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Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?

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NOTE

Campaign Finance Reform: Pollution Control for the Smoke-Filled Rooms?

With the passage of the Federal Election Campaign Act on April 7, 1972, came the first reform of campaign finance laws in 45 years. The author examines the changes in campaign techniques that have arisen during those years and analyzes the consequent inadequacies that have developed with the older legislation. He evaluates past reform proposals and follows the slow road to congressional reform of the campaign finance laws. Finally, he discusses and analyzes the recently passed Tax Checkoff legislation and Federal Election Campaign Act with a view towards determining whether they will provide the means to effectively regulate the modern political campaign. The author concludes that, although inadequate in some areas, the new legislation is a promising step forward in regulating campaign finance.

I. THE DILEMMA OF MONEY AND POLITICS

A. *Rising Cost of Elections*

IN 1972, it is estimated that candidates for all political offices in the United States will spend $400 million in their campaigns,[1] which represents a 33 percent increase over the 1968 election year when candidates spent an estimated $300 million, and almost a 200 percent increase over the 1952 figure of an estimated $140 million.[2] A candidate for the Senate from a major state will face an average of $1.5 million in financing a primary and general election campaign,[3]

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[1] 117 CONG. REC. 1972 (1971) [remarks of Rep. Lee Hamilton (D., Ind.) introducing H.R. 550, 92d Cong., 1st Sess., a bill on campaign finance].

[2] Estimated spending by all candidates for political office in the United States in presidential election years

Year	Estimated Spending ($)
1952	140 million
1956	155 million
1960	175 million
1964	200 million
1968	300 million
1972	400 million

The 1952-64 figures on estimated expenditures are from Alexander, *The Cost of Presidential Elections*, in PRACTICAL POLITICS IN THE UNITED STATES 277 (C. Cotter ed. 1969). The 1968 figures are from REPORT OF THE TWENTIETH CENTURY FUND COMMISSION ON CAMPAIGN COSTS IN THE ELECTRONIC ERA, VOTERS' TIME 9 (1969), and the 1972 figures are from 117 CONG. REC. 1972 (1971) [remarks of Rep. Lee Hamilton (D., Ind.)].

[3] TIME, Nov. 23, 1970, at 11. This figure may be somewhat inflated because of the unusually high expenses of $3.5 million reported by Richard Ottinger in his unsuccessful Senate campaign in New York.

about half of which will be used for television and radio advertising.[4]

It is not mere coincidence that the rapid increase in campaign expenditures has occurred at the same time that television has become such an effective medium for the politician. The first year in which television assumed a major role in the campaign process was 1952. Of the $19.6 million spent on the presidential campaign in that year, about one-fourth was for television and radio advertising.[5] By 1968, the total broadcast expenditures for the presidential primary and general election contests had reached $28.5 million.[6] Of this figure, Robert Kennedy spent over $1.5 million,[7] even though his campaign ran through only several of the major primaries. And of the two major candidates, Hubert Humphrey spent a total of $6.1 million and Richard Nixon $12.6 million for television and radio advertisements.[8] With the increased use of television by political candidates, the front porch campaign of a McKinley at Canton, a Wilson at Shadow Lawn, or a Harding at Marion has become a thing of the past. Today's candidate must concentrate on reaching large

[4] Television and Radio Expenditures of Selected Senatorial Candidates in the 1970 Elections (both primary and general)

Candidate	State	Party	Total Expenditures ($)
Grossman	Arizona	Democrat	111,224
Fannin	Arizona	Republican	87,470
Tunney	California	Democrat	556,225
Murphy	California	Republican	471,738
Chiles	Florida	Democrat	83,492
Cramer	Florida	Republican	216,064
Humphrey	Minnesota	Democrat	196,658
MacGregor	Minnesota	Republican	196,392
Ottinger	New York	Democrat	1,375,641
Goodell	New York	Republican	570,306
Buckley	New York	Conservative	516,512
Metzenbaum	Ohio	Democrat	507,627
Taft	Ohio	Republican	374,281
Gore	Tennessee	Democrat	214,636
Brock	Tennessee	Republican	209,461

Hearings on S. 1, S. 382, & S. 956 Before the Subcomm. on Communications of the Sen. Comm. on Commerce, 92d Cong., 1st Sess., App. A, at 687-719 (1971) [hereinafter referred to as *1971 Hearings on S. 382*].

