Purer Politics, Greasier Pigs, and Other Wonders of Campaign Reform

Sam Kazman

In his *Devil's Dictionary* Ambrose Bierce defined the presidency as "the greased pig in the field game of American politics." The capture of a greased pig may not be an ennobling spectacle, but at least it is usually entertaining. Had it not been for H. Ross Perot's oscillating candidacy, however, much of the 1992 presidential campaign would have lacked even that minor quality. Notwithstanding his vox-pop teaser of a campaign, he saved us, at least temporarily, from an unimaginably sluggish, unbearably tiresome political season.

While Mr. Perot's candidacy owed its existence to his personal fortune, it would have never occurred without another factor as well—the failure, sixteen years ago, of Supreme Court Justices Thurgood Marshall and Byron White to persuade their brethren of the validity of section 608(a)(1) of the Federal Election Campaign Act Amendments of 1974 in the case of *Buckley* v. *Valeo*. Had they succeeded in convincing just two of their fellow justices, then the Supreme Court would have upheld Congress's attempt to limit the personal funds that a presidential candidate can spend on his campaign, thereby preventing Mr. Perot's self-financed bid for the White House.

Perot's candidacy spared us from what might have been a dead certainty under a slightly different Supreme Court: a two-party system of unflappable complacency, waddling unscathed through S&L bailouts and broken tax pledges, discomfited now and then only by the distant rumbling of some proposed constitutional amendment. But the Court left standing an extensive program of campaign "reform" that each year threatens to grow even larger.

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Nixon's the One

In its 120-year history, campaign regulation in the United States has gone from the credible goal of controlling corruption to the delusionary goal of controlling capital. In 1870 Congress prohibited fraud and bribery in voting, and in 1907 it banned campaign contributions by national banks and corporations. But responsibility for the modern era of campaign regulation belongs, in large part, to Richard Nixon. Nixon signed the 1971 Federal Election Campaign Act into law. He stated that it would "guard against campaign abuses" and "build public confidence in the integrity of the electoral process." He should have known better—the 1974 amendments to that act, the core of the current regulatory regime, were passed in the wake of his own reelection campaign funding scandals—in particular, a $2 million milk producers' pledge that apparently led Nixon to overrule his secretary of agriculture and raise dairy supports.

The 1971 act restricted candidates' use of personal funds for campaigning, limited spending on media advertising, placed disclosure requirements on contributions exceeding $100, and brought the Federal Election Commission into existence. A related bill established the first public funding mechanism for presidential campaigns, through a $1 checkoff on income tax returns.

Campaign finance control went into even higher gear after Watergate. The 1974 FECA amendments imposed a far more extensive set of contribution limits, spending caps, and disclosure requirements, and it enlarged the public financing scheme to presidential primary campaigns and nominating conventions.

Those amendments were quickly challenged in court by an array of plaintiffs covering the ideological spectrum; among them presidential candidate Eugene McCarthy, then-Sen. James Buckley (seeking reelection at that time), the Libertarian Party, the New York Civil Liberties Union, and several state Republican and Conservative parties. Prominently absent from that lineup, as they have been prominently active in subsequent attempts to expand FECA, were the Democrats.

In its 1976 decision in *Buckley,* the Supreme Court upheld the amendments' major provisions, with the exception of the spending caps on individuals, on candidates, and on candidates' use of personal funds. In the Court's view those latter activities were directly tied to the right of political expression and could not be restricted in the drastic manner chosen by Congress. Contribution caps and disclosure requirements, on the other hand, involved a less direct and less burdensome curtailment of speech and were therefore justified by the government's interest in reducing the influence, real or apparent, of big money.

The Current Controls

The system of campaign finance controls left standing by the Court, with some subsequent congressional modification, is essentially as follows. *Individual contributions* to any federal candidate and his authorized political committee are limited to $1,000 per primary election and $1,000 per general election. Individuals may also make annual contributions of up to $20,000 to a national party's political committee and up to $5,000 to an independent political committee. The total of those contributions, however, cannot exceed $25,000 per year.

