Cato Handbook for Policymakers

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9. Campaign Finance

Congress should

- repeal the prohibition on soft money fundraising in the Bipartisan Campaign Reform Act of 2002,
- repeal the provisions of BCRA related to electioneering communications,
- eliminate taxpayer funding of presidential campaigns and reject new proposals for such funding of congressional campaigns,
- repeal limits on spending coordinated between a political party and its candidates and
- reject proposals to mandate electoral advertising paid for by the owners of the television networks.

The 107th Congress passed the most sweeping new restrictions on campaign finance in a generation, the Bipartisan Campaign Reform Act of 2002. During the 108th Congress, the Supreme Court endorsed almost all of BCRA. Over the last four years, the tide has begun running toward more liberty and freedom of speech. In 2007, the Supreme Court expanded the realm of free speech in its decision in *Wisconsin Right to Life v. FEC* by restricting the reach of BCRA. In 2008, the Court again invalidated part of BCRA to vindicate the First Amendment. In *Davis v. Federal Election Commission*, the Court stated that the Constitution protects freedom of speech, not equality of electoral opportunity. Congress should follow the Court's lead and further liberalize our campaigns and elections.

Liberty and Corruption

The Constitution prohibits governments from abridging freedom of speech. In the seminal case of *Buckley v. Valeo* (1976), the Supreme Court recognized that restrictions on political spending abridge political speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Note that the Court did not say, ''Money equals speech.'' It said that political speech requires spending money. Restrictions on money thus translate into restrictions on speech.

Some support such restrictions because they believe there is ''too much money'' in politics. In 2004, spending on federal elections came to roughly $4 billion. This sum should be seen in context. According to political scientist Ray La Raja, a single company, Wal-Mart, spent that much on advertising during the same period.

If we believe that voters should be informed, we ought to encourage, not restrict, campaign spending. John J. Coleman of the University of Wisconsin found that campaign spending increases public knowledge of the candidates across all groups in the population. Less spending on campaigns is unlikely to increase public trust, involvement, or attention. Implicit or explicit spending limits reduce public knowledge during campaigns. Getting more money into campaigns benefits voters.

Unfortunately, contributions to campaigns do not enjoy the same constitutional protections as spending. In 1974, to prevent ''corruption or the appearance of corruption,'' Congress severely limited campaign contributions. Until recently, those ceilings have governed American elections without being adjusted for inflation. BCRA raised the limits on ''hard money'' contributions, but their real value remains well below the ceilings enacted in 1974.

The lower protection afforded contributions makes little sense. Political candidates spend money to obtain the means (often television time) to communicate with voters; such spending, as noted earlier, is protected speech. But contributors give to candidates for the same reason—to enable candidates to present their views to the electorate. Moreover, ceilings on contributions complicate raising money and thus inevitably reduce ''the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached'' by the candidate.

Elections after BCRA have shown that contribution limits restrict speech and political participation. An increase in the donation limit for individuals

combined with the emergence of the Internet as a fundraising tool led to greatly increased contributions in the 2006 and 2008 election cycles. BCRA revealed that members of Congress understand the effect of limits on donations. Congress enacted the Millionaire's Amendment, which liberalized the limits on donations to opponents of self-funding candidates. Members understood that liberalized limits meant more fundraising and a more competitive elections.

What about corruption? The Supreme Court has said that restrictions on campaign finance are justified to prevent corruption or the appearance of corruption in politics. What is corruption? Bribery is a clear case of corruption. Bribery involves secretly giving public officials something of value (usually money) in exchange for political favors. Officials then spend bribes on private consumption. Campaign contributions also involve giving money to public officials or their agents. However, by law the recipients may spend contributions only for political purposes. Anyone who spends campaign contributions on fancy cars and lavish houses commits a felony. Unlike bribes, contributions are publicly disclosed.