[5] V. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 534, 539 (1958).

[6] H. ALEXANDER, FINANCING THE 1968 ELECTION 5 (1971). This 1968 figure for broadcast expenditures at the presidential level is 2.2 times greater than comparable figures for 1964. *Id.*

[7] *Id.* at 56. Kennedy also spent approximately $360,000 on newspaper advertising during these primaries.

[8] *Id.* at 92. These figures consist of expenditures for actual time and space on television and radio, media production costs and advertising agency fees.

numbers of voters; and in the case of a presidential election, his campaign must cover an expansive geographic area. Quite naturally, television has become the most important medium available to the politican.

According to one leading communications expert, television is a medium for playing down the idea of issues and emphasizing the celebrity image that is created.[9] Indeed, Marshall McLuhan has severely criticized campaign analyst Theodore White for concentrating on the content of the Nixon-Kennedy debates, rather than the image each man was presenting to the American public.[10] But whether the candidate's image or his position on the campaign issues is more important in television political advertising is of little significance from a cost perspective: since the candidates themselves believe that their image is critical, they invariably hire advertising agencies and public relations experts to design and orchestrate their media campaigns.[11] Ever since the 1952 presidential election when advertising agencies first came on the national political scene, the use of these experts to project the candidate's desired public image has become an indispensable function in an effective political campaign. The important point, however, is that television communication has provided political campaigns with a powerful resource, and the media expert has become an integral factor in its use. And, as the above statistics illustrate, the optimal utilization of this resource requires the outlay of vast sums of money.

B. *Financing the Political Campaign*

American political parties have relied solely upon private contributions to finance candidates' campaigns. Given the large increase in campaign spending — precipitated for the most part by the rising use of mass media advertising — it is not hard to grasp the immense financial burden presently facing political parties, or for that matter, the individual candidate who wishes to campaign without strict allegiance to any party affiliation. Of necessity, political parties and candidates are constantly searching for new sources of funds.

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[9] *See generally* M. McLuhan, Understanding Media: The Extensions of Man (1964).

[10] *Id.* at 287-88. For White's analysis of the Nixon-Kennedy debates, see T. White, The Making of the President 1960, 279-95 (1961).

[11] Reports indicate that, in 1970, 26 candidates for senator or governor employed media experts to manage their television advertising. Time, Nov. 16, 1970, at 14. For a general discussion of the use of media advertising in a political campaign, see J. McGinnis, The Selling of the President 1968 (1969).

It would seem that a continuing goal of both major political parties would be to increase their number of contributors. Succinctly stated, the more people who contribute, the more money the parties will have available to spend. For example, if everyone who voted in the 1968 presidential election had given one dollar, the campaigns of Nixon, Humphrey and Wallace could have been completely financed.[12] In practice, however, only a small percentage of voters contribute to a political campaign. In order to stimulate interest in the small contribution, Phillip L. Graham, publisher of the Washington Post, suggested the use of nonpartisan national advertising to urge political contributions.[13] The idea was adopted by the Advertising Council of the American Heritage Foundation which ran spot advertisements soliciting voters to contribute to the party of their choice.

Although such nonpartisan appeals have occasionally been successful on a small scale,[14] the usual result is abysmal failure, which has been explained by the lack of emotional bias which seems to motivate contributions in partisan fund-raising campaigns.[15] Also,

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[12] Implicit in this premise is the assumption that the small contribution can be attracted with relatively small expenses. This assumption may or may not be correct in a particular situation. If the contributions are solicited by mailings, for example, the costs of the operation may cancel out a major part of the contributions. Indeed, it has been estimated that a national committee spends $250,000 on postage alone in a campaign year. V. KEY, *supra* note 5, at 539.

[13] Address by Phillip L. Graham, University of Chicago, School of Business, June 1, 1955.