In its 120-year history, campaign regulation in the United States has gone from the credible goal of controlling corruption to the delusionary goal of controlling capital. The Supreme Court upheld the major provisions of the 1974 FECA amendments, which imposed an extensive set of contribution limits, spending caps, and disclosure requirements, but rejected the spending caps on individuals, on candidates, and on candidates' use of personal funds.

Political committees can generally give up to $5,000 per candidate per election (unless they operate on too small a scale to qualify as a "multicandidate" committee, in which case they are subject to the same limits as individuals).

With respect to *expenditures,* independent spending by individuals is unlimited under *Buckley.* If the expenditure is not made independently, however—if it involves cooperation or consultation with a candidate, his agents, or his committee—then it is subject to the contribution cap. Spending by political party committees is limited in Senate races to the greater of $20,000 or two cents times the number of people of voting age in the state; in House races the limit is $10,000.

Corporations and labor unions are barred from making contributions or expenditures. They may, however, set up their own political action committees (known as "separate segregated funds") to receive and make contributions and expenditures. The administrative and solicitation expenses of such PACs (which constitute three-quarters of all PACs) may be borne by their sponsors. On the other hand, "nonconnected" PACs, such as grassroots ideological groups, must bear their own expenses. A PAC can receive up to $5,000 from any individual per year; as an individual, it can make unlimited independent expenditures.

Subsidies for presidential primary elections are available to any candidate who raises at least $5,000 in contributions of $250 or less in twenty or more states. The federal government will match those contributions, up to a maximum of $10 million. Public funding of $2 million for nominating conventions and $20 million for general elections is available to major parties (which are defined as winning 25 percent or more of the popular vote in the preceding presidential election). Minor parties (those that won at least 5 percent of the popular vote in the prior election) can receive public funds based on their past election performance. Additional postelection funds are available to minor parties that improve their election performance and to new parties that reach the 5 percent threshold. This general election funding is contingent upon the candidate's pledging to accept no private contributions and to spend no other monies (unless, that is, the available public funding falls short of $20 million).

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There have been repeated proposals to expand the subsidy and spending limit system to congressional elections. This past spring President Bush vetoed a bill that would have set voluntary spending caps of $600,000 for House elections and $950,000 to $5.5 million for Senate elections (depending on state size), coupled with matching federal funds and discounted television time as inducements for compliance.

Broadcasting

Broadcasting is subject to its own set of campaign advertising rules under the "equal time" and "reasonable access" provisions of the Federal Communications Act. Those rules are limited in scope; their main objective is to ensure that candidates get air time at highly favorable rates. They should not be confused with the now-defunct Fairness Doctrine, an agency-created policy that mandated balanced coverage of public interest issues. The FCC scrapped the Fairness Doctrine in 1987 because of its chilling effect on broadcasters; President Reagan subsequently vetoed a congressional attempt to enact it by statute.

Essentially, any broadcaster that opens its facilities (whether on a paid or free basis) to one candidate must open them to all competing candidates on the same terms. If a broadcaster sells time to a candidate, it must be at its "lowest unit charge" for that time class—at the same rate given to the station's most-favored advertisers.

The equal-time requirements are not triggered by bona fide news coverage of a candidate. The definition of what constitutes a genuine news event is a source of some controversy; the concept has been gradually expanded to the point where stations may broadcast their own debates between selected candidates without incurring any equal-time obligation to excluded candidates.

Provisions like this rarely stand alone, of course, but instead give rise to an array of court threats and bureaucratic niggling over their implementation. For example, in 1976 Eugene McCarthy unsuccessfully attempted to enjoin the televised Ford-Carter debates by arguing that his exclusion violated equal time. This year the FCC pressured broadcasters to stop requiring advance payment from candidates for air time. Broadcasters began to insist on their money up front after they had trouble collecting what candidates owed after their spots had aired. To the FCC the requirement for advance payment constituted unfair discrimination against politicians.

