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Publication Date

1994

A1458.
NO. 94-19

11/10/95

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A Critique and Commentary on S.3 and H.R. 3
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A Critique and Commentary on S.3 and H.R. 3
103rd Congress

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Introduction

Election reform is nearing passage in the Congress. The Senate and House have approved distinctly different bills.

To get Democrats and Republicans, Senate and House, Congress and President, together on this controversial subject will require an extraordinary effort. The stakes are high because the public perception of Congress is low -- partly because of certain current campaign finance methods -- and pressure for term limits surely will increase if Congress does not act. The public may not be marching in the streets for campaign finance reform, but no incumbent needs to be told that the voters are in a foul mood.

The last time the federal law was revised was in 1979, and there is need for fine-tuning if not fundamental change. The problem is that the forms of change contemplated by the Senate and House bills, while differing in major respects, are both seriously flawed. Leadership agreement leading to reconciliation in a conference committee poses a formidable task, but in their present forms, neither will accomplish what is most needed. Nor is it good public policy, as some have suggested, to acquiesce in one set of regulations for Senate campaigns and a different set for House campaigns; as it is, presidential campaigns are funded on a unique basis, and for the Senate and House to each go their own way with only a few common provisions would be disastrous. What is needed is coherence in federal election law, not dissonance.

The aims of the proponents of "serious" reform are enormously ambitious. Given budgetary and practical political considerations, quite probably not all of them can be achieved. Nor should some of them, for both constitutional and pragmatic reasons. There are a number of assumptions in the conventional wisdom on election reform, on which S. 3 and H.R. 3 are based, that need to be questioned, and will be in this White Paper. The need is for sound policy, not policies that sound good, offer bravado solutions, but will not work.

Notable strides are attainable in the mix of Senate- and House-passed bills, and other proposals that the conference committee, when it is appointed, will face. Given the commitments to reform made by the President and the Democratic leaderships of both the Senate and House, and the cooperation and good will of the Republican leaderships and members, new legislation is probable. For this reason, it is essential that the Congress get it right. The Congress should revise the bills, not rush to enact them in their present ill-considered form.

The means of funding the bills are uncertain at best because they require still another bill to implement the public financing and expenditure limit provisions. And there are *FECA-specific aspects* of the two bills, and *chamber-specific aspects* relating to the two houses of Congress, that need to be separated out, perhaps treated separately, and then reconciled into one bill acceptable to a majority of Democrats, bipartisan to attract significant Republican support, and sufficiently reform-directed to raise levels of confidence of the citizenry in the ways in which political money is raised, handled and spent in our democratic pluralistic society.

At the heart of reform should be the attempt to formulate a system that encourages citizen participation, promotes voter education on the candidates and issues, diminishes incumbency advantage, enhances competitiveness by assisting challengers as much as possible, augments

candidate communication with potential voters, and raises public confidence in the fairness of the system. Both the Senate and House bills fall short in some of these regards.

The purposes of legislation should be to regulate the problem areas widely perceived to be crucial; to seek to keep concentrations of power in check; to use government assistance where necessary, but with the least intrusion in the process; to ease fund raising and not make it harder, as the tendency is in the bills; to permit candidates and parties to spend ample money to campaign effectively and not seek to starve candidacies financially; to diminish created dependencies on PACs and certain other financial sources by providing alternatives; to provide ample funding for the Federal Election Commission to administer and enforce the new law; and to structure a system that is flexible and not rigid.

Election reform is not neutral. It works to change institutions and processes, sometimes in unforeseen ways. There is a sense of irony, that no matter how well intended election laws are, the consequences are sometimes contrary.

These concerns should not prevent attempts to improve the system. Unwanted outcomes are not a reason to retain the status quo. But they are a reason to weigh the possible consequences of change as carefully as possible. And reform is possible without challenging the courts to find sections of the law unconstitutional; it is unbecoming for the Congress to legislate in that way. It is not desirable to compromise basic constitutional rights of voters, candidates, special interests, and other participants in the political arena, in order to achieve some "ideal" system that is watertight, because it leads to rigidity in the political arena that should remain flexible, to accommodate new candidacies, new ideas, and on occasion, new parties.

Following is a critique and commentary of selected issues in S.3, a bill passed by the Senate on June 17, 1993, and H.R. 3, a bill passed by the House on November 22, 1993. [This analysis is based on a CRS Report for Congress, *Campaign Finance Reform: Comparison of Current Law with H.R. 3 and S. 3 As Passed by the House and Senate in the 103d Congress*, by Joseph E. Cantor and L. Paige Whitaker, Washington, D.C.: Congressional Research Service, The Library of Congress, December 29, 1993; and other sources.]

PACs

Political action committees are controversial but it should be remembered that President Clinton is more favorable to them than George Bush or Ross Perot were. In his May 7 proposals, Clinton did not seek to abolish PACs as either of them presumably would have tried. The Senate bill bans PAC contributions in Senate campaigns, but realistically acknowledges its probable unconstitutionality with a back-up position that simply reduces the current PAC contribution limit from \$5,000 to \$1,000, the same amount the President advocates (Sec. 102). This Senatorial grandstanding to abolish PACs is unfortunate, given the participatory aspects of their appeal, and members of the Senate surely know it.

