10. Campaign Finance, Corruption, and the Oath of Office

Congress should

- recognize the conflict of interest inherent in its writing campaign finance regulations,
- reject proposals to further regulate campaign financing,
- remove the current limits on campaign contributions, and
- reduce opportunities for corruption by restoring constitutional limits on government.

Campaign finance reform bills have been a staple in Congress for several years now, yet Congress remains deeply and apparently irreconcilably divided over the issue. Many members want to expand the regulations now in place, constitutional principles notwithstanding. Others want to roll them back or eliminate them.

The intense congressional interest in the issue—substantially greater than the interest indicated by most Americans—should hardly surprise. For no other issue today affects members more directly—not taxes, not spending, not war or peace. Indeed, campaign finance law bears directly on the ability of members to remain in office. Not to put too fine a point on it, all the talk of good government aside, for many it is a matter of job security. Indeed, the high correlation between past campaign finance legislation and reelection rates is no accident, for the temptation to write the law to favor incumbents is palpable and inescapable. Only the Constitution and the Supreme Court have stood in the way of further regulations.

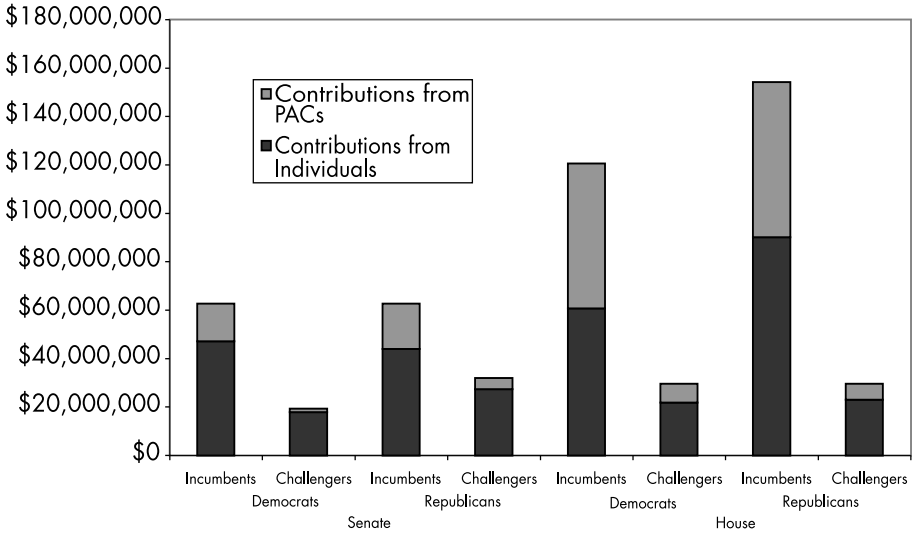
There, in stark relief, is the conflict of interest that every member of Congress faces when considering proposals to reform our campaign finance law. Arising out of the reformist zeal of the Watergate era, like the late Independent Counsel Statute, campaign finance regulation brings every member face to face with the problem of self-dealing—not only the self-

dealing the regulations are supposed to prevent but, more immediately, the self-dealing that is inherent in writing regulations not simply for oneself but for those who would challenge one's power to write such regulations in the first place. It is as if the winner of the World Series were to write the rules to determine who should play in the next World Series. It takes little imagination to understand the temptation to write the rules to favor the current winners. And the evidence from the quarter of a century of federal elections that have followed the reforms of 1974 bears that out. Even the electoral "revolution" of 1994, which changed control of the House for the first time in 40 years, saw 90 percent of House incumbents who ran for reelection reelected—up by 2 percent from 1992. By 1998 the figure was 98.5 percent.

Is it any wonder that voters have increasingly lost interest in the electoral process and that voting is at an all-time low? As one wag put it, there was greater turnover in the old Soviet Politburo than there is in the U.S. Congress. Not all of that can be explained by our campaign finance law, of course, but a good deal of it can, because the law so disables challengers. It takes a tremendous amount of money today to mount a campaign for public office, especially at the federal level, and especially for challengers. Challengers have to overcome the manifest advantages of incumbency—name recognition, the power of office, the franking privilege, a knowledgeable staff, campaign experience, and, perhaps most important, easy access to the media, to name but a few. Given those advantages, the challenge is daunting, the need for funds to overcome it extraordinary. Yet that is precisely the need at which present law strikes: in any given election cycle, an individual can give no more than $1,000 to a candidate; a political party or a political action committee (PAC) can give no more than $5,000. In today's market, those are minuscule sums. Figure 10.1 shows the uphill battle challengers face, given the contribution limits now in place.