As Chief Justice John Roberts observed in the *Wisconsin Right to Life* decision, the burden of proof in campaign finance matters lies with the censor, not with the speaker. Congress must show that spending money on politics somehow corrupts the government. Many claim that contributors influence the judgment of legislators and receive favors for their donations. The evidence says otherwise. Three leading scholars examined 41 studies of the influence of money on legislative voting. They concluded: ''The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. Contributions explain a minuscule fraction of the variation in voting behavior in the U.S. Congress. Members of Congress care foremost about winning reelection. They must attend to the constituency that elects them, voters in a district or state, and the constituency that nominates them, the party.''

What about preventing the appearance of corruption? We might first wonder why the mere appearance of illegality should be sufficient reason to restrict First Amendment rights. Proponents argue that campaign contributions appear to corrupt the political process, thereby undermining public confidence in government. Once again, the evidence runs against proponents of campaign finance restrictions. John Coleman found that campaign spending had no effect on public confidence in government. Nathaniel Persily and Kelli Lammie of the University of Pennsylvania discovered

that Americans' ''confidence in the system of representative government'' is associated with individuals' positions in society, their general tendency to trust others, their beliefs about what government should do, and their ideological or philosophical disagreement with the policies of incumbent officeholders. However, they found that our system of campaign finance had no effect on public confidence.

Congressional Conflicts of Interest

Campaign finance regulation brings every member face-to-face with the problem of self-dealing—not only the self-dealing that 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. Only one congressional election since 1974 has seen an incumbent reelection rate lower than 90 percent. Even in the ''revolution'' of 1994, which changed control of the House of Representatives, 90 percent of incumbents were reelected. The last three elections have seen reelection rates of more than 94 percent.

Campaign finance restrictions may not fully explain the lack of competition for incumbents in American politics. But those restrictions encumber entry into the electoral market and thus discourage credible challenges to incumbents. A challenger needs large sums to campaign for public office, especially at the federal level. He needs big money to overcome the manifest advantages of incumbency—name recognition, the power of office, the franking privilege, a knowledgeable staff, campaign experience, and, perhaps most importantly, easy access to the media. Current law limits the supply of campaign dollars: an individual can give no more than $2,300 to a candidate, and a political party or a political action committee can give no more than $5,000. In a free and open political system, challengers could find a few ''deep pockets'' to get them started, then build support from there, unrestrained by any restrictions save for the traditional prohibitions on vote selling and vote buying.

Problems with BCRA

BCRA made things worse. By banning ''soft money''—unregulated contributions given to the political parties—Congress complicated the lives of challengers. Parties have traditionally directed soft money contributions to races in which challengers might have a chance. At the same

time, BCRA does not affect donations by political action committees, most of which go to incumbents. Ray La Raja found that after BCRA the financial gap has widened between officeholders and challengers. Incumbent fundraising increased 20 percent between 2002 and 2006, whereas challenger fundraising stayed flat.

BCRA has reduced the resources available to the political parties. Before BCRA, soft money fundraising by the parties had been rising quickly. The parties have made up some of the shortfall caused by the soft money prohibition in BCRA. If we extrapolate the trend before BCRA, however, both parties would have had a great deal more money to spend if the soft money ban had not been enacted. Moreover, according to La Raja, party receipts in off years have diminished for both the Republican National Committee and the Democratic National Committee under BCRA. For the RNC, the drop-off has been significant, falling from a high of $134 million in 2001 (just before BCRA) to $86 million in 2007. For the DNC, which is typically less well-funded, the decline over the same period was from $68 million to $55 million.

Before BCRA, the parties consulted with candidate campaigns to target soft money for advertising and get-out-the-vote efforts. After BCRA, parties may spend limited sums of hard money only in coordination with candidate campaigns. Parties have ended up spending money independently of their candidates to avoid the coordination restrictions. In some cases, parties have run advertising that candidates for Congress did not support. In these situations, voters can hold a party responsible for its advertising only by voting against a candidate who is not responsible for the messages. Congress could end this absurdity by loosening or removing restrictions on party spending in coordination with candidates.

Congress's conflict of interest did not end with the ban on soft money. Before BCRA, interest groups funded aggressive advertising criticizing members of Congress during their reelection campaigns. To be sure, some of those ads were unfair or inaccurate, but the Constitution protects the right to be both. BCRA prohibited such advertising—now called ''electioneering communications''—funded by unions and corporations, including nonprofit corporations, if it mentions a candidate for federal office. If such ads are coordinated with a campaign, their funding is subject to federal election law, including contribution limits. Those restrictions meant elections had fewer ads, less debate of public matters, and less criticism of elected officials.

