6. Restrictions on Political Speech

Congress should

- deregulate the campaign finance system by repealing contribution limits and providing for immediate disclosure of contributions,
- reject ''voluntary'' spending limits,
- reject efforts to require any given percentage of contributions to come from within a member's district, and
- reject calls to abolish political action committees.

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 since the 1974 amendments to the Federal Election Campaign Act (FECA), Congress and its regulatory creation, the Federal Election Commission (FEC), 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, including primaries, in 1995–96 was just $3.89 per eligible voter, about the price of a single video rental. We spend far more money on communicating about things that most Americans would agree are far less important—for example, snack foods and soft drinks. And annual political spending in the United States—for every ballot issue; every state, local, and federal race; and every primary combined—is much less than one-quarter the amount spent on advertising automobiles each year. It is hard to argue that America spends too much on campaigns (see Table 6.1).

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 messages known. Thus, spending limits benefit incumbents, as can be seen in the McCain-Feingold reform bill, filibustered in the 104th and 105th Congresses. 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.

Similarly, the House version, the Shays-Meehan bill, would have set a spending limit of $600,000 in House races. In 1996 every House incum-

Table 6.1
Campaign Spending in Perspective

Total estimated congressional campaign spending, 1997–98: **$800 million**	Annual spot TV advertising for entertainment and amusements: **$1.95 billion**
Total PAC contributions to all federal elections, 1995–96: **$218 million**	Annual sales of Barbie Doll line: **$1 billion**
Budget for Republican and Democratic Parties' presidential general election: **$62 million**	Amount spent in 1995 to promote syndicated reruns of the comedy *Seinfeld:* **$100 million**
Total estimated political spending in the United States, 1995–96 election cycle: **$4 billion**	Total amount spent annually on pet food: **$5 billion**

SOURCE: Compiled from news reports and FEC reports.

bent who spent less than $500,000 won, but House challengers who spent less than $500,000 won 3 percent of their races. Challengers who spent more than $500,000, however, won 40 percent of their races. Again, the threshold is set just at the point where races become competitive.

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 $3,200.

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.

How Fast Is Campaign Spending Going Up?

Item	Percentage Growth in Advertising, 1995–96
Pet items	28.9
Tobacco	28.3
Electronic entertainment equipment	27.9
Drugs and remedies	27.3
Computer, office equipment, and stationery	26.1
Business and consumer services	25.4
Insurance and real estate	18.5
Candy, snacks, and soft drinks	17.5
Publishing and other media	14.0
All advertising	**11.4**
Toiletries and cosmetics	11.2
Household supplies	10.8
Building materials, equipment, and fixtures	10.0
Travel, hotels, and resorts	9.9
Automotive	9.4
Sporting goods, toys, and games	7.4
Retail	6.8
Other advertising	6.0
Spending on House and Senate races	**5.5***
Gasoline, lubricants, and fuels	4.0
Aviation	2.9
Entertainment	2.5
Beer and wine	−0.4
Food	−0.7
Household furnishings	−2.6
Liquor	−3.6
Farming	−6.4

SOURCE: *Advertising Age* and FEC reports.
*Based on two-year increase, 1994–96.

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 concerned about 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 $3,300 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 individu-

als. 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.

Finally, under FECA, parties are subject to the same $5,000 ''hard money'' contribution limit that PACs are. Most observers would probably agree that the limits on contributions political parties can make to candidates should be higher than those for PACs. Parties mediate disputes between interests and form governing coalitions. Restricting financial support from a party to a candidate means that party support is of little more importance to a candidate than is 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. Limits on party contributions should be substantially increased or repealed altogether.

Soft Money

Many people argue that large contributions to political parties for purposes other than express support for federal candidates, called ''soft money,'' should be banned. However, the Supreme Court has held that contributions for purposes other than the express advocacy of election or defeat of a candidate cannot be limited under the First Amendment. The Court has also held that political parties have the same rights to such expression as do other private groups. By definition, ''soft money'' is not used for express advocacy of candidates. Thus, a complete ban on soft money contributions is probably unconstitutional.

Soft money in 1996 amounted to less than 10 percent of total spending on House and Senate races, up from about 3 percent in 1992. Though still small as a percentage of total spending, it is increasing. This is not necessarily bad. Among other things, soft money is used by parties to conduct get-out-the-vote drives, voter registration drives, and generic party advertising. Are those really activities on which we want to reduce spending? Soft money also funds party-run ''issue ads.'' Many so-called reformers hate issue ads, but the fact is that the Supreme Court has clearly, and quite correctly, held that such ads are a protected form of political speech.

