Bankers' Association (ABA) get their clout in a traditional way: they buy it. A weekend story in *The New York Times* described this week's Herculean efforts of ABA's large lobbying staff, and the details of a $1,000 per ticket fundraiser sponsored by ABA for House Financial Services Chairman Rep. Barney Frank (D-Mass.) last spring. Members of Congress benefit mightily from the largesse of financial interests. "I'm not allergic to business, I'm not hostile at all," Dodd reassured his listening potential donors when he assumed the reins of the Senate Banking Committee in December 2006, according to a report in *The Hartford Courant*. Dodd was the single largest recipient of campaign contributions from Fannie and Freddie PACs and employees in the Congress since 1989.

Such clear evidence that the system is broken demonstrates the need for a fundamental restructuring to assure that members of Congress act as the people's representatives, rather than merely as powerful proxies for monied interests. A solution to break the stranglehold of special interests is already being considered, and must be taken up by the new Congress when it returns in the spring.

Just last week, the Fair Elections Now Act, which would establish a system of voluntary public financing for Congressional elections, was introduced with bi-partisan support in the House. Last

year, Senators Durbin (D-Ill.) and Specter (R-Pa.) introduced the Senate version of the Fair Elections Now Act, which would create a voluntary public financing system for Senate candidates. With the introduction of its House counterpart this week by Representatives Larson (D-Conn.) and Jones (R-N.C.) (both from Clean Elections states), lawmakers are presented with a bipartisan, bicameral effort to undertake serious and lasting structural reform. Public financing would eliminate the perils of special interest cash by establishing strict spending limits, enabling small donors and greatly increasing the power of ordinary voters to hold Congress accountable. Dependent on Wall Street cash, Congress has proven incapable of effectively regulating the financial system; Congressional public funding offers voters a timely way to insist that Congress end the reign of big-money politics.

Public financing systems are already in place for legislative and statewide candidates in Maine, Arizona, and Connecticut, for judicial candidates in North Carolina, and for municipal candidates in several cities.

In language crafted before the current economic crisis, the bill's sponsors presciently warned in no uncertain terms that our democracy is being undermined by the "large, unwarranted costs on taxpayers through legislative and regulatory outcomes shaped by unequal access to lawmakers for campaign contributions." The costs of business-as-usual politics, it turns out, are staggeringly high. The American people deserve a political system that answers to their interests first, and public funding of elections would return power to the people, where it belongs.

http://blog.thehill.com/2008/10/02/bailout-backlash-congress-must-examine-its-own-house/

Seattle Post-Intelligencer
http://www.seattlepi.com/opinion/366105_focus08.html

Supreme Court justices should know by now -- money is not speech

Last updated June 6, 2008 4:29 p.m. PT

By CIARA TORRES-SPELLISCY
GUEST COLUMNIST

Whenever I admit to fellow guests at a dinner party that I work as a campaign finance lawyer, the following happens. Either their eyes glaze over, hoping for a rapid change of topic, or they launch into a heated discussion of why the case that decided "money is speech" is so wrongheaded -- since after all, money is, well, money, and speech is something else entirely. Sad to say, the justices on the U.S. Supreme Court seem to be losing their grasp on this simple point.

Contrary to popular opinion, the landmark case, Buckley v. Valeo, never actually equated money with speech. Instead, the opinion analyzed political campaigns and concluded that lots of money is needed to get a candidate's message to voters. Buckley used gasoline as a metaphor for campaign cash. The fuel of contributions makes the campaign car go.

As Justice Stephen Breyer once wrote, "a decision to contribute money to a campaign is a matter of First Amendment concern not because money is speech (it is not); but because it enables speech." Despite this truth, the bumper sticker version -- "money is speech" -- has seeped into our collective unconscious.

Buckley held that contributions could be regulated but expenditures could not, a holding that produced two striking consequences. First, candidates now spend an inordinate amount of time trying to win a fundraising arms race since the supply of campaign dollars is limited but the demand for it is not. Second, rich, self-financed candidates retain an enormous advantage if they can put their own money on the line.

In 2006, the Supreme Court had an opportunity to re-balance the scales in Randall v. Sorrell, a case challenging Vermont's contribution and expenditure limits. As Randall was winding its way up from the district court, there was reason for hope that the court would discard Buckley's misaligned structure. After all, in 2003, the court affirmed the Bipartisan Campaign Reform Act (BCRA) in a 5-4 decision. Those same justices were on the court. But before the Randall case was decided, Justice Sandra Day O'Connor stepped down, and Chief Justice William Rehnquist died.