In a free and open political system, challengers would be able to do what they used to be able to do—find a few "deep pockets" to get themselves started, then build support from there, unrestrained by any restrictions save for the traditional prohibitions on vote selling and vote buying. That is how liberal Eugene McCarthy challenged an incumbent president in 1968. It is how conservative James Buckley challenged an incumbent senator and a major party challenger in 1970. Today, neither would be able to do that—thanks to the "reforms" of 1974. Both would face a huge and often inscrutable body of legislation, case law, and Federal Election Commission (FEC) rulings and interpretations that would limit

Figure 10.1
Incumbent Money Advantages: The Challenge Facing Challengers (1997–98 general election contributions)



SOURCE: Federal Election Commission.

them in countless ways, especially in obtaining start-up money. Both would incur massive compliance costs, including the risk of future litigation and prosecution. Both would be discouraged, in all likelihood, from mounting a challenge. Mounting a challenge today, even through a major party, is not for the faint of heart or for the "grass-roots" candidate. That is not healthy for democracy.

Just what was wrong with the old system, which is still the system in many states today? The assumption seems to be that money corrupts politics, that more money means more corruption, and that, given the "obscene" amounts of money pouring into political campaigns today, more regulation is needed to root out the corruption that necessarily follows. Unfortunately, the premise of that argument is rarely examined. When it is, the case for regulation falls apart. Moreover, rarely is it admitted that most of the problems with our system today are the products of earlier reforms. Finally, all too rarely is it noticed that massive government, government with the power to redistribute and regulate almost anything, is at the heart of the problem. Modern government—a product of the demise of constitutional limits on government—is a magnet for the kind

of "corruption" our campaign finance laws are supposed to stop. To illustrate those points, let us begin with a closer look at the idea of corruption.

The Roots of Corruption and the Difficulties of Rooting It Out

Campaign finance reformers claim to be driven by the desire to end corruption or its appearance. For its part, the Supreme Court has said that preventing corruption or its appearance is the only reason that will justify limiting campaign contributions, which are otherwise protected by the First Amendment. But what is the nature of the corruption that concerns reformers? And just how much corruption is there to be rooted out?

The premise of clean government is that public office is not to be sold—not for money, not for personal gain, not even for elective office. Thus, money is not the real issue, even if money is often involved in corruption cases. The issue, rather, is trust. In our system, public office is a trust, solemnized by the oath of office, through which officeholders swear to support the Constitution. Implicit in that oath, because implicit in a Constitution written to serve all the people, is the obligation to serve the general good, the good of all, as spelled out in the Constitution. When an officeholder sells his vote to a special interest for any narrower reason, he appears, at least, to be breaching the trust he assumed when he swore to support the Constitution. He appears, that is, to be serving a good more narrow than the good of all—and may be, for all we know. His oath entails an obligation to avoid even the appearance of doing so.

Corruption is thus a function of the public trust entailed by the oath of office and the Constitution. It arises, in a constitutional republic like ours, when officials give at least the appearance of serving a good narrower than the general good they swore to serve as provided for in the Constitution. As a practical matter, however, one of the enduring problems in the analysis of corruption is distinguishing between appearance and reality. A member who votes for a bill in exchange for some payoff is said to be corrupt. But if that same member votes the same way because he believes he is serving the general good, he is not thought to be corrupt. Thus, the same act may or may not be corrupt depending on the reasons behind it. Yet reasons or motives, being subjective, are notoriously difficult for others to determine, especially when they are mixed. What are we to say when a member accepts a campaign contribution from a special interest, votes as the interest wishes, but does so because he genuinely believes he is

voting for the general good? After all, a particular good and the general good may coincide.

Our system could preclude such appearances, of course, simply by prohibiting all private contributions, whether designated as campaign contributions or not, and moving to a system of public funding. Setting aside other problems that would arise if we were to do so, we in effect resort to public funding when we pay members of Congress a salary and then, through ethics rules, prohibit their receiving various forms of outside income. Not all such income is prohibited, however. And we know the difficulties in drawing those lines. It may be useful, in fact, to place issues like these on a continuum: we prohibit private payoffs in exchange for congressional votes because that is the very essence of corruption; we allow some forms of outside income where corruption is not likely; and we allow private campaign contributions because rights fundamental to the democratic process are directly implicated.