The Senate concept of a world without PACs is illusory because their prohibition would only serve to put a premium on innovative mechanisms that will pull them back into the political arena. This necessarily means that only a few of the most sophisticated organizations will be able to compete through greater use of soft money, independent expenditures, communication costs and

gift bundling. Ultimately it will make it more difficult for certain issues and ideologies to enter into the political dialogue. The Senate fall-back position that reduces the current PAC contribution limit from \$5,000 to \$1,000 is the same amount the White House advocates.

The House bill reflects greater House incumbent dependence on PAC contributions and so retains the current \$5,000 limit on PAC contributions. Having an election law with two or three different levels of PAC contributions would represent bad public policy, because donors would have to be educated to varying amounts and differing restrictions. All federal-level campaigns -- presidential, Senate and House -- should play by the same rules. But grounds for compromise are present because the \$1,000 level is too low. If the House backs down to \$3,000, the Senate retreats from its unconstitutional ban and ups its \$1,000 fall-back position to the same \$3,000, then a more realistic level can be achieved. If there were congressional agreement, surely the President would agree to this level for presidential campaigns. The alternative to compromise on this issue is differing amounts of contributions and the certainty of litigation on the Senate ban.

An interesting point: the members of the Congressional Black Caucus insist on retaining the \$5,000 PAC contribution limit because so many of their districts comprise low income populations that their members' dependence on PAC contributions is greater than that for most other incumbents. Such a dependence should be recognized when formulating a PAC contribution limit rather than seeking a blanket but arbitrary \$1,000 that many reformers demand. What is a loophole to some is a means to electoral success for others. Should those already elected be sacrificed for the sake of the principle of strict reform?

Political action committees have assumed roles in election campaigns once occupied by political party precincts. Geographic neighborhoods have been replaced as centers of activity and sources of values by occupational and issue groups with which individuals identify. The rise of PACs has occurred largely because the groups that sponsor them can provide the possibilities for meaningful political action once provided by the now ideologically ambiguous political parties. The collecting of many small contributions has been institutionalized by PACs, making donations possible through payroll withholding and union checkoffs; we need more such ways to make it easy for people to give.

Aggregate PAC Limits

Related to the issue of PAC contribution limits is that of aggregate limits on PAC contributions a candidate can accept. In the Senate bill, if the ban on PAC contributions is declared unconstitutional, then aggregate PAC receipts that could be accepted would be up to 20 percent of the candidate's spending limit, or a maximum of \$825,000 for California candidates and less for all others, indexed for inflation (Sec. 102). The House version sets an aggregate limit at one-third of the fund-raising limit, or \$200,000, plus an extra \$100,000 if there is a runoff, and an additional \$66,600 if the candidate in the general election wins the primary with 20 percent or less of the vote (Sec. 201); all these limits are indexed for inflation.

A reduction of PAC funding would benefit incumbents, who begin re-election campaigns with the ability to command greater media attention than most challengers, and allowances for salary, staff, travel, office, and communications whose worth over a two-year term has been estimated at more than \$1 million. Respected research has concluded that increases in campaign funds generally

help challengers more than incumbents and thus lead to more electoral competition. The incremental value of each additional dollar raised and spent by a challenger, in terms of name recognition and possible votes, is much greater than that for an incumbent. To limit aggregate PAC giving would make it more difficult for challengers to mount effective campaigns and would increase the power of incumbency.

Aggregate limits probably would not reduce PACs' influence on the political process; they would merely cause PAC's sponsoring organizations to intensify their efforts to make the voices of their members and sponsors heard through direct and indirect lobbying. Such a legislative change would result in greater diffusion of accountability in the electoral process and would encourage coordination of giving among like-minded PACs.

If reduced, PAC contributions, and aggregate contributions by PACs to candidates, would lead to an increase in independent spending; then there would be a corresponding loss of control of spending by candidates' campaigns and of accountability to the electorate for political uses of money.

The impact of aggregate limitations would be greater on some groups than on others, causing more disparity and imbalance than now exist between business and labor PACs, and between conservative and liberal PACs. For example, the proposal to reduce the amount individual PACs may contribute to candidates would restrict a number of large union and membership/health PACs, which give the maximum amount to a relatively large number of candidates, but would have little effect on most corporate PACs, since few of them approach the current \$5,000 limit. The proposal to restrict the aggregate amount candidates may accept from PACs, on the other hand, would make it more difficult for candidates who have already accepted the total permitted to campaign effectively in the final days of a highly competitive contest.

Introducing aggregate limits raises constitutional questions of a different order than those raised by either contribution or expenditure limits, on which topics the Supreme Court has spoken. The proposed limits are, in effect, aggregate receipt limits, and candidates would need to pick and choose among proffered contributions to stay under the ceiling. Those who could not contribute because the candidate's limit had been reached could argue that their legal right to give was denied, presuming the candidate would have been willing to accept the money had there not been an imposed limit. Also, aggregate PAC limits would enable incumbents to pick and choose which of the least offensive PACs would be allowed to contribute to their campaigns. In such a climate, House incumbents might diminish their exposure to criticism by demanding that only maximum contributions be given, and could max out with only 20 PAC gifts.

There are better ways to offset the development of PACs without unduly restricting their growth or limiting their contributions.