[14] One successful bipartisan campaign for contributions has been carried on by the Aero-Jet General Corporation. Political contributions are withheld from employee's pay, at their request, and between 1958 and 1968 Aero-Jet has raised almost half a million dollars. Alexander, *The Cost of Presidential Elections*, in PRACTICAL POLITICS IN THE UNITED STATES 284 (C. Cotter ed. 1969).

[15] In 1964, two significant attempts at bipartisan fund raising were made. The R. L. Polk & Co. plan sought individual contributions via letters to the general public signed by Dwight Eisenhower and Adlai Stevenson, but the effort failed. The relative absence of emotional bias (which is presumably greater with partisan pleas), and the mere novelty of bipartisan pleas have been given as reasons for the failure of the Eisenhower-Stevenson letter. Haydon & Daly, *The "Eisenhower-Stevenson Appeal": An Adventure in Bipartisan Political Fund Raising*, in BIPARTISAN POLITICAL FUND RAISING: TWO EXPERIMENTS IN 1964) (A. Heard ed. 1966), *cited in* 2 STUDIES IN MONEY IN POLITICS 9, 17 (H. Alexander ed. 1966).

The second fund raising attempt was proposed by Neil Staebler, a former congressman from Michigan, and adopted by the Michigan Center for Education in Politics. The campaign was to take the form of a charity drive with door-to-door solicitation. Saginaw, Michigan was selected as the test community because of its relative isolation and the balance between the two political parties. Although substantial support was obtained from community leaders, the campaign was unsuccessful. The solicitors received only 372 contributions totaling $410.86. Once again the failure was attributed to a fundamental need for partisanship in political appeals. Schutz, *Community Bipartisan Political Fund Raising: An Exercise in Futility*, in BIPARTISAN POLITICAL the small contributor can expect to exert little influence upon the politician, whereas the large contributor can expect to have a greater influence on and access to the politician's views and decision-making.[16] Thus, most attempts at expanding the base of political contributions have been relatively unsuccessful.

In fact, from 1964 to 1968 the number of individual contributors declined by four million[17] — perhaps because the major political parties are unwilling, as much as unable, to generate a larger number of small contributions. Yet the almost exclusive reliance of the major political parties upon large contributions is not unjustified, for it is clearly easier and more efficient to obtain one 500 dollar contribution than 500 one dollar contributions.[18] Such a philosophy, however, raises serious problems that must be appreciated in any analysis of campaign finance.[19]

FUND RAISING: TWO EXPERIMENTS IN 1964 (A. Heard ed. 1966), *cited in* 2 STUDIES IN MONEY IN POLITICS 19-20, 26-27 (H. Alexander ed. 1966).

16 The direct access of the large contributors to political candidates cannot be underestimated. Well-heeled Harold Perlman, for example, wrote Senator Edmund Muskie a letter stating that he was prepared to contribute $100,000 to Muskie and suggesting a meeting later that week. When Perlman was informed by a Muskie aide that the Senator would like to meet with him, Perlman simply replied, "I'm not surprised." The meeting took place the next day and when Muskie later disclosed his campaign contributors, Perlman was listed as a $32,000 contributor. Pruden, *Why Fat Cats Make Good Political Pets*, National Observer, April 8, 1972, at 1, col. 1.

17 Number of Contributors to Political Campaigns in Presidential Years.

Year	Number of Contributors
1952	3 million
1956	8 million
1960	10 million
1964	12 million
1968	8 million

H. ALEXANDER, *supra* note 6, at 144. Alexander is unable to give any plausible explanation for the decline in individual contributors in 1968.

18 Only three times since 1948 have the two major presidential candidates received more than half of their contributions in amounts of less than $500.

Percent of Political Contributions of $500 or more to Presidential Candidates

Year	Democrats	Republicans
1948	69%	74%
1952	63%	68%
1956	44%	74%
1960	59%	58%
1964	69%	28%
1968	61%	47%

The 1948-56 figures on political contributions are from A. HEARD, THE COSTS OF DEMOCRACY 48, 51 (1956); the 1960 figures are from H. ALEXANDER, FINANCING THE 1964 ELECTION 85 (1966); and the 1968 figures are from H. ALEXANDER, *supra* note 6, at 163.

