18. Restrictions en Political Speech

Congress should

- reject so-called "voluntary" spending limits;
- significantly raise or abolish limits on individual political contributions;
- abolish limits on contributions by political parties;
- reject efforts to require any given percentage of contributions to come from within a member's district;
- reject calls to abolish political action committees;
- deny expanded enforcement powers to the Federal Election Commission; and
- adopt a clear statutory definition of "express advocacy," which provides maximum protection to political speech.

Americans sometimes debate whether or not the First Amendment's right to free speech extends to pornography, hate speech, or flag burning, but virtually no one would contend that First Amendment protection does not apply to political speech. Yet for the past 22 years, since the 1974 amendments to the Federal Elections Campaign Act (FECA), Congress and its regulatory creation, the Federal Election Commission, have attempted to regulate, channel, and thwart political speech and participation by American citizens. This effort to police citizen participation in politics has been a disaster. It has directly contributed to government gridlock; helped to entrench incumbents in office and increased the influence of special interests; required members of Congress to devote enormous amounts of time to fundraising; cut off grassroots political participation; and, most important, deprived Americans of their civil right to engage in political speech. Is it any wonder that many Americans feel more distant from Washington than ever before?

Spending Limits

Recognizing that virtually all forms of mass communication in a modern society require the expenditure of money, the Supreme Court has, on First Amendment grounds, steadfastly rejected efforts to place mandatory limits on political spending. Such limits, the Court has recognized, directly restrict the amount of political speech in which candidates and individuals may engage.

Nevertheless, in recent years numerous proposals have been made to impose "voluntary" caps on campaign expenditures through a mixture of subsidies for candidates who agree to limit their spending and penalties for those who do not agree to arbitrary spending limits. Most of those proposals so severely tip the scales against any candidate who rejects the "voluntary" limits as to be, in effect, mandatory. As such, they would still be subject to constitutional challenge on First Amendment grounds. However, even setting aside such constitutional difficulties, efforts to limit spending are bad public policy.

Total political spending for all local, state, and federal races and ballot issues is approximately 0.05 percent of the nation's gross domestic product, only slightly more than what was spent 20 years ago. Studies have shown that voter interest in and knowledge of issues increase when more money is spent on a campaign. Yet total spending on congressional races in 1994 amounted to just $3.74 per eligible voter. We spend far more money on items that most Americans would agree are far less important—for example, potato chips. It is hard to argue that America spends too much on campaigns (see Table 18.1).

In addition to reducing the information available to voters, spending limits unfairly benefit incumbents. Limits on campaign spending make candidates more dependent on free media coverage. In most cases, incumbents, through the use of their offices, will find it easier to attract free coverage. In addition, incumbents usually begin a campaign with a high level of name recognition and an established political base. Challengers, on the other hand, need to spend more money to make themselves and their message known. Thus, spending limits benefit incumbents, as can be seen in the McCain-Feingold reform bill, filibustered in the 104th Congress. In both 1994 and 1996 every Senate challenger who spent less than the "voluntary" ceiling included in the McCain-Feingold bill lost, but every Senate incumbent who spent less than the "voluntary" ceiling proposed in the bill won.

Table 18.1
Campaign Spending in Perspective

Total congressional campaign spending, 1993-94: **$724 million**	Annual sales of Barbie Doll line: $1 **billion**
Cost of Michael Huffington's 1994 campaign for U.S. Senate in California: $29 **million**	Amount budgeted by Sony Music International to promote latest Michael Jackson CD release: **$30 million**
Total PAC contributions in federal elections, 1993-94: **$189 million**	Cost of producing the 1995 movie *Waterworld*: **$180 million**
Budget for Republican and Democratic Parties' 1996 presidential general election: **$62 million**	Amount spent in 1995 to promote syndicated reruns of the comedy "Seinfeld": **$100 million**
Total political spending in the United States, 1991-92 election cycle: $3.2 **billion**	Total amount spent annually on potato chips: $4.5 **billion**

SOURCE: Compiled from news reports.

Spending limits, including most proposals for "voluntary" limits, violate the First Amendment, are inherently unfair to challengers, limit the flow of information to voters, and should be rejected by Congress.

Contribution Limits

The 1974 FECA amendments limited individual campaign contributions to just $1,000, an amount that has never been adjusted. Had that amount been indexed for inflation, it would now be approximately $3,300.

Like spending limits, limits on campaign contributions benefit incumbents. Historically, most challengers relied on a small number of supporters to launch their campaigns. However, the $1,000 contribution limit requires candidates to raise sums in small amounts. That benefits incumbents, who are more likely to have a database of past contributors, broad name and issue recognition among other potential donors, and a longer time period in which to raise contributions.