I believe that the limit on an individual's contributions should be increased to \$2,500 or \$3,000. These actions would make needed funding available to underfinanced campaigns and at the same time would respect the values of diversity and participation in our political system. Further, these actions would increase the individual contribution component of total political receipts and correspondingly decrease the PAC component. Neither individual nor PAC contribution limits have been indexed to account for inflation. When the Consumer Price Index is used as a measure, the purchasing power of a \$1,000 contribution in 1994 was worth about one-

third of the buying power of a \$1,000 contribution in 1975 when the limit went into effect; in other words, when adjusted to reflect increases in the CPI, it costs \$2,751 in 1994 dollars to buy what \$1,000 would purchase in 1975. Yet the costs of most items needed in campaigns have skyrocketed at an even higher rate. These circumstances validate the complaint that incumbents and challengers alike need to spend great amounts of time raising money -- naturally so when relevant law has not been changed in twenty years!

While it is true that PACs give mainly to incumbents, by a factor of 4-to-1, it also is a fact that some challengers are non-starters without PAC assistance from supportive groups. There is a tradeoff here, where that 20 percent of PAC dollars that go to challengers or open seat candidates, PAC contributions are more helpful to selected challengers than the figures would suggest. We may be focusing on a couple dozen contests where PAC money can be determinative, but it is worth keeping the political process open to even these few rather than to cut off their necessary PAC support. Black caucus members make that argument for maintaining the \$5,000 PAC contribution limit, and it applies as well to arguments against aggregate limits.

In conclusion, one study found that 212 members of the 103rd Congress raised more than \$200,000 from PACs, and that excess is important in a number of challenger's campaigns. Why does not the House bill use such empirical evidence instead of picking an arbitrary amount?

Leadership PACs

Leadership PACs are special funds that some congressional leaders set up apart from their own principal campaign committees. While the funds are sometimes used for travel or other purposes not appropriate to spending by the campaign committee, and sometimes for internal leadership contests within the House or Senate, they open the door to multiple contributions from special interest PACs and large contributors who find this a legitimate way to make additional contributions, possibly currying special favor.

The Senate bill prohibits federal candidates or officeholders from establishing or maintaining such committees after 12 months following the effective date of the Act (Sec. 701). The House bill is silent regarding leadership PACs and so endorses them by default. The House had a change of mind from a 1992 bill that banned them, and was vetoed by President Bush, to the 1993 bill which members know President Clinton will sign. Leadership PACs only add to the amounts of resources available, and they are a form of double-dipping that properly should be banned.

Bundling

Banning the "bundling" of contributions, wherein an organization solicits campaign contributions from individuals and passes them on to the candidate in bulk without reference to the bundler's contribution limit, raises questions regarding the constitutional right of like-minded individuals to associate and seek to influence the outcome of elections. But to ban bundling entirely also raises a serious question of judgment. Given the women's networking that helped to produce dramatic increases in women's representation in the Senate and House in 1992, one must wonder at values that put a seemingly water-tight system of regulation of money above the value of achieving more women or minorities in the Congress. To this observer, the attaining of a broader

representation far outweighs the formulating of a strict law on bundling. Surely some exceptions are warranted.

In cases such as this, the Congress should do more balancing of issues -- just as the courts balance rights -- when confronting one value, such as avoiding exemptions, vis-a-vis another value that would bring about more diverse representation. What neither the Senate bill nor the House bill do on a broad scale is admit that some groups, such as many Afro-American Members of Congress, face demographic and societal problems that, in lieu of substantial amounts of public funding, can only be overcome with permitted fund raising at current levels.

The Senate bill prohibits lobbyists, PACs, corporations, labor unions, trade associations, and their agents and employees, from bundling contributions (Sec. 401). The House bill permits bundling by PACs without a connected organization or sponsor, which are mainly ideological and issue PACs (Sec. 501). The House formulation is much more realistic and is preferred because it would allow organizations such as Emily's List to operate somewhat as in the past. But even the House formulation presents problems. By eliminating bundling except in cases where a candidate designates as a fund-raising agent a person who is not associated with a lobbying organization, clearly the candidate cannot select people who are associated with corporations, trade associations or labor unions as their fund-raising agents. However, they can select as a fund-raising agent someone from Emily's List, for example, because the organization claims not to engage in lobbying. But the mere act of designation of a fund-raising agent requires consultation. Thus, by definition, such an organization loses its ability to engage in independent expenditures for that candidate. Accordingly, all expenditures by Emily's List to facilitate bundling -- including mailings to members urging them to contribute -- would be an in-kind contribution subject to the \$5,000 per election contribution limit, and would be reportable by both Emily's List and the candidate.

Emily's List was the most successful bundler in 1992, raising about \$6.2 million for Democratic women candidates who are pro-choice; the organization properly argues that bundling should not apply to groups such as this that do not engage in direct lobbying. Emily's List is to be commended for attracting widespread participation -- scores of thousands of relatively small contributors -- and the law should provide an opening for other issue and ideological groups to emulate Emily's List in the future. It is ironic that an organization that has successfully broadened its financial base should be punished. President Clinton has said it aptly in another context: "Beware letting the perfect stand in the way of the good."

Public Financing and Expenditure Limitations

The Congressional Budget Office estimated that total election cycle costs for public funding of both Senate and House campaigns would be \$181 million every two years. No federal income tax checkoff is being proposed, since the presidential check-off was increased from \$1 to \$3 in the Omnibus Budget Reconciliation Act of 1993. It is important to keep in mind that congressional public funding would accelerate the need for money from every four years (in presidential campaigns only) to every two years (in 33 or 34 Senate and 435 House contests), not counting special elections.