19 Fear of the impact of the large contribution is perhaps the most important reason why campaign finance laws were enacted originally. Indeed, large contributions and

Large individual political contributions usually seem to be induced by several desires: the contributor seeks to influence the making or administration of public policy;[20] the contributor seeks to elect public officials with values and preferences which promise a sympathetic attitude toward his private interests;[21] or the contributor seeks an appointment to a political or public service job.[22] Although incidents establishing a conflict of interest between contributions and private interests are far too numerous to be effectively summarized, a few examples should illustrate the kind of favoritism that occurs. In 1970, two large shipping lines were convicted of violating the prohibition against corporate contributions to politi-

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their critics have been part of the American political scene for many years. In the presidential election of 1896, Republican entrepreneur Mark Hanna raised $10-15 million from large corporations for the campaign of William McKinley. E. SAIT, AMERICAN PARTIES AND ELECTIONS 644 (1942). In 1904 Democratic presidential candidate Alton B. Parker made a campaign issue out of the corporate financing of the Republican party. Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1035 (1965). Republican Theodore Roosevelt, elected over Parker in 1904, urged the enactment of campaign regulations in his yearly message to Congress. Roosevelt stated that "all contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes, and moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts." 40 CONG. REC. 96 (1905).

Professor Louise Overacker, one of the earliest scholars in the area of campaign finance, stated that the primary reason to fear the large contribution is that "[t]he American public has a general belief that contributions and expenditures are morally suspect and that unchecked election financing would lead to unfair pressure from monied interests." L. OVERACKER, MONEY IN ELECTIONS 197, 376 (1932).

20 F. SORAUF, POLITICAL PARTIES AND POLITICS 321 (1968). Senator John J. McClellan (D., Ark.), in testimony before a congressional investigating committee in 1957, stated:

> I don't think anybody that gave me a contribution ever felt he was buying my vote or anything like that, but he certainly felt he had an entree to me to discuss things with me and I was under obligation at least to give him an audience when he desired it. . . . V. KEY, *supra* note 5, at 563.

As early as 1924, politicians recognized the potential influence of large contributors. In that year Senator William Borah stated that, "So long as political parties seeking power or control of the government accept vast contributions from those who are interested in matters of legislation or administration, you will have sinister and corrupt and controlled government." E. SAIT, *supra* note 19, at 647.

Senator Roman Hruska has stated that "conventions . . . are bought all the time by the business community — and everyone . . . knows it." NEWSWEEK, March 20, 1972, at 33.

21 F. SORAUF, *supra* note 20, at 321.

22 This system of political appointments to large contributors has existed almost since the beginning of presidential elections. In 1968, Herbert Alexander studied 345 major Nixon appointees and found that 34 had contributed more than $500 each to the 1968 campaign. In sum, these individuals contributed $326,975, of which $325,975 was given to the Republicans. H. ALEXANDER, *supra* note 6, at 353-55.

cal campaigns;[23] both lines had recently been awarded multimillion dollar Government subsidies.[24] And in 1966, the Committee for Action, a group of construction and paving contractors who opposed certain legislation, gave $14,000 to the campaign of Senator Robert Griffin, a leader in the opposition against such legislation.[25]

While such examples are obviously not conclusive proof that money in fact influences political decision-making, they aptly illustrate the potentially dangerous possibilities that exist when politicians are forced to rely on large private donations to finance their election campaigns. It would seem that the large contributor has at least a built-in lobby with which to influence elected officials, as well as a better opportunity to gain a political appointment. When the candidate must rely more or less exclusively on the large contribution, it is a logical extension of such reliance that he in some way repay his benefactor, or else lose his support in the next campaign. Given this connection, it is not hard to realize why the general public takes a moral dislike to large political contributions.

Senator Edward Kennedy has perhaps best stated the predicament of the political candidate:

> Without a source of outside wealth, [the candidate] faces the Hobson's choice of either a shoestring election campaign or reliance

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[23] Originally enacted as the Federal Corrupt Practices Act of Feb. 28, 1925, ch. 368, tit. III, § 313, 43 Stat. 1074.