But even if the rights that arise in the campaign finance context were set aside, how as a practical matter would a system of public campaign financing work? It is one thing to fund congressional salaries from public monies, quite another to fund the costs of campaigning. Most immediately, would incumbents and challengers receive equal amounts of money? Given the extraordinary advantages of incumbency noted above, that would hardly level the playing field or respect the democratic process. Then what is the right ratio? How would public funding offset the advantages of incumbency? No one knows the answers to those or to any of the myriad other practical questions that surround public campaign funding, even if we did set aside the rights issues. When we add in those First Amendment principles, the case against public funding becomes overwhelming.

Thus, we have two practical difficulties to balance: on one hand, the difficulty of determining when an act has been done from a corrupt motive, which drives us toward public funding; and, on the other hand, the difficulty of devising a system of public funding that eliminates even the appearance of corruption but at the same time preserves democratic processes and principles, which drives us away from public funding and back toward a more open system. Public salaries for members and ethics rules regarding outside income solve a small part of the problem. Once we go much beyond that, however, the difficulties start to mount, and mount rapidly.

Not surprisingly, therefore, until the federal reforms of 1974, and still today in many states, we have generally decided not to try to address the problem of corruption through sweeping regulations but simply through

limited rules and prosecutions of fairly clear cases—what the Supreme Court has called quid pro quo corruption. In keeping with the presumptions and burdens of proof in the rest of our legal system, that is, we have presumed that there is no corruption, then placed the burden on those charging it to prove it. Having done that, it turns out that there is rather less corruption than reformers would have us believe. They talk regularly of corruption but are never quite able to put their finger on the real thing. It is corruption in general that animates them, not corruption in particular.

Thus, the basic premise of the campaign finance reform movement—that money corrupts and more money corrupts even more—comes up short on the evidence, despite its initial appeal. Charges of corruption are easy to make but difficult to prove, primarily because members of Congress are generally not "on the take." Yet the move toward public funding—as a way to avoid such difficulties—is fraught with problems that are, if anything, even more difficult to resolve consistent with fair democratic processes, to say nothing of First Amendment guarantees. And public funding raises starkly the very corruption it is meant to address: self-dealing—the self-dealing otherwise known as incumbency protection.

What is more, the complaint about "obscene" amounts of money flowing into the political process today is likewise belied by the facts. In the 1996 elections, for example, the amount spent for every race in the country, from president on down, came to less than $10 per eligible voter. Given the trillions of dollars that our governments redistribute, to say nothing of the untold regulatory costs they impose, that is a paltry investment in the political process. Table 10.1 places various campaign expenditures in context, showing them to be anything but "obscene." Indeed, one of the great ironies surrounding the complaint that we spend too much on campaigns is that it undercuts the argument for more regulation based on increasing corruption. For the more money that flows into the political process from more sources, the less potential there is for any single contribution to corrupt. A corrupt member of Congress can serve just so many masters, after all, especially when their interests conflict, as they often do. That doubtless goes far toward explaining why reformers are having such a difficult time putting their finger on real corruption.

Current Law and Its Untenable Consequences

Even before we get to the First Amendment issues, therefore, we run up against intractable practical problems that frustrate efforts to proscribe all but the clearest cases of corruption. And we see that borne out with

Table 10.1
Campaign Spending in Context

Although the amount of money spent on the presidential and congressional elections is breaking records, it pales in comparison with some of the dollars generated in the entertainment and sports industries.

Amount of money *Forrest Gump* grossed	$330 million
Amount raised by major presidential candidates	$321 million*
Amount raised by George W. Bush	$177 million*
Last year's earnings of Oprah Winfrey	$150 million
Combined 1999 payrolls of New York Yankees and Jets	$135 million
Amount raised by Al Gore	$127 million*
Amount raised for New York Senate race	$63 million
Amount earned last year by Backstreet Boys	$60 million

SOURCE: *National Journal,* October 14, 2000, p. 3232.

*Includes federal matching funds.

the regulations that were put in place a quarter of a century ago. Most of the 1974 amendments to the 1971 Federal Election Campaign Act were thrown out by the Supreme Court in 1976 in the seminal case of *Buckley v. Valeo*. Those regulations that survived, however, have produced many of the problems complained of today. Yet, rather than notice that connection and roll back the regulations that give rise to the problems, reformers call for still more regulations. We have here a textbook example of government regulations begetting only the need, in the eyes of reformers, for more such regulations.