Their replacements, Justices Samuel Alito and John Roberts, brought with them hostility to campaign finance reform and little interest in remediating Buckley. Randall instead revitalized the old junker of a car metaphor, opining that "a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."

The new majority on the court also oversimplified matters during the recent oral argument for Davis v. FEC, a case about the constitutionality of the so-called Millionaires' Amendment. This provision of BCRA attempts to assist candidates who are facing an opponent willing to lavish $350,000 or more of their money on their own campaign.

Attorney Andrew Herman, representing the allegedly aggrieved millionaire and twice-failed candidate

for Congress, Jack Davis, argued, "money and speech are synonymous in an electoral context." The Millionaire's Amendment does not limit the amount that Davis could contribute to his own campaign, but by assisting his opponents, Herman argued that the law discouraged Davis from spending his own money and thus was stifling his freedom of speech. Roberts, the chief justice, appeared to have thoroughly internalized the old slogan, stating mid-sentence an assumption "that money is speech," without missing a beat.

During another part of the Davis oral argument, Justice Anthony Kennedy followed the money-is-speech line to its illogical extreme. He observed, "It's not just money. It's the quality and kind of speech .... I know of no precedents of this Court that says one party is entitled to assistance from a certain segment and another is not, based on the -- the content of the speech. And that's exactly what (the Millionaires' Amendment) is."

Kennedy's statement is a bit hyperbolic given that the Millionaires' Amendment doesn't say a solitary word about the content of anyone's speech. Every candidate is allowed to spend as much money as he or she has on whatever types of speech he or she desires. In taking the money-is-speech incantation literally, Kennedy leads us into a bizarre backward world, in which an attempt to level the playing field between a candidate legally constrained by contribution limits and a self-financed candidate free to spend millions is a form of "content"-based discrimination against the rich.

A reconceptualization of this issue is sorely needed. As Burt Neuborne pointed out, Buckley's (and now by extension Randall's) car metaphor is misconceived since:

An election campaign is not a drive in the country, a race between two or more contestants. If money is gasoline, how can you have a fair race when only one car has enough fuel? And when that fuel must be obtained from interested suppliers, who is it that really decides where the car ultimately goes?

Realizing that a campaign is a dynamic competition of many self-interested players might lead us to different approaches.

Most important, Buckley's central metaphor may have made sense in the mid-1970s, when communicating with the masses required huge amounts of advertising on the three major TV networks or in national newspapers. But in 2008, campaigns can e-mail millions of contributors with the touch of a button (instead of franking millions of pieces of snail mail), campaigns can link to a speech on the Internet for practically nothing (instead of paying millions for broadcast time). Presidential candidate Barack Obama's 37-minute speech on race has been viewed more than 5 million times on YouTube. This forum provides for more nuance, and is far more useful to democratic discourse than the classic 30-second political ad.

It's clear that the cost of campaigning for national office is still astronomically high, as evidenced by the price tag for the presidential primaries this year. Yet we can and should be grateful that, today, speech is not nearly as dependent on money as it once was because of technologies that allow expanded reach with little additional marginal cost. A reflexive money-as-speech metaphor misses out on some of this new reality. Vast sums of money are not the only, or perhaps even the preferable, way to get out a political message. Our political campaigns are now driving hybrids.

The final reason we should leave the money-is-speech slogan behind is that it empowers the rich at the expense of everyone else in our democracy. When millionaires may become a protected class in our jurisprudence, that should be a clear signal that we collectively misstepped.

The laws intended to support our democratic experiment should take equality of opportunity in the electoral context more seriously. It impoverishes our politics when only the richest of the rich can ever dream of running for political office. Since the Supremes seem, at least in the short term, to be unlikely to approve expenditure limits, establishing robust systems of voluntary public financing for candidates at the state and federal levels is all the more urgent.

Public financing provides a meaningful respite from the chase for dollars. Money is harnessed in the service of our democracy, and not the other way around. Under public financing, it becomes clear that political speech is actually just speech -- sometimes eloquent, sometimes stumbling, and sometimes downloadable for free.

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