[24] REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON FINANCING CONGRESSIONAL CAMPAIGNS, ELECTING CONGRESS, THE FINANCIAL DILEMMA 49 (1970) [hereinafter cited as TWENTIETH CENTURY FUND REPORT]. The two shipping lines were fined $50,000 each, which seems a small price to pay considering that, combined, they received $36.4 million in Government subsidies.

[25] D. PEARSON & J. ANDERSON, THE CASE AGAINST CONGRESS 316 (1968). The most recent charge of conflict of interest concerning campaign contributions involved the case of international Telephone and Telegraph Corp. In 1969, Justice Department Antitrust Chief Richard McLaren filed three separate suits against ITT, challenging three corporate acquisitions as violating section 7 of the Clayton Antitrust Act [15 U.S.C. § 18 (1970)] which prohibits corporate mergers when they "substantially lessen competition or tend to create a monopoly." In 1971, a settlement was reached which allowed the acquisition of the Hartford Fire Insurance Co., the biggest corporate merger in United States history. At about the same time, it appears that ITT offered to underwrite up to $400,000 of the costs of the 1972 Republican convention then scheduled for San Diego.

Allegations concerning a link between the antitrust settlement and the $400,000 underwriting arose from a memorandum supposedly written by ITT lobbyist Dita Beard and disclosed to syndicated columnist Jack Anderson. After the disclosure, Democrats on the Senate Judiciary Committee turned the hearings on the nomination of Richard Kleindienst to Attorney General into a full-scale investigation of the ITT controversy.

With the Republicans' charge that the Democrats were exploiting the hearings for political reasons and the Democrats' charge that the Republicans were attempting to cover up a political scandal, the ITT controversy caused a continual series of allegations and denials, charges and countercharges. But whether or not there was a link between the antitrust settlement and the convention pledge, the latter seems to be a clear violation of 18 U.S.C. § 610 (1970). *See generally* NEWSWEEK, March 20, 1972, at 24.

> on a few large contributors. If he takes the shoestring route, he faces the prospect of almost certain defeat. If he goes the route of the larger contributors, he inevitably creates the sort of ambiguous relationship in which he is obligated — or appears to be obligated — to his wealthy supporters.[26]

Indeed, the average political candidate, faced with escalating costs and unable to sufficiently tap the small contributor, turns out of necessity to the large contributor.

II. THE REGULATION OF CAMPAIGN FINANCE

A. *The Power to Regulate*

Constitutionally, the Congress is empowered with broad authority to enact legislation controlling the election of its members and to prescribe such rules as are necessary to secure the fair and honest conduct of those elections.[27] As a result, the courts in the past have not questioned Congress' power to set limitations on political contributions and expenditures, to require various financial disclosures, and to prohibit contributions from certain sources.[28] In addition, Congress would clearly seem to have the power to regulate presidential elections.[29] Nevertheless, the question remains whether there are legitimate governmental interests which justify the exercise of these powers.

Certainly the Congress has an interest in preserving its integrity as well as that of its individual members. And any reasonable regulation which attempts to reduce the possibility that congressmen may be influenced by potentially harmful special interests, should not be looked upon as an abuse of its power. As a corollary to this justi-

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[26] 117 CONG. REC. 13297 (daily ed. Aug. 5, 1971).

[27] *See* U.S. CONST. art. I, § 4, which states that "[t]he Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing senators." *See also* U.S. CONST. art. I, § 5, which states that "[e]ach House shall be the judge of the elections, returns, and qualifications of its own members . . . ."

[28] *See* United States v. Brewers' Ass'n., 239 F. 163 (D. Pa. 1916), which enumerates and discusses the various constitutional bases for the regulation of elections. *See also* Burroughs & Cannon v. United States, 290 U.S. 534 (1934), which held that Congress had the power to safeguard elections by the enactment of appropriate legislation, including the public disclosure of political contributions, as well as the names of contributors.