Consider the issue of "soft money," which more than anything else, perhaps, reformers would like to restrict. Soft money contributions stand opposed to "hard money" contributions given directly to candidates or campaigns. Although people often speak of soft money as going to political parties for purposes other than expressly advocating the election or defeat of a particular candidate, soft money in truth includes every contribution that is not hard, or regulated, money, regardless of whether it goes to a political party or to some independent issue-oriented group.

In *Buckley*, the Court distinguished between contributions and expenditures, rejecting restrictions on expenditures by saying that they were direct limits on protected speech. But the Court upheld restrictions on direct

contributions to campaigns, calling them marginal limitations on protected speech because "the transformation of contributions into political debate involves speech by someone other than the contributor." The arguments supporting that distinction have never been deeply satisfying—political contributions are a form of political speech too, after all, no less worthy of protection than political cartoons or political commentaries, which surely are "contributions" to a campaign. But that is the law the Court let stand. Thus, still today we have the $1,000 and $5,000 hard money limits noted above, which are worth about one-third of what they were worth when first enacted. Everything else is soft money.

Why then is there soft money? The answer is simple: Because we impose limits on hard money contributions; because the Constitution prohibits limits on other kinds of contributions; and, therefore, because people and institutions that want to give more than they are allowed to give directly to a candidate give in other ways. Thus, if there were no limits on hard money contributions, if individuals and PACs could give a campaign as much as they wanted, they would not have to resort to soft money. In fact, there would be no hard money/soft money distinction. There would be just contributions—to campaigns, to parties, to whomever or whatever.

Reformers complain that people give soft money to "get around" the limits on hard money contributions. Of course they do. That should hardly surprise. Reformers then speak of soft money as squeezing through a "loophole" in the law. That is equivalent to saying that the First Amendment is a loophole. It is. In fact, the Constitution itself is one grand "loophole," if you want to look at it that way. It is the loophole through which people find freedom from oppression. The answer to the "problem" of soft money is not to close the loophole, which the Constitution forbids short of a constitutional amendment. It is to open the restriction that gives rise to soft money in the first place, to end the limits on hard money contributions.

But just what is the "problem" of soft money? Stated plainly, it seems to be that there is money that government does not regulate, money that can be given in unlimited amounts. And that offends reformers because it seems to defeat the purpose of regulation, which is to prevent corruption. The idea seems to be that large contributions to a candidate corrupt the candidate, small contributions do not, but large contributions to parties bring corruption back in. In other words, large contributions, to whomever, corrupt.

Once again, however, where is the evidence, for parties *or* candidates? The Court has said that the only rationale that will justify limits on direct contributions to candidates is the prevention of quid pro quo corruption. Unfortunately, in saying that, the Court never went on to demand any serious evidence of corruption—and Congress has never produced any. As several Supreme Court justices have noted, therefore, the limits on hard money are on shaky footing. That does not bode well for any limits on soft money. At the least, those asking for restrictions on soft money need to show that soft money leads to real corruption—not generalized allegations but the real thing. And if they are able to do that, they need to show further that current law is inadequate to handle the problem.

Soft money given to parties is used for party-building activities, voter registration and get-out-the-vote drives, generic party advertising, and issue ads—all protected under the First Amendment. How could restricting contributions for those activities possibly prevent corruption? Reformers counter that "issue ads," which discuss issues and avoid expressly advocating the election or defeat of particular candidates, are used nonetheless to influence elections. Thus, they are subterfuges to get around restrictions on direct contributions.

Here again the reformers are right: issue ads do influence elections. That is why parties run them. But they have a perfect right to do so. Plainly, what reformers have a problem with is free speech. They erect barriers to contributing directly to candidates. Then when people find ways around those barriers—when they find ways to speak indirectly—reformers call that "corruption." There seems to be no limit to what they will include under that label. It is the rankest kind of bootstrapping.

But when direct contributions to candidates are restricted as they are today, and people then contribute to parties or interest groups that sponsor issue ads or put out voter scorecards, uncoordinated with a candidate, a very real problem can arise for candidates. They can lose control of their message. Indeed, they often feel that they lose control of their campaign. Voters can become confused about what the candidate really stands for. Candidates sometimes ask to be protected from their "friends" even more than from their opponents.