Broadcasters are also barred from refusing campaign ads that contain objectionable content. In the 1970s a state office candidate in Georgia ran television ads that equated blacks' demands for integration with their supposed lust for white women. In the 1980s radio spots for presidential candidate Barry Commoner used one of the seven famous words that the FCC had barred comedian George Carlin from broadcasting. This year an Indiana congressional candidate ran televised slides of dead fetuses. The FCC's position is that broadcasters can only bar ads that constitute a "clear and present danger" or that violate a federal statute, as did the pornographic ads of *Hustler* publisher Larry Flint during his brief run for the White House.

As occasionally burdensome as the political broadcasting rules are, they pale before the threat of proposals to give free air time to candidates. Many of those proposals are patterned after the system in Great Britain, where the major parties each receive up to fifty minutes of free time yearly, with that amount doubled in election years. Advocates argue that free air time would drastically reduce campaign costs—a claim that demonstrates once again the ubiquitous perversity of off-budget thought processes. From the standpoint of viewer welfare, moreover, one might well argue that only those who pay for campaign spots should be entitled to inflict them on television audiences.

Unguere Porcum Incumbentem?

Extending Bierce's presidential analogy to congressmen raises the question of whether campaign finance reform has thickened the slippery coat worn by officeholders. One of the major charges cast at FECA is that of incumbent protection. Campaign reform, it is argued, handicaps challengers by making fundraising more costly (through recordkeeping requirements and limits on individual contributions) and by subsidizing "established" presidential candidates. The spending caps that were invalidated in *Buckley* were an even more outright attempt to limit campaigning.

That charge is consistent with the outcomes of recent congressional elections. In 1988, for example, 98.5 percent of House incumbents who ran were reelected; in the Senate 85 percent were reelected. In 1990 the respective percentages were 96 and 97. James Madison wrote that "where annual elections end, tyranny begins"; that same effect may not be far off if the odds of reelection become a near certainty.

But incumbents have probably always held some electoral advantage; one recent study finds the presence of such an advantage in congressional elections since 1900. The reelection rate in House races has been increasing since at least 1948, when it stood at 80 percent. In the Senate the postwar reelection rate has been far more erratic, plunging to a low of 57 percent in 1980; nonetheless, it too shows signs of a general increase. If campaign reform has increased those trends, it is not readily apparent.

But the historical advantages of incumbents make FECA's campaign restrictions all the more suspect, even if the statistical evidence of their effect is still unclear. Campaigns are a form of advertising, and advertising restrictions are a well-known means of keeping out newcomers, whose major obstacle is consumer ignorance of their existence and attributes. At the same time, campaigning, like most advertising, is an easy target. Many consumers view advertising as a repetitive, nagging activity that interrupts television programming. Thus, the ceaseless claims that campaign advertising costs too much, and therefore needs reforming, find a ready audience.

The incumbency protection charge also finds support in the *size* of the spending limits that Congress tried to impose in 1974. At least two separate attempts to quantify the incumbency advantage held by House representatives indicate that those spending caps were far below the sum needed to challenge a House incumbent successfully. Similarly, the FEC's original structure, under which the Senate and the House could each disapprove the regulations affecting their respective elections, strongly suggested that this was a case of incumbent self-fortification.

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One obvious result of the election act is the boom in research on the topic. Incumbency advantage is today analyzed in great detail, broken down into such aspects as "sophomore surge"—the increase in a freshman's winning margin upon reelection; "retirement slump"—the drop in a party's vote margin when an incumbent retires; and "slurge"—a combination of the two factors. In the words of one study, "incumbency advantage is the most frequently studied factor in the last 15 years of congressional elections research."

Getting over, under, and around Controls

Whether they consist of water or capital, streams generally find ways of getting around obstacles placed in their paths. While campaign reform

"Let's see now—your answers were: 37 'Don't know', 42 'No opinion', and one 'Industry should commit itself to long-term projects instead of concentrating capital expenditure in short-lived investments which offer a quick cash return'."

advocates like to focus attention on their goals, those are often overshadowed by the distortions and avoidance mechanisms that result from reform.

Perhaps the most surprising development has been the ascendancy of PACs at the expense of the established political parties. By directing public funds to candidates rather than to parties, FECA decreased the dependence of candidates on party support.