[29] The power to regulate presidential elections can be derived from several sources. Article II, section 1 of the Constitution, modified by the 12th amendment, clearly gives Congress the power to regulate the procedures for selection of president and vice president. Additionally, this power may be derived from Article I, Section 8, the commerce clause, and from section 5 of the 14th amendment, which was used to uphold civil rights voting legislation in Katzenbach v. Morgan, 384 U.S. 641 (1966).

fication, Congress has a legitimate interest in requiring its members to make public disclosures as to their campaign finances. Furthermore, Congress has an interest in seeing that wealth does not become a precondition to election to its membership. While this list does not exhaust the possibilities, it should be sufficient to dispose of any questions as to the general propriety of Congress' activity in the area of political campaign finance regulation. Still, it must be remembered that Congress' regulatory power may possibly be abused — viz., where the putative campaign finance regulations are only of token substance and nothing more than a self-serving guise for no regulation at all. At that point, regulatory legislation would probably be constitutionally invalid.

B. *Legislation Prior to the Federal Election Campaign Act*

Federal campaign finance laws were embodied in sections 241-56 of title 2 of the *United States Code* (Federal Corrupt Practices Act), which was repealed by the Federal Election Campaign Act;[30] and in sections 591-612 of title 18 of the *United States Code* (Election and Political Activities Laws), which were amended and repealed in part by the Federal Election Campaign Act.[31] While examining the substantive provisions of these laws and their attendant problems, the reader should keep in mind several inquiries: (1) did these laws provide candidates with a reasonable means of financing increasing campaign costs; (2) or in the alternative, did they provide a realistic method of limiting the amount of expenditures; (3) did they protect the general public from the possible dangers of special interest influence on elected officials; (4) did they provide for adequate public disclosure; and (5) did they include appropriate mechanisms to enforce effectively the substantive provisions? Proceeding with such inquiries as a basis of analysis, it will become readily apparent in which areas comprehensive reform was needed.

In essence, the Federal Corrupt Practices Act,[32] promulgated in 1925, contained six major provisions: (1) every political committee was required to have a chairman and a treasurer and keep an account of all contributions and expenditures;[33] (2) political com-

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[30] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[31] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, §§ 201-07.

[32] Act of Feb. 28, 1925, 43 Stat. 1070.

[33] 2 U.S.C. § 242 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

mittees were required to file this accounting with the Secretary of the Senate or Clerk of the House of Representatives, 15 days before and 30 days after the election;[34] (3) the Secretary of the Senate and the Clerk of the House of Representatives were to hold these accounts open for inspection;[35] (4) Senate candidates were allowed to spend $10,000 and House candidates $2,500, or each could spend three cents times the number of voters in the last election, with a Senate candidate not to exceed $25,000, and a House candidate $5,000;[36] (5) a candidate could not directly or indirectly promise an appointment or use of influence in return for support in his candidacy;[37] and (6) violations of any of these provisions were punishable by a $10,000 fine and two years imprisonment.[38] The Federal Corrupt Practices Act was oriented primarily towards a system of public financial disclosure, but it also attempted to limit the amount of money a congressional candidate could spend. Yet the maximum allowable expenditures were grossly unrealistic; and as we shall see later, they were easily circumvented.

The Election and Political Activities Laws were directed at the political contribution, and they contained, among other less salient provisions, three significant restrictions: (1) one who directly or indirectly contributed more than $5,000 in one year to a candidate for federal office or to a national committee would be fined not more than $5,000 or imprisoned not more than five years, or both;[39] (2) no political committee could receive contributions of more than $3,000,000 or spend more than $3,000,000 in one year;[40] and (3) national banks, corporations and labor unions were prohibited from contributing to any federal election.[41] Again, the maximum contri-

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[34] *Id.* § 246, *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[35] *Id.* § 247, *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[36] *Id.* § 248, *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[37] *Id.* § 249, *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405. A similar provision remains embodied in 18 U.S.C. § 600 (1970), *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 202.

[38] 2 U.S.C. § 252 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[39] 18 U.S.C. § 608 (1970), *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, §§ 201, 203.

[40] *Id.* § 609, *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 204.

[41] *Id.* § 610, *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, §§ 201, 205. Several prosecutions arose under this section, which stated that:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to

bution ceiling of $5,000 immediately strikes one as unrealistic in view of common knowledge regarding individual political contributions. But as one would expect, this provision, as well as the prohibition against contributions by corporations and labor unions, was quite easily circumvented and violations were rarely, if ever, prosecuted.