In the President's May 7 proposals, the means of funding for public financing was to come from repeal of the deductibility of business lobbying expenses. The income from the repeal --

estimated to be about \$1 billion over a five-year period -- was directed instead to offset a portion of the 1993 budget reconciliation, and may be considered to cover the presidential income tax checkoff increase contained in that measure. It is worth noting that a suit has been undertaken to reverse the repeal. In any case, that source of funding is not available for either S.3 (Sec. 101-510," 711) or H.R. 3.

The effort to provide public funding requires budget neutrality according to the Gramm-Rudman-Hollings mandate on appropriations by Congress. Provisions of both the Senate (Sec. 802) and House (Sec. 1105) bills state that none of the relevant portions of the law will become effective until the enactment of subsequent legislation providing for revenues, which would supply the money for public funding or vouchers, and hence enable the imposing of voluntary expenditure limits. In the House, efforts to provide the funding were made by sponsors seeking to enact a tax add-on of up to \$10 by permitting taxpayers to add that much voluntarily to their tax bill or as a subtraction from a tax refund.

In eight states where the tax add-on is provided, the monies raised are minimal; in 1990, the average participation rate was 0.8 percent of taxpayers who voluntarily added to their tax liability through this means. Thus the add-on would not likely provide very much money.

The plan also would have imposed registration or user fees on PACs. If these measures did not provide sufficient funds, the suggestion was to impose a 5 percent tax on candidate receipts. When these ideas were floated to members of the House Ways and Means Committee, the reception was unenthusiastic, particularly on the part of Chairman Dan Rostenkowski. While lack of funding may have resulted in a few more votes, it raised two scenarios: (1) passage of a hollow bill that promises a lot but cannot be implemented, or (2) a major effort to find funding in ways acceptable to members of that key House committee.

Imposing a tax on campaign contributions as a means of paying for public financing raises serious questions. In the Senate bill, a tax would be applied to candidates' campaigns only when the candidate did not agree to comply with the spending limits (Sec. 101-510"). The proposed 35 percent tax would be confiscatory of more than one-third of monies raised, and is a punitive provision that makes a mockery of so-called voluntary spending limits. The House suggestions, a tax on PACs only, or a later proposal to tax all candidates' receipts, for the purpose of providing public funding to candidates' agreeing to spending limits, also raises constitutional questions, because campaign committees would be taxed to supply money to candidates they do not support or with whom they disagree.

Committee taxation would compel an individual to make a contribution for political purposes not intended -- just as much an infringement on constitutional rights as prohibiting the exercise of free speech rights. First Amendment rights are infringed by forcing individuals to choose between making a political contribution and as a by-product helping to finance candidates they oppose, or not contributing at all. In this circumstance, contributors would be penalized for exercising their rights of free speech and of association. The size of the assessment does not affect its constitutionality. Even a five percent tax for public funding would be a compelled form of political speech. The Florida Supreme Court, in 1992, held that a state tax on campaign receipts -- only 1.5 percent -- was unconstitutional because singling out political parties and associations (PACs) to supply money for public funding is unduly burdensome and bears no relationship to the interest

advanced, namely, to fund candidates' campaigns. (*State of Florida v. Republican Party of Florida*, Supreme Court of Florida, 598 So. 2d 78 (Florida, 1992).

In the Senate bill, public financing is available only when an opponent who does not agree to abide by the spending limit exceeds the relevant spending limit (Sec. 101-"501", "503"). Hence the Senate bill does not provide for universal application to candidates who might be eligible and accordingly does not provide much help to challengers, as the purpose of the legislation should.

In the House bill, the coverage is broader, applying to all candidates who become eligible. Accordingly, the purpose of assisting challengers is better achieved in the House bill than in the Senate bill (Sec. 122/121-"604").

In its limited application, the Senate bill provides "voluntary limits" for a full six-year cycle, based on state population, ranging from \$1.2 million to \$5.5 million for the general election (Sec. 101-"501", "502"), with 67 percent of that limit for a primary, maximum of \$2.75 million, and 20 percent for a runoff election. The primary amount is part of the overall limit. Candidates who agree to these limits, and are eligible due to their opponent's actions, receive no public funds but would be given (1) lower postal rates up to two mass mailings at lowest third-class, non-profit rate (Sec. 132), and (2) broadcasters would be required to sell time to such candidates at 50 percent of lowest unit rate in the last 60 days of the general election period (Sec. 131). Thus the Senate would impose spending limits but would not provide public funds, only lay off to the Postal Service the costs of lower postal rates, and to the broadcasters the costs of the broadcast rate discount. Actual money benefits would go only if a non-complying opponent exceeded the limit, with varying amounts depending on the excess spending by the opponent (Sec. 101-"503"). The Senate version is hardly worthy of the term "public funding".

The range of the spending limits may seem wide until one realizes that the \$5.5 million applies only to California, not even that much for highly-populated states such as New York, Texas and Florida. Surprisingly, the low range of \$1.2 million applies to 22 states, not only states such as Delaware and Rhode Island, but including, for example, Iowa, Mississippi and Oregon, which are entitled to as many as five House seats. So if one favors drastically reducing campaign costs, this bill will do it, but again, why starve candidates? In 1992, winning Senate candidates spent \$8 to \$10 million in California campaigns. Enacting such low limits only favors incumbents who are already better known.