It makes little sense to allow labor unions, business organizations, trial lawyers, and environmental groups to raise unrestricted funds for the purpose of running issue ads while limiting contributions for issue advertising by political parties.

Finally, we need to recognize that one reason for the growth in soft money is that limits on ''hard money'' have never been increased since they were enacted in 1974. Just as one cannot buy a new car on a 1974 budget, political campaigns cannot be run on 1974 budgets. Thus, merely raising the limits on individual and PAC contributions to candidates to account for inflation since 1974 would considerably reduce the role of soft money in campaigns, and perhaps placate those who are concerned about it.

Issue Advocacy

Many recent reform efforts, including the Shays-Meehan bill in the House and the McCain-Feingold bill in the Senate, have attempted to regulate what has become known as ''issue advocacy'': ads that discuss issues, and often candidates, but stop short of urging voters to support or oppose any particular candidate for office. Sometimes these are television ads, which may attack a representative's position on an issue and urge voters to ''call X and tell him what you think.'' Another prominent form of issue advertising is candidate scorecards, which show candidates' positions or votes on certain issues. Many members of Congress feel that those ads and scorecards are unfair and amount to a subterfuge campaign, and no doubt that is sometimes true.

However, the Supreme Court and lower federal courts have consistently and without exception held that such ads are protected political speech. The reason is obvious: the discussion of political issues is intimately intertwined with the discussion of candidates for office. To try to regulate such ads is to regulate the core political speech that is the heart of the First Amendment

The Supreme Court, in *Buckley v. Valeo* and later decisions, has held that limits on contributions and expenditures 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 use words such as ''vote for,'' ''elect,'' ''support,'' ''defeat,'' and ''reject'' about specific candidates. Any lesser standard, the Court has noted, is an unconstitutionally vague restriction on the right to communicate with the public about political issues. Yet, despite repeated

admonitions by both the Supreme Court and lower federal courts, both the FEC and congressional reformers have 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 definitions for which the FEC has fought, and those included in various versions of the Shays-Meehan and McCain-Feingold bills, a voter guide that states, ''Protect the Environment'' and then compares candidates' voting records on various environmental issues might be construed as express advocacy, if the candidates have different voting records on environmental issues.

Such broad standards would allow the government to regulate most political speech by unions, corporations, associations, and advocacy groups, from the National Rifle Association to the Christian Coalition to Planned Parenthood and Handgun Control, Inc. This is exactly the type of regulation that the First Amendment is intended to prevent. It is not for the government to regulate who can say what about politics and candidates.

An alternative proposal, included in McCain-Feingold, to limit ads that mention a candidate at all within 60 days of an election, is also blatantly unconstitutional under the same judicial precedents. But such efforts are not only unconstitutional, they are little short of downright stupid. For example, had such laws been in effect in 1998, they would have prohibited groups from running ads urging members of Congress to support or oppose impeachment precisely when Congress was faced with the issue. It is ironic to note that such a prohibition would also have prevented groups from running ads urging Congress to break the filibuster of the McCain-Feingold bill in September 1998, since such ads would have mentioned candidates by name within 60 days of an election.

There is no way to regulate political discussion of current issues consistent with the First Amendment. Elections belong not to the candidates but to all the people of the district. Candidates are not the only ones with a right to decide what issues the public should discuss in connection with the campaign. An election is an opportunity for *the people* to choose a representative, and *the people* must be able to share information with fellow voters.

If Congress wishes to reduce the importance of issue ads as a form of political communication, it should substantially raise or abolish limits on direct contributions to candidates and encourage, rather than excoriate, large contributions to the parties. That would increase the relative impor-

tance of direct contributions to candidates and parties. Once again, the problem is not American citizens' exercising their First Amendment rights but the unintended consequences of a regulatory regime that attempts to limit those rights.

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.

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

BeVier, Lillian R. ''Campaign Finance 'Reform' Proposals: A First Amendment Analysis.'' Cato Institute Policy Analysis no. 282, September 4, 1997.

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.

Smith, Bradley A. ''Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences.'' Cato Institute Policy Analysis no. 238, September 13, 1995.

_____. ''Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban.'' *Journal of Legislation* 24 (1998).

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