Given that possibility, many in Congress have called for restricting issue ads. And the FEC has often brought suit to do the same. One way that both have tried to restrict such ads is by expanding the definition of "express advocacy," for which contributions may be limited because they are construed to be direct contributions to a candidate. But the Court has

repeatedly rejected those efforts, holding that, to avoid the problem of vagueness, "express advocacy" covers only communications that "in express terms advocate the election or defeat of a clearly identifiable candidate for federal office." And the Court has made it clear that "express terms" means words like "vote for," " vote against," " elect," or "defeat." Issue ads that avoid such terms are core political speech protected under the First Amendment.

Here again, then, it is core political speech that reformers want to restrict, which the Constitution forbids. And here too the solution to the admittedly real problem that independent issue ads sometimes pose for candidates is as close at hand as deregulation. One of the main reasons people give to independent, issue-oriented organizations is because they are limited in what they can give directly to candidates. Raising those limits or, better, eliminating them altogether would not end such independent efforts, but it would reduce their influence in the overall mix of political speech and give candidates more control over their message and their campaign.

The Heart of the Problem: Power Corrupts

Thus, campaign finance reform, like so many other "reforms," has led to consequences that in many ways are worse than the problems that gave rise to the reforms in the first place. To be sure, the potential for corruption should not be lightly dismissed. But the very difficulties of defining and prosecuting "corruption" should serve as a caution. We all know that money buys "influence," but influence is not the same as corruption. In fact, studies show that the most important influences on a member of Congress are his ideology, his party, and his constituents. We also know that abuses of office take many forms. The "selling" of the Lincoln bedroom in the White House is an outrageous abuse of public trust. But how do we write regulations to prevent it? How do we draw lines between "friends," " friend-contributors," and "soon-to-be friend-contributors"? It is doubtless the case that most forms of "corruption" are best handled not through regulation and the legal process but through the political process. And if the people are not sufficiently outraged at such things as the selling of the Lincoln bedroom, it means either that the opposition has not made the case or that the people themselves have become numb to corruption—and thus corrupt themselves.

In either event, however, it should be clear that the forms of corruption that are best addressed through the political process are not trivial matters.

They coarsen our political culture and weaken our political institutions. Still, that does not warrant the kinds of "reforms" we put in place in 1974, much less those proposed in recent years. Indeed, those reforms have themselves weakened our institutions—and led to their own kind of corruption. By greatly enhancing incumbency, they strike at the very heart of democratic government. The whole point of democracy, after all, is to enable the people, through the ballot box, to control those who govern them. To the extent that campaign finance law undermines that power, it undermines democracy. Moreover, as we will now see, to the extent that incumbency is correlated with ever-larger government, as studies repeatedly show, our present law exacerbates the very problem it was meant to reduce—corruption.

We come, then, to the heart of the matter. The focus on campaign finance reform is a distraction from the real issue, the ultimate source of the potential for corruption—ubiquitous government. Government today is a magnet for corruption of every form because it exercises vast powers over virtually every aspect of life. Given that reality, is it any wonder that special interests—indeed, that every interest but the general—should be trying either to take advantage of that or to protect themselves from it? The Founders understood the problem of what they called "factions." They understood that interests would be tempted to capture government for their own ends. To reduce that temptation, they wrote a constitution that granted government only limited powers. They understood that the best way to reduce corruption is to reduce the *opportunities* for corruption.

The great fear of reformers, of course, is that special interests will "buy" members of Congress through campaign contributions and members will then serve those interests rather than the general good they are sworn to serve. But instead of questioning whether members have such power under our system of constitutionally limited government, reformers simply assume they do. The only question then is how to stop special interests from gaining "undue influence." Thus, the thrust of so much campaign finance reform is to equalize the influence by reducing permitted contributions to ever-smaller sums, the better to encourage every citizen to contribute and to be part of the system. It is the campaign-finance branch of egalitarianism. Indeed, public campaign funding, through the tax system, moves in that direction. It amounts to forced contributions from everyone, albeit in proportional rather than equal amounts: "From each according to his ability."

The Founders took the opposite approach. Far from forcing everyone to contribute to campaigns, they left individuals free to decide the matter

for themselves—and free also to decide how much to contribute. And it is not as if the Founders were unmindful of the potential for real corruption, which they left to traditional legal means to ferret out. It is rather that they had a pair of better ideas about how to handle the various forms of corruption. The first was to rely on competition, to construct a system that enabled interest to be pitted against interest. There is no shortage, after all, of special interests. But if you fetter them all, through some grand regulatory scheme, you stifle the natural forces that are necessary for the health of the system. No individual, no committee of Congress, no blue-ribbon committee of elders, can fine-tune the system of political competition. It has to be free to seek its own equilibrium.