At the same time, the $1,000 contribution limit has forced members of both houses to devote inordinate amounts of time to fundraising. Unable

to raise money in large amounts, candidates must attend a constant stream of fundraisers and spend hours on the telephone raising the money needed to finance a campaign for public office. Voters are quite right to be critical of the amount of time legislators spend raising campaign funds. However, that time commitment is a direct result of FECA's $1,000 campaign contribution limit.

Supporters of contribution limits argue that strict limits are needed to prevent the buying and selling of votes in exchange for campaign contributions. However, systematic studies of legislative voting records show that campaign contributions have far less effect on legislative voting patterns than do personal ideologies, constituent desires, and political party affiliations and agendas. Furthermore, by restricting the supply of campaign funds, contribution limits increase the relative value of each potential donation. A candidate who is unable to get campaign funds from political supporters (because they have already contributed the legal maximum) may feel added pressure to please potential new donors. Thus, in certain situations, contribution limits may actually increase the influence of campaign donors.

At a minimum, the limit on individual donations should be raised to $3,500 and indexed for inflation; a significantly higher limit, or the complete abolition of any personal contribution limit, would be preferable.

One "reform" idea popular in recent years has been to limit contributions received from sources outside a legislator's state or district. That idea is also misguided. It would prevent candidates from raising money, for example, from friends and family members outside the district. It would tend to increase the power of local media outlets and special interests *in* campaigns, by cutting off outside sources of financing. It would promote legislative gridlock by emphasizing the local nature of representation rather than the greater good of the country when legislative votes are cast. Finally, such proposals may be unconstitutional, as they constitute a complete ban on the political speech of the individuals involved. A legislator's vote affects all citizens, not just those in his or her district. Outsiders may not have the right to vote in local elections, but they do have the right to attempt to persuade and educate those who do vote.

Another popular proposal is to ban political action committees (PACs). PACs, however, provide a valuable public service by monitoring the activities of legislators and reporting the information to interested individuals. PACs mobilize small contributors and increase the importance of their contributions by combining them with those of like-minded individuals.

A ban on PACs would eliminate one of the most important forms of political access available to small contributors. It would violate not only the right to free speech but also the rights of individuals to associate and to petition government for redress of grievances.

In addition to raising or abolishing individual contribution levels, Congress should abolish limits on political party contributions to candidates. Parties serve to mediate disputes between interests and to form governing coalitions. Restricting financial support from the party to a candidate means that party support is of little more importance to a candidate than the support of any single interest group. Such a scenario naturally increases a candidate's reliance on special interests. Furthermore, by weakening the bond between candidate and party, FECA makes it more difficult for voters to hold one or the other party accountable for legislative action. In that way, FECA contributes to legislative gridlock and to the type of incumbent protection that has fueled demand for term limits. Parties exist in order to elect candidates to office; efforts to limit their ability to do so are counterproductive. Restrictions on party contributions should be repealed.

The Threat to Free Speech and Grassroots Politics

In addition to the negative consequences discussed above, FECA has placed barriers in the way of grassroots political participation and encroached on First Amendment rights.

Most obviously, of course, limits on campaign contributions infringe on the right of individuals to become involved in politics. Imagine the outcry if newspaper columnists were restricted to, say, two or three political columns per year, lest they gain "too much influence." The effort to prevent people from spending their own money to promote their political beliefs is contrary to the founding principles of this country. The Founders, after all, pledged their "lives," "sacred honor," and "fortunes" to the creation of our nation. They did not pledge their fortunes "up to $1,000 per annum."

In addition to that direct limitation on free speech, the complex regulations issued by the FEC to enforce FECA hamstring grassroots involvement in politics in a variety of other ways. For example, a 1991 *Los Angeles Times* investigation found that most individuals who violated FECA's complex provisions on total political expenditures were "elderly persons . . . with little grasp of the federal campaign laws." As election law attorneys Allison and Steve Hayward have pointed out,

> If you set up a pornographic site on the World Wide Web, the government cannot regulate you in any way. But if you set up your own "Vote for Bill Clinton" site on the Web (or simply print your own bumper stickers), and spend more than $250 on the project, you become subject to FEC reporting requirements.