The House bill provides "voluntary limits" of \$600,000 for a full two-year cycle or a special election, permitting an extra \$200,000 in cases where the candidate won in the primary by 20 percent or less, and an extra \$200,00 in case of a runoff (Sec. 121-"601"). All of these limits are indexed for inflation, based on 1992 cost-of-living, and will be higher still if the legislation goes into effect for the 1995-1996 election cycle. The more generous the limits the better. Candidates' campaigns should not be starved, and in fact, elections are improved by well-financed candidates able to wage competitive campaigns, not by stifling political dialogue. Candidates who agree to these limits, and are eligible, receive voter communication vouchers on a matching basis up to the first \$200 maximum, for a maximum of \$100,000, to be used for television, radio and print ads, voter contact materials, and postage (Sec. 121-"604"). Unlike the Senate bill, the House coverage would have wide application to candidates who are eligible, regardless of their opponent's actions.

The spending limits are arbitrary. For example, one study of 1992 House elections found that of members serving in the 103rd Congress, 147 spent more than \$600,000, and 61 spent more than \$1 million. If spending limits must be enacted, why not use empirical evidence that points to the demonstrated need for a higher limit?

Yet, of the two bills, the House bill is far superior in its spending limits, which are more generous and contain more exceptions. All limits are indexed on a 1992 cost-of-living base that will raise them by about 10 percent if they go into effect for the 1995-1996 election cycle; if a candidate is in a runoff election, add \$200,000; if a candidate wins a primary by 20 percent or less, add \$200,000 to the general election limit; for fund raising costs and FEC compliance costs, add another 10 percent, so the \$600,000 limit may rise to more than \$1 million if the add-ins apply (Sec. 121-"601"). But importantly, the House bill provides up to one-third of the limit in matching funds if the candidate is eligible – and assuming the means of public funding has been enacted (Sec. 121-"604"). In addition, there are exemptions from the limits, which include:

- legal and post-election audit costs (Sec. 121-"601");
- fund-raising, accounting and legal compliance costs (House only);
- income or payroll taxes;
- waiver to extent of independent expenditures made against a participating candidate or for opponents in the general election, once \$10,000 in such aggregated independent expenditures are made (Sec. 121-"604").

But it is unfortunate there is such a strong commitment to enacting spending limits. The major problem with them -- apart from their inducement to seek other, less disclosed channels -- is that they reinforce the advantages of incumbency and hence fail to achieve what should be one of the goals of reform, to help challengers. Ensuring that all serious contenders have a reasonable minimum to spend is more important than limiting how much candidates can spend. The bigger problem is how to provide money to candidates, not how to unduly restrict it.

If voluntary spending limits are to go forward, at the least, there should be separate, generous ones for the primary and similarly for the general election. To fail to provide separately for primary elections in an age of anti-incumbency and a rising number of primary challenges, is not very realistic. But then it is incumbents who write such legislation, and understand not to give generous space to possible challengers.

At the most, if voluntary spending limits are to be included in the legislation, why not try flexible spending limits as recommended by the Mitchell-Dole Senate Campaign Reform Panel of 1990, of which the author served as a member? Flexible spending limits entail three conditions: (1) reasonably high limits to permit adequate competitive opportunities; (2) a significantly expanded role for parties to finance without limitation, or under generous allowances, defined organizational activities on behalf of candidates; and (3) an exemption from spending limits for limited contributions, say up to \$250 or \$500, from individuals from the candidate's state. These conditions make real sense because they enhance the role of political parties while expanding spending limits in ways that should not be objectionable. Why not permit unlimited individual contributions from within the candidate's state?

Recognizing that the conference committee will not go back to the drafting boards in a major way, nevertheless it is hard to refrain from bringing to the election reform debate some principles derived from academic studies and pragmatic analysis.

Analyzing campaign expenditure data, political scientist Gary C. Jacobson has shown that spending does not have the same consequences for incumbents and challengers. Rather, spending by challengers has more impact on election outcomes than spending by incumbents. The incumbent, provided with the resources of office, already enjoys an advantage in name recognition. The challenger, meanwhile, not so well known to most voters, has everything to gain from an extensive and expensive effort to acquire more voter awareness.

Translated into financial terms, this means that because senators and representatives are generally better known, they usually need less money but generally are able to raise more. The challengers, while they may need more money, have difficulty getting it. But when they do, either through providing it to their own campaign out of their own pockets, or by attracting it, they become better known and are more likely to win. In short, those votes that change as a result of increased campaign spending generally benefit challengers.

Thus the conclusion is that public financing or vouchers that would increase spending for both incumbent and challenger would work to the greater benefit of the challenger, thereby making elections more competitive. In the reverse, attempting to equalize the financial positions of candidates by limiting campaign spending would benefit incumbents, thus lessening electoral competition.

This analysis supports the principle of "floors without ceilings," that is, an effort to give financial assistance that will permit candidates to have access to the electorate but without exacting the accompanying price of spending limits. This system benefits challengers by providing public funds, but its downside is that incumbents are able to raise more private money and one might ask why tax dollars should be added to unlimited private dollars. The answer is that may be the price exacted in order to help level the playing field for challengers, by giving them access to more money. No system will be perfect, but this one would play out better than most.