The second idea was equally simple, yet equally profound. It was, as noted above, to limit power in the first place, the better to limit the opportunities for corruption. After all, if a member of Congress has only limited power to sell, there will be limited opportunities to buy. That will not eliminate all corruption, of course, but it will greatly reduce it.

To return to points made earlier, then, once we recognize the essential character of corruption—that it is a breach of the trust that is grounded in the oath of office and, ultimately, in the Constitution—it becomes clear that the problem is much broader than is ordinarily thought, even if most such corruption should not be the subject of regulation and prosecution. In fact, those who try to reduce the issue to one of money—of big money buying access—miss the larger picture entirely. Money may induce a member to vote for an interest narrower than the general good—the evidence notwithstanding—but when we ratified the Constitution we gave members the opportunity to do so only to a very limited degree. In fact, it was because we understood, as Lord Acton would later put it, that power tends to corrupt and absolute power corrupts absolutely, that we so limited our officials. And we realized that not only would they be tempted to breach their oaths of office for money but for power as well—indeed, for the office itself. Thus, it was not "special interests" alone that the Founders feared but the people too: They wanted to protect against the capture of government by that ever-changing special interest known as "the majority." For that reason too—no, especially—they limited government's powers. A limited government would have limited powers to capture.

Thus, the problem with post–New Deal government, with its all but unlimited power to redistribute and regulate at will, is that it virtually ensures that members of Congress will act not for the general good, the

good of all, but for some narrower interest. Indeed, the modern state is premised on "corruption," for when it takes from some to give to others, it does not serve the *general* good—and cannot, *by definition*. Thus, candidates find themselves selling their office right from the start. When they promise "free" goods and services from government, in exchange for votes, they are selling their office, plain and simple: "Vote for me and I'll vote to give you these goods." That is where corruption begins. It begins with the corruption—or death (the root of "corruption")—of the oath of office. For not remotely does our Constitution authorize the kind of redistributive state we have in this nation today (see Chapter 3 of this *Handbook* for a detailed discussion).

It was because the Founders were so keenly aware of the kind of corruption the redistributive state would set in motion that they strictly limited Congress's powers—and directed them, in addition, toward the general good. And for most of our history, officeholders in the political branches, quite apart from anything the courts did, rose to challenge efforts that would undermine that plan. They understood that the line between an officeholder's selling his vote for money and his selling that same vote, beyond bounds set by the Constitution, to obtain or keep his office is imaginary. And they understood especially that the greater wrong is not in the tempting but in the succumbing to temptation: it is the officeholder, after all, not the citizen, who takes the oath of office.

To root out the kind of generalized corruption that is endemic to modern government, then, one should begin not with more campaign finance regulations but with the Constitution and the oath of office. The Constitution establishes a government of delegated, enumerated, and thus limited powers. It sets forth powers that are, as Madison put it in *Federalist* 45, "few and defined." Thus, it addresses the problem of self-dealing by limiting the opportunities for self-dealing. If Congress has only limited power to control citizens' lives—if citizens are otherwise free to plan and live their own lives—there is little power for members of Congress to sell, whether for cash, for perquisites, or for votes.

Before they take the solemn oath of office, therefore, members should reflect on whether they are swearing to support the Constitution as written and understood by those who wrote and ratified it or the Constitution the New Deal Court discovered in 1937. The contrast between the two could not be greater. One was written for limited government, the other was crafted for potentially unlimited government. As that potential has materialized, the opportunities for corruption of every kind have become ever

more manifest, as members know only too well. Indeed, to appreciate the point, we need only notice the corruption that is endemic to totalitarian systems—the ultimate redistributive states—despite draconian sanctions against it. It goes with ubiquitous government.

Conclusion

In most cases, therefore, the answer to the corruption that is thought to attend our system of private campaign financing is not more campaign finance regulations but fewer such regulations. The limits on campaign contributions, in particular, should be removed, for they are the source of many of our present problems. More generally, however, the opportunities for corruption that were so expanded when we abandoned constitutionally limited government need to be radically reduced. Members of Congress can do that by taking the Constitution and their oaths of office more seriously.

Suggested Readings

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