The "bundling" of individually small, legal contributions into large packages is one way for corporations and other barred entities to make political gifts. The appearance of corporate sponsorship on bundled money is sometimes so strong that companies themselves are mistakenly listed as the illegal sponsors of fundraising events. That happened to Chrysler and four other corporations at a Bush affair in Michigan.

Nonmonetary gifts are another way to avoid contribution caps. Contributions are defined as "gifts . . . of anything of value made for the purpose of influencing" a federal election, but the term does not encompass "voluntary services by individuals." That exclusion has magnified the political power of such people as media stars, whose drawing power exceeds by light years that of mass mailings. Their appearances and endorsements, which are not restricted by campaign law, have become an incredibly valued prize for candidates.

The pressure for unrestricted spending targets has led to "soft money," a funding category that came into being under the 1979 amendments to FECA. Local party offices can now engage in unlimited spending on supposedly nonpartisan "party-building" activities, such as voter registration drives, which in reality benefit federal candidates. Corporations, barred from federal election contributions, are allowed to contribute to that spending unless state law prohibits it.

Perhaps the most surprising development has been the ascendancy of PACs at the expense of the established political parties. By directing public funds to candidates rather than to parties, FECA decreased the dependence of candidates on party support. FECA's focus on independent spending led PACs to engage in activities that conventional campaign supporters had avoided; the head of the National Conservative PAC once boasted that "a group like ours could lie through its teeth and the candidate it helps stays clear." Grass-roots work, which was once the exclusive province of local party offices and labor unions, is now increasingly performed by single-issue ideological PACs.

The rise of PACs has attracted huge amounts of criticism, though it is far from clear that they represent a danger to democracy. What is clear is that campaign capital is far harder to control than reformers once thought; that fact alone raises the question, "Why bother?"

Egalitarianism on the Stump

Much of the drive for campaign reform comes from an egalitarian view of the First Amendment—the notion that government may properly "level the playing field" for competing viewpoints by eliminating the distortions caused by unequally distributed wealth. Some commentators view the ability of the rich to make large campaign contributions as an unfair form of "multiple representation." Harvard law professor Laurence Tribe, for example, after suggesting that both the legal system and government are responsible for these inequalities, wrote, "Whether or not one regards government as responsible for the distribution of wealth underlying this distortion, it is hard to deny that the contribution and expenditure limitations redress it and to that extent increase freedom of speech." Tribe equates *Buckley*'s rejection of the government's "interest in equalizing the voices of candidates" with the *Lochner* era's rejection of state attempts to equalize economic power.

But whether that is a "distortion" in need of correction depends entirely on one's baseline. (It also depends on one's view of wealth as something to be distributed rather than to be created, but that issue is a topic for another day.) If the baseline is equality, then the egalitarian view has some basis, though in principle there is no reason to limit redistribution to wealth; such unevenly distributed factors as intellect, fame, articulateness, charisma, and pedigree often play stronger roles than money in shaping the course of any particular public debate. Consider, for example, what Meryl Streep did to Alar. Should she, excelling in several of those qualities, also be treated as "multiply represented" and handicapped appropriately?

The baseline chosen by the Founders was not equality but freedom. It is the restriction of freedom, rather than the disturbance of equality, that the Constitution conditions in some areas and prohibits altogether in others. Spending and contribution caps may increase many aspects of speech, but, Tribe's claim notwithstanding, freedom is not one of them.

In *Buckley* the Supreme Court described FECA's goal as "equalizing the relative ability of individuals and groups to influence the outcome of elections." That is a goal that cannot be reached even on paper. If some people belong to many groups while others belong to none, then what should be equalized—their abilities as individuals or the abilities of their representative groups? Should multiple memberships be double-counted? Computation aside, should we really worry about people and groups whose lack of electoral ability stems not from some undeserved stigma, but from the sheer zaniness of their views?