One crucial issue is the voluntary aspect of the proposed spending limits. In 1976 in *Buckley v. Valeo*, the Supreme Court ruled that campaign spending is a form of free speech protected by the First Amendment. The Court stated that candidates may voluntarily choose to comply with statutory spending ceilings but cannot be compelled to accept mandatory spending restrictions. If sanctions are imposed on candidates who choose not to abide by spending limits, the provision takes on a coercive nature and the "voluntary" precept is lost. To meet the constitutional requirements, a candidate must be permitted free choice to accept or reject the merits of a spending limits program and should not be punished for choosing not to comply. In a recent Minnesota case, a federal appeals court has suggested that punitive measures cannot be used to achieve compliance with spending limits in congressional races. (*Weber v. Heaney*, 995F. 2d 872). A voluntary spending limits program is currently available in presidential contests, and eligible candidates who comply with spending limits receive public funding in exchange.

The Senate bill particularly has other disincentives to non-compliance with the limits; for an example of a punitive requirement, advertising of non-participants must state that he or she is not abiding by the spending limits (Sec. 104). This is not providing the option of accepting spending

limits on the merits, but is designed to make campaign life difficult for those who do not subscribe. Such a system cannot be considered fair by any measure.

In the five presidential campaigns where we have had experience, clearly the spending limits fail to control costs; adding in presidential PACs, soft money, independent expenditures and communication costs, spending runs roughly twice as much as the limits envision. This encourages spending in areas where disclosure is not easily linked to the candidate, and leads to both less public knowledge of related spending, as well as to legal gamesmanship testing the parameters of the law.

The presidential experience with spending limits is that there are two or three simultaneous campaigns -- one controlled by the candidate, one coordinated with the candidate, and one entirely outside the candidate's control. The conclusion follows that, if limitations are not effective, they are illusory and breed disrespect for the law; if they are effective, then they tend to inhibit free expression. A false impression of limits serves no purpose; it creates compliance problems and unnecessary bookkeeping costs for the candidates, in that they must keep track of both limited expenditures and exempt costs. In short, because spending limits provide rich opportunities for avoidance and evasion, they are unable to reach levels of effectiveness which is necessary to establish respect for the law.

A final consideration in extending public financing to congressional campaigns is the concomitant need to greatly increase funding for the Federal Election Commission to administer the system -- at a time when the FEC appropriations are lagging.

Lobbying

Another problematic provision in the Senate bill prohibits lobbyists or political committees under their control from contributing to or raising money for a candidate for one year after a lobbying contact with the incumbent or staff, or if a presidential candidate, an executive branch official; and prohibits contributors from lobbying a federal officeholder or staff or executive branch official, to whom they contributed, for one year after the contribution (Sec. 401). This provision was included in President Clinton's proposals.

The Constitution grants everyone the right to petition the government for redress of grievances. By forcing a person -- even a professional lobbyist -- to give up the right to contact the government because campaign contributions were made, or may be made, seems to challenge the "equal protection of the laws" section of the Fourteenth Amendment to the Constitution.

In short, under the U.S. Constitution and the constraints imposed by the Federal Election Campaign Act, citizens have a First Amendment right to engage in lobbying activity and they are legally empowered to contribute up to the limits. Curiously, what the Senate is saying is that a person who engages in these two legal activities simultaneously is breaking the law. Here again there is grandstanding, picking on lobbying that is not fashionable these days, despite constitutional protections.

A similar ban on lobbyist contributions in California was found to be unconstitutional in 1978. The California Supreme Court found that the prohibition applied to any and all lobbyists,

without discriminating among small and large, and that the burden is to demonstrate the aspects of political association where potential corruption might be identified in a way the state can show a sufficiently broad interest in restricting lobbyists' freedom of association. (*Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33; 157 Cal. Rptr. 855, 599 p. 2d 46). I doubt the 12-month or 24-month window would make a difference.

Fortunately there is no similar provision in the House bill.

Individual Contribution Limits and Soft Money

Both bills retain the individual contribution limit at \$1,000 per candidate per election, but raise the amounts an individual may contribute to candidates, political parties, and political committees, to \$60,000 per election cycle, up from \$50,000 in current law (House, Sec. 402; Senate Sec. 312). Under the bills, individuals could make annual contributions of up to \$25,000 to candidates, \$20,000 to national parties, and \$20,000 to state party "Grass Roots" accounts. In the House bill, PACs could contribute up to \$25,000 to national party committees, representing an increase, and \$15,000 to state party grassroots funds (Sec. 407). All of this is hard money, and the purpose is to convert certain current soft money to hard money by introducing State Party Grassroots Funds (SPGRF). These state funds could use the money to operate generic campaign activities, get-out-the-vote activities on behalf of the party's presidential candidate, voter registration and development and maintenance of voter files during federal election years. The amounts raised and spent by the SPGRF would have to comply with the contribution limitations and prohibitions of FECA.

The \$60,000 limit over an election cycle enables individuals to give up to \$20,000 to national party committees each year, in addition to the SPGRF, and that may help sustain the parties for some of their loss of soft money that in the past could relate to federal candidacies in specified ways.

Federal candidates and officeholders would be prohibited from soliciting contributions not subject to the limitations and prohibitions of the FECA, in other words, so-called soft money (House, Sec. 405; Senate, Sec. 314). Whether this applies to a President, for example, speaking at a party event where the price of admission may have been soft money, is not clear.