It should be noted that Congress has the inherent, constitutional power to investigate the election of its own members.[42] But effective congressional enforcement is virtually a dead issue.[43] Most members of Congress ignore the existence of campaign finance laws, let alone take action for failures to comply with them. Thus, the enforcement of these laws is ultimately vested with the Justice Department via the criminal sanctions attached to the violation of a provision. Once the Justice Department has knowledge of a violation, it has the discretion, as in any other criminal charge, to prosecute or not. But under the statutory scheme of the Federal Corrupt Practices Act and the Election and Political Activities Laws, there existed no formal procedure for reporting violations to the Justice Department. While the Federal Corrupt Practices Act did require candidates to file statements containing certain information relating to campaign contributions and expenditures with designated congressional officials, there was no statutory duty on such officials to report any violations to the Justice Department.[44]

Presumably, any person could complain to the Justice Department about a potential violation. But this did not facilitate effec-

make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. *Id.*

42 U.S. CONST. art. I, § 5.

43 The last serious congressional challenge based on excessive and illegal campaign expenditures was in 1927 when the Reid Committee investigated the election of William S. Vare of Pennsylvania to the House of Representatives. TWENTIETH CENTURY FUND REPORT, *supra* note 24, at 48.

In 1960, for example, 14 Senate and 65 House candidates filed no statements whatsoever — a clear violation. Yet the Secretary of the Senate and the Clerk of the House took no action. During that same year, the Secretary of the Senate told Senator Maurine Neuberger, who had filed an itemized statement of her expenses, that such detail was unnecessary. *1971 Hearings on S. 382*, *supra* note 4, at 454 (statement of Philip M. Stern).

44 2 U.S.C. §§ 244-45 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

tive enforcement because the minimal disclosure requirements reduced the amount of available information, and the Justice Department retained total discretion as to prosecution. Indeed, it was this discretion in a highly political area of the law which made the Justice Department ineffective in enforcing the campaign finance laws.[45]

The ease with which the law and its enforcement was circumvented can be shown by an incident which occurred in the mid-1960's. As indicated earlier, the Election and Political Activities Laws prohibited corporations from contributing to any federal election campaign.[46] Under an Internal Revenue Ruling, however, corporations advertising in the official program of a national political convention were allowed a deduction as an ordinary and necessary business expense.[47] The Government deemed any such advertising expenditure outside the prohibition against corporate contributions (and hence deductible) if: the amount of advertising was reasonable; the advertisement was directly related to the advertiser's business and was within the advertising value of the space required; and the proceeds from the advertisement were used only to pay for the convention.

In 1964, the Democrats took advantage of this revenue ruling in financing their $2 million national convention in Atlantic City[48] by selling 96 full-page advertisements in their convention program

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[45] In 1968 the Clerk of the House notified the Justice Department about reporting violations by a number of presidential committees. Although supplemental reports correcting the violations were filed late, the Justice Department took no action. Indeed, there has never been a prosecution under the Federal Corrupt Practices Act. Similarly, between 1925 and 1969, there have been only a few prosecutions under the Elections and Political Activities Laws (all of which centered on section 610, which prohibits contributions by corporations, banks and labor unions). In 1969, however, the Justice Department indicted 14 corporations for violations of section 610. All of the indictments arose out of an investigation by the Internal Revenue Service of Howfield, Inc., a Los Angeles advertising firm which was a conduit for direct contributions by corporations. *See* TWENTIETH CENTURY FUND REPORT, *supra* note 24, at 48-50. Thus, despite the recent flurry of prosecutions under section 610, the campaign finance laws are still virtually unenforced.