Activists have responded to the soft money ban and electioneering regulations by raising unlimited contributions on behalf of groups orga-

nized under Section 527 of the Internal Revenue Code. These efforts are an exercise of First Amendment rights and provide information to voters. Congress should not seek to prohibit 527 activities. Instead of adding more restrictions, Congress should repeal the soft money prohibition and the restrictions on electioneering, thereby removing the rationale for the existence of the 527 groups.

Not surprisingly, BCRA has not increased public confidence in the campaign finance system. When Americans are asked in a Gallup poll about the state of the nation's campaign finance laws, more than 50 percent say they are dissatisfied and only 21 percent say they are satisfied. Those proportions have not changed since before BCRA.

BCRA loosened federal contribution limits for candidates running against self-funding individuals. Apparently, contributions of over $2,300 corrupted politics—unless an incumbent faces a self-funding millionaire. BCRA seems little more than an incumbent protection law, a monument to the dangers of self-dealing. Recently, the Supreme Court struck down that selective liberalization of campaign finance regulation. Congress should respond by liberalizing contribution limits for all participants and not just for candidates who face a self-funder.

Taxpayer Financing of Campaigns

Some people believe the United States can preclude corruption or its appearance only by prohibiting all private contributions, whether designated as campaign contributions, and by moving to a system of taxpayer-financed campaigns. In practice, several states have established partial public financing. Since 1976, federal taxpayers have partially financed primary and general election campaigns for president. Some now propose to extend public financing. Recently, Sens. Richard Durbin (D-IL) and Arlen Specter (R-PA) introduced S. 936, the Fair Elections Now bill, to force taxpayers to fund congressional campaigns.

Compared with the system it replaced, presidential public financing has not increased competition in the party primaries or the general election. The system borders on insolvency because ever-fewer taxpayers check off the contribution box on their income tax return. The declining support for the program makes sense. Polls show that Americans reject public financing as ''welfare for politicians.'' Congress should eliminate this unpopular multibillion-dollar boondoggle. The Durbin-Specter bill inadvertently provides additional evidence of the public's distaste for taxpayer financing. The bill is not funded by general taxation or by a checkoff

system of earmarking taxation as is the presidential system. Instead, the bill purports to obtain sufficient funding from the sale of recovered electromagnetic spectrum, excess spectrum user fees, a tax on private broadcasters, and other miscellaneous sources. These choices for funding sources suggest senators know that taxing to fund campaigns would be highly unpopular with their constituents. If public funding offers so many benefits to the nation, why are taxpayers unwilling to pay the costs of the program? Could it be that taxpayer financing actually offers few benefits? In any case, forcing taxpayers to support campaigns for Congress at a time of continuing budget deficits makes little sense.

The Real Problem

As James Madison said in *Federalist* No. 51, a dependence on the people is the primary control on government. That dependence can only have meaning in elections with vigorous competition. By undermining competitive elections, campaign finance laws undermine democracy. Moreover, to the extent that incumbency is correlated with ever-larger government, BCRA exacerbates the very problem it was meant to reduce—corruption. Campaign finance ''reform'' distracts us from the real issue, the ultimate source of potential corruption—ubiquitous government. Government today fosters corruption because it exercises vast powers over virtually every aspect of life. Is it any wonder that special interests—indeed, every interest but the general—should be trying either to take advantage of that or to protect themselves from it?

Our Constitution does not authorize the kind of redistributive state we have in this nation today (see Chapter 3 for a detailed discussion). The Constitution establishes a government of delegated, enumerated, and thus limited powers. It sets forth powers that are, as Madison put it in *Federalist* No. 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—Congress has little influence to sell, whether for cash, for perquisites, or for votes. Before they take the solemn oath of office, therefore, members of Congress 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 cor-

ruption have become ever more manifest. It goes with ubiquitous government.

Conclusion

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, 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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