The soft money provisions of the Senate and House bills are identical with one exception: the Senate, remembering the Keating Case, also prohibits federal candidates or officeholders from raising any money for a tax-exempt group which devotes significant activities to voter registration and get-out-the-vote drives (Sec. 314). The other provisions would prohibit national parties from soliciting or receiving any contributions not subject to the limitations, prohibitions and reporting requirements of FECA, except for funds transferred to state parties and used solely for certain defined activities which do not affect federal candidates and funds raised to pay for the cost of a building or to operate a television or radio facility. The bills prohibit state parties from soliciting or receiving contributions not subject to the limitations, prohibitions and reporting requirements of FECA for any activity that identifies or promotes a federal candidate regardless of whether a state or local candidate is also identified (including GOTV during a presidential election year, voter registration, and any generic activity), except non-FECA contributions may be expended for certain defined state activities (House, Sec. 401, 403; Senate, Sec. 311, 313).

New restrictions on PACs in the proposed campaign reform legislation, if enacted, will enable the parties to play larger roles in providing candidate support, and the anticipated federal legislation can do much to enhance the role of the parties in the political and electoral arenas. After all, political parties stand as only one source among several seeking campaign resources, competing for dollars against candidates, PACs, and political committees, some attracting strong donor loyalties. PACs can survive on single issues with small but devoted constituencies, whereas parties, with a more diffused and generalized message, must be more widely based. Parties often do not have as much appeal to contributors, even small donors, who may prefer to give directly to candidates.

With soft money under attack as a means of financing party renewal, new ways of raising money to sustain grassroots activity need to be found. Clearly the proposed legislation should focus on enabling the parties to raise the necessary money, and at the least should not pose new obstacles in the way of efforts to broaden the parties' financial constituencies. To make the parties more competitive, limits on contributions to the parties should be raised, as should the limits on party assistance to candidates. Many candidates would prefer to receive more money from the parties, and the parties, in turn, should not be as limited as they are by law in assisting candidates on their tickets.

The chorus of criticism of soft money has masked its value to the electoral system, to the extent the money is spent to help spur citizen participation and help to revitalize state and local party committees. The problem is the public perception that soft money comes in large contributions from special interests. Again, soft money is a created dependency, because contribution limits to party committees were too low, and other means were not devised to enable the parties to raise needed funds. The provisions in the bills seek to control soft monies and at the same time spell out their uses and exceptions. The bills complement the disclosure requirements established by the Federal Election Commission, restricting the freer-spending aspect of soft money that has caused so much controversy in the past. Fortunately the bills recognize the value of party strengthening and do not seek to completely separate parties from functions that may be helpful to candidates running on the party tickets.

Goals should be to encourage the parties to achieve greater voter outreach, party renewal, and higher levels of citizen participation in ways that can help reorient people from single-issue and litmus-test politics to a politics of broader consensus as represented by the parties. The financial underpinnings of such an effort are crucial and hopefully the new legislation will incorporate concepts leading to a broader based politics.

A new recognition is essential: that modern parties are a world apart from the days of Tammany Hall, when parties lived on patronage in smoke-filled rooms. The opportunity now is ripe to strengthen the parties by basing them on democratic principles, open and welcoming to all, well financed, interested in issues, and seeking to accommodate conflicting interests.

Carry Over and Surplus Funds

The author admits to a change of mind regarding carry-over funds. I used to condone them on grounds that incumbents would only spend more time in the new election cycle raising large

amounts, and still have an advantage over their challengers. However, now I realize the advantage carry-over funds give to incumbents can be immense, enabling the accretion of large funds that discourage would-be challengers. The amounts carried over can be very intimidating to the entry of a challenging candidate of the same party in the primary, or an opposing candidate in a general election.

The House version permits a surplus from one election cycle to be transferred to the next election cycle without counting against the next cycle's aggregate contribution limits (Sec. 201). The surplus may not be used to qualify for voter communication vouchers but may be used for all other lawful purposes.

If a candidate carries over funds, but agrees to spending limits, then, of course, his or her carry-over may reduce the need to raise funds, but spending is still controlled by the spending limits.

The Senate bill permits up to 20 percent of primary and general election limits which may be transferred for use in the next election cycle (Sec. 105).

One related Senate bill provision prohibits the acceptance of out-of-state donations more than two years before the general election (Sec. 406). This serves the purpose of cutting down but not eliminating out-of-state donations, the practice of Senate members to raise money in the early years of a six-year term, and building large war chests that may intimidate possible challengers..

Another Senate bill provision, not in the House bill, prohibits post-election contributions from being used to repay loans from the candidate or his or her family (Sec. 301).

In the 1992 bill that passed the Congress and was vetoed by President Bush, a limit of \$600,000 in carry-over funds was provided. In 1993, the House dropped the provision. It is unfortunate that neither the Senate nor House have adopted the principle of reducing or zeroing out surplus or carry-over funds, thus continuing another form of incumbent-protection.

Executive Personnel

I call attention to a curious provision in the Senate bill concerning executive personnel of common employees. This seems to mean that even individual executive contributions made for personal reasons may be subject to the corporate PAC limit. At the least, this provision is vague and open to varying interpretations; at the worst, it is bad public policy and probably unconstitutional to subsume employee's personal contributions within the employer's limit -- seemingly a violation of the "equal protection of the laws" section of the Fourteenth Amendment (Sec. 102).

Independent Expenditures

One provision of both bills would provide federal funds to counter independent expenditures (House, Sec. 121; Senate, Sec. 101), possibly encroaching on or usurping an individual's constitutional right to carry on such a campaign and the right of free speech. This illustrates a

broad strategy of attack on Supreme Court decisions, leading to efforts to overcome constitutional principles as enunciated by the Court, by instituting forms of coercion by penalizing, for example, those who do not agree to abide by spending limits, or compensating victims of independent expenditures.