Even large, sophisticated groups have been hamstrung by the FEC in attempting to communicate with their members. For example, before the 1994 elections, the FEC adopted a restrictive rule that prevented the United States Chamber of Commerce from distributing candidate endorsements to over 220,000 dues-paying members and the American Medical Association from distributing endorsements to over 44,000 of its members. Most of those members were small business persons and self-employed professionals who often join such organizations precisely to obtain that type of political information. Although the Chamber and the AMA felt that the rule was unconstitutional, they were unwilling to risk fines by publishing endorsements before the election. Fortunately, like so many FEC rules, this rule was eventually found unconstitutional in federal court, but only after it had muzzled the Chamber and the AMA in the 1994 election.

The FEC has doggedly attempted to limit political speech through a doctrine known as "express advocacy." Under FECA, corporations, labor unions, and issue groups such as the Christian Coalition and the National Organization for Women may spend money to inform voters about issues but may not make expenditures "relative to a clearly identified candidate." The Supreme Court has held that such a limitation may apply only to communications that "in express terms advocate the election or defeat of a clearly identified candidate for federal office." The Court explained that such communications must include words such as "vote for," "elect," "support," "defeat," and "reject," relative to specific candidates. Any lesser standard, the Court has noted, is an unconstitutionally vague restriction on the right to communicate with the public on political issues. Yet despite repeated admonitions by both the Supreme Court and lower federal courts, the FEC has consistently attempted to expand the definition of "express advocacy" to include any communication that "encourages" actions to defeat or elect certain candidates. In other words, under the definition for which the FEC has fought, a voter guide that states, "Protect the Environment," and then compares the voting records of candidates on various environmental issues might be construed as express advocacy, if the candidates had different voting records on environmental issues.

Although the FEC has lost a steady string of court cases, it continues to press for an expanded definition of "express advocacy" that would

allow it to regulate most political speech by unions, corporations, associations, and advocacy groups, from the National Rifle Association and the Christian Coalition to Planned Parenthood and Handgun Control, Inc. And though the FEC does, in fact, regularly lose in court, its actions have forced groups to spend tens of thousands of dollars in legal bills and had a chilling effect on speech generally, as can be seen in the Chamber of Commerce example described above.

Public Citizen and other "reform" groups have also called for stricter disclosure of the donors to issue advocacy groups. Here again, Congress should proceed cautiously and reject disclosure rules that would burden Americans' First Amendment rights. Most issue advocacy poses no danger of political corruption—money is not given to or spent directly on behalf of candidates, so disclosure serves less purpose than in the case of direct contributions to candidates. Furthermore, disclosure can have a chilling effect on individuals seeking to promote an unpopular position. The Supreme Court has long recognized that there is a right to anonymous speech and that groups that legitimately fear harassment may not be required to reveal their membership or donor lists. Requiring broad disclosure from issue advocacy groups would serve little purpose and come at a high price in added reporting and burdens on free, uninhibited speech.

If Congress is unwilling to repeal FECA in its entirety, it at least needs to make certain that the FEC is limited to its intended role of regulating campaign contributions, not controlling political speech. Thus Congress should amend the statute by writing into law a definition of "express advocacy" that mirrors that set forth by the Supreme Court in *Buckley v. Valeo*. Congress should also deny any added enforcement powers to a bureaucracy that has so consistently thumbed its nose at the Constitution, the courts, and the rights of the American people to participate in political activity.

Finally, Congress should not let the recent revelations of large foreign donations, some possibly made in the names of others, stampede it into hasty reforms. Contributions from foreign corporations and foreign citizens living abroad are already illegal. Similarly, it is already illegal to make a donation in the name of another person or entity. All that is needed is to enforce those laws. Although it is possible to extend those laws to prohibit contributions by U.S.-incorporated subsidiaries of foreign corporations, or by permanent legal alien residents of the United States, it must be remembered that those entities and individuals are subject to the same laws as are domestic corporations and U.S. citizens. That they have no right to

vote is obvious. However, it is less obvious that they should be deprived of any legal means of participating in political debate in the country in which they are domiciled.

Conclusion

Efforts to "fix" the campaign finance system have been bad for government and bad for American citizens, who have a right to speak and be active in public affairs. The clear failure of FECA's regulatory scheme has led many to propose still more regulation and more bureaucracy to fix the problems that FECA has created or exacerbated. Congress should reject such calls for more regulation and instead focus on deregulating the system to fix the damage FECA has done.

Suggested Readings

Fair Government Foundation. *The FEC's Express War on Free Speech: An Examination of the Federal Election Commission's Lawless Regulation of Political Advocacy.* Washington: Fair Government Foundation, 1996.

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Samuelson, Robert J. "The Price of Politics." *Newsweek,* August 28, 1995.

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