In short, the egalitarian goal is as undefinable as it is unattainable. Taken seriously, it raises a host of intractable problems of definition and computation—imagine combining the quandaries of affirmative action and public funding for the arts, and you get a sense of what is in store, because the categories here involve ideology as much as ethnicity. Taken lightly, the goal becomes a ruse for whatever officeholders can get away with. As one commentator asserted, "[e]nriched public debate in some sense reeks of the lamp. It is something that an academic might think sounds like a good seminar or a good class. How do we know what an enriched public debate would be, that a government could put its stamp of approval on? How do we know when we have heard from enough different voices . . . ? It can't be that just the multiplicity of messages is all that matters. It can't be that just hearing lots of voices matters. Many will be redundant, some will have no force, some will be marginal simply because no one wants to listen to them. How are we to decide what's rich?"

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Nor does the goal of campaign reform become clearer at the representational level, when we ask just how legislators should function. Fred Wertheimer of Common Cause describes the ideal as "leaders who . . . weigh all the competing and conflicting interests that reflect our diversity and . . . decide what, in their judgment, will best advance the interest of the citizenry." The problem, according to him, is that "we are not obtaining the best judgment of our elected representatives in Congress because they are not free to give it to us. As a result of our present congressional campaign financing system . . . members of Congress are rapidly losing their ability to represent the constituencies that have elected them."

But it is by no means clear that congressmen freed of campaign finance worries are better congressmen. They must still worry about reelection (though if one accepts the incumbency-protection view of campaign reform, that worry will diminish). Is there any evidence that wealthy congressmen, who theoretically are less dependent on contributions, make better leaders than poorer ones? Furthermore, in reducing a congressman's need for monetary support we reduce, in one sense, his dependence on his constituents. From a democratic standpoint that is something we should not undertake lightly.

Factions and Free Markets

Many organizational issues can be resolved by market approaches—different people try different arrangements, and we see which works best. The issue of federal campaign reform may well be amenable to such a method. Nothing prevents candidates from competing on the basis of their individual campaign finance policies. No candidate is forced to accept any contribution or to spend any sum of campaign money. Any candidate could declare his own contribution-spending policy (such as no PAC money), based perhaps on guidelines and seals of compliance from groups such as Common Cause. Disclosure requirements would enable candidates to publicize their competitors' finance records. If campaign money is in fact a major issue, voters would respond accordingly.

In attempting to eliminate wealth from politics, campaign reform partakes of the old antipathy to wealth itself, and in that sense it is part of the oldest faction of all. The problem with campaign reform as faction is its unique capability of wiping out the competition, given its grasp on the slippery keys to the presidential and congressional kingdoms.

One suspects, however, that the campaign "purifiers," as Eugene McCarthy calls them, would not be satisfied with voter response alone—the changes they seek involve not electoral options but constitutional structure. To many of them PACS and other sources of campaign capital are the dreaded "factions" that pose a ceaseless threat to democracy.

But dirty politics are not new. James Madison well knew the potential for "unworthy candidates to practice with success the vicious arts, by which elections are too often carried." PACS and monied contributors may be factions, but so is campaign reform itself. In attempting to eliminate wealth from politics, campaign reform partakes of the old antipathy to wealth itself, and in that sense it is part of the oldest faction of all. In Madison's words, "the most common and durable source of factions has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society."

In Madison's view the best protection against faction lay not in its minimization but in its abundance, in a multiplicity of competing little evils that would prevent dominance by any single one. The key was liberty: "Liberty is to faction, what air is to fire. . . . But it could not be a less folly to abolish liberty, which is essential to political life because it nourishes faction, than it would be to wish the annihilation of air . . . because it imparts to fire its destructive agency."

The problem with campaign reform as faction is its unique capability of wiping out the competition, given its grasp on the slippery keys to the presidential and congressional kingdoms. And while the purifiers talk of changing campaign practices, their real target, it seems, is constitutional policy.

Selected Readings

Jacobson, G. C. *The Politics of Congressional Elections,* 3rd ed. Glenview, Ill.: Scott Foresman, 1992.

Magleby, D. B. and Nelson, C. J. *The Money Chase: Congressional Campaign Finance Reform.* Washington, D.C.: Brookings Institution, 1990.