State Initiatives

Another curious provision requires federal registration and reporting by groups involved in campaigns in state initiatives and referenda which involve federal issues (House, Sec. 404; Senate, Sec. 315). This is designed particularly to provide information not otherwise available at the federal level about term limit initiatives, but other election-related initiatives that may affect federal office as well. What is not capable of being turned into a federal issue these days?

Conclusion

Because the Senate passed its bill in June 1993, before the House action in November, the bills are considered to be Senate-originated and funding cannot be attached -- money bills must originate in the House. Accordingly, if a funding mechanism is found, it must originate in the House, where the Ways and Means Committee may well prove to be an immovable obstacle.

Since both political parties have to live with new legislation, it is better to have a bipartisan approach: a compromised bill that contains elements favorable to each and that both can support, rather than a new law imposed by the majority party. This course may even avoid a Senate filibuster. The following scenario offers the outlines of a possible compromise:

- **Spending Limits.** Putting aside the many philosophical and constitutional issues enmeshed in spending limits, as noted above, there is a salient political point to the current debate. If the Democrats continue to insist that reform legislation must contain spending limits, they will not get much Republican support. For most Republicans, opposition to spending ceilings is an essential element of their campaign reform agenda.
- **Public Financing.** In return for Democrat's giving up on spending limits, the Republicans could give one to the Democrats. GOP leaders had been adamant in their dislike of voluntary spending ceilings with public funding as the carrot for compliance.

But that is different from the idea of public funding per se. Partial public funding of congressional campaigns -- a "floor" without a spending "ceiling" -- would give candidates money for at least minimal access to the electorate and provide alternative funds so that candidates could reject less desirable types of private donations. A number of Republicans will remain unalterably opposed to the idea of public funding on fiscal and philosophical grounds. But a few Republicans have begun to recognize that public funding might even work to their interest. Their party, as the congressional minority, has more non-incumbent candidates who are less well-known, finds it difficult to raise enough private money to adequately support many challengers, and hence could use the public funds.

Rank-and-file Democratic legislators are by no means united on the idea of public financing, either. But Democratic leaders have been pushing public funding for the past two decades as a way to diminish the influence of "special interest" contributions. A "floors without ceilings" approach could finally bring public money into congressional campaigns without the stifling effects of spending limits. Strictly from a self-interested standpoint, the Democrats also would be winners here. With restrictions on political action committees certain to be in any campaign reform bill, the Democrats -- who have garnered the larger chunk of PAC money in recent years -- will need some alternative sources of funding. They are more PAC reliant than are Republicans, particularly in the House. Hence to get Republican support for public funding, Democrats would give up spending limits.

- **Party Renewal.** It is good policy to revive the role of political parties in congressional elections and allow them to funnel more money to individual candidates. Party contributions to candidates are drawn from a variety of sources, and represent a broader number of interests than the money now being furnished by PACs. And while the Republicans would initially get the advantage from this type of change, the Democrats might find that greater availability of the party's purse strings would help reduce their reliance on PAC contributions.

In the present atmosphere in which the center of gravity has been the two bills to the exclusion of all else, it is noteworthy that both play to public perceptions formed by the "serious" reformers and their uncritical echo-chamber, the media. It would take enormous leadership to turn these bills toward serious consideration of other ideas. This is the challenge for transforming leadership to point to new visions of reality.

For editorial writers to espouse "freedom of the press" while seeking to limit political spending -- the voicing of political ideas -- is ironic. Both electronic and print media would prefer to frame the campaigns to the electorate in their own words rather than allow candidates to speak for themselves, even if through the unpopular spot announcements that candidates find effective.

Still another alternative is possible: If a funding bill cannot be passed to implement any bill resulting from the conference committee and subsequent action, then those positions of the bills not requiring funding, or a new bill, could be presented stripped of all budgetary considerations. I refer to the *FECA-specific provisions* that can be so packaged. Reform groups will charge that such a bill would bring only incremental change and would not be "serious" reform. But meaningful reform is possible regarding items such as:

- a single PAC contribution limit and certain other PAC-related provisions (but not aggregate PAC limits);
- an exception to a complete bundling ban;
- the closing down of leadership PACs;
- a revised soft money policy that works to supply money to strengthen the political parties as a counterweight to PACs;
- a tightening of independent expenditures;
- reducing broadcast costs;
- closing a millionaire's advantage by waiving limits on contributions to opponents of wealthy candidates spending large amounts of their own money.

This would be a package bringing significant change and would be well worth pursuing. There are minimalist and maximalist positions regarding election reform, and perhaps discussion based on the lowest common denominator of agreement could lead to widening circles of issue acceptance. The maximalist positions represented by S.3 and H.R. 3 do so much to reinforce incumbency advantage that runs counter to the prevalent anti-incumbency feeling in the country, that dialogue in the context of some of the criticisms and ideas offered here would be a great movement forward in understanding reform and reality regarding issues and abuses of money in politics.

NOTE: Neither bill deals with the Federal Election Commission; the Senate bill contains a few provisions relating to the presidential campaigns, but the House bill does not. In an effort not to add to the controversy already evident in S.3 and H.R. 3, a separate bill on the FEC and related topics will be offered in the House by Representatives Al Swift and Bob Livingston. The FEC would need greatly increased budgets to administer and enforce congressional public funding and accompanying spending limits.

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