Following both the 1960 and 1968 presidential elections, the president named his campaign manager as Attorney General. And during testimony before the subcommittee hearings on the Campaign Reform Bill, then Deputy Attorney General Richard Kleindienst admitted that even-handed enforcement of these laws is extremely difficult. *Hearings on S. 1121 Before the Subcomm. on Communications of the Sen. Comm. on Commerce*, 92d Cong., 1st Sess. 522 (1971) [hereinafter referred to as *1971 Hearings on S. 1121*]. Kleindienst later blamed lack of enforcement on weakness in the present law, especially in the area of administrative provisions. *Hearings on S. 382 Before the Subcomm. on Privileges & Elections of the Sen. Comm. on Rules & Administration*, 92d Cong., 1st Sess. 53 (1971).

[46] 18 U.S.C. § 610 (1970), *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, §§ 201, 205.

[47] Rev. Rul. 343, 1956-2 CUM. BULL. 115.

[48] H. ALEXANDER, FINANCING THE 1964 ELECTIONS 40 (1966).

at a price of $15,000 per ad. The revenue from these advertisements (plus some support from other sources) produced a total in excess of the cost of the convention.[49] Republican Senator John J. Williams asked the Internal Revenue Service to investigate the disposition of this excess of funds, but he was told that the amounts spent by the corporations for advertisements were reasonable and that the Internal Revenue Service was not interested in how the excess was spent.[50] Williams then turned to the Justice Department, alleging a violation of the prohibition against corporate contributions, but was told that the "facts . . . do not demonstrate a violation."[51] Buoyed by the 1964 results, the Democrats published a booklet in late 1965, *Toward an Age of Greatness*, filled with more $15,000 per page corporate advertisements. Even though the distortion between advertising billing price and circulation indicated a violation, and despite the statements of several Democratic congressman that they would use the funds in their campaigns, the Justice Department took no action.[52]

Generally, then, the Justice Department is largely ineffective as the enforcement agency for campaign finance laws because of its close proximity to the electoral process. No administration is likely to vigorously enforce the campaign finance laws against its own party membership, nor will they enforce them against the other party for fear of reciprocal treatment when party control changes. In such a situation, where enforcement is almost nonexistent, the substantive provisions contained in any system of campaign finance regulation become meaningless. Clearly, any solution relying on governmental enforcement requires that the body charged with enforcement be

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[49] *Id.* at 101.

[50] *Id.*

[51] Letter from Fred M. Vinson, Jr. (Assistant U.S. Attorney General) to Senator John J. Williams (D., Del.), 112 CONG. REC. 1240 (1966).

[52] Neal Peirce found that *Toward an Age of Greatness* had approximately 250,000 readers. He reported that the cost per thousand distributions of these ads was $60 as compared to $5 for *Time* magazine. Peirce, *Financing Our Parties*, THE REPORTER, Feb. 10, 1966, at 29, 32, 34.

The $700,000 received by the Democrats from *Toward an Age of Greatness* has been held in escrow until recently while it was decided what to do with the money. The lawyers advising the Democrats convinced them that the scheme was so dubious that the money should not be used to pay any partisan obligations. Instead, the money is to be used for nonpartisan voter education and registration. N.Y. Times, April 13, 1972, at 35, col. 1. Still, the fact that this money is apparently going to nonpartisan purposes should not exonerate the corporate advertisers. Their intention *at the time the money was paid* to the Democrats is determinative of their guilt or innocence under federal law, and the original intention points strongly to partisan contributions.

politically autonomous, thereby removing the pressures which rendered past legislation impotent.[53]

Along with the inadequacy of enforcement mechanisms, the failure of previous legislation is also attributable to its poor drafting. Then President Johnson — certainly one who is knowledgeable about corruption in politics — stated that "current regulations of campaign finance are more loophole than law."[54] And the formula for campaign spending which limited Senate candidates to $25,000 and House candidates to $5,000,[55] was written in 1925 when the front-porch campaign was still feasible and when radio was in its first decade. The spending limitation of $3 million by political committees[56] was an arbitrary standard, which failed to take into account inflationary cost increases. No doubt, these spending limitations were completely unrealistic in the current era of crosscountry, mass-media political campaigns.

Fortunately for the candidates, however, there were sufficient loopholes in the campaign finance laws to allow easy avoidance of these restrictions. For example, the definition of a political committee applied only to those committees which operated in two or more states,[57] so a candidate could set up committees on a one-state level and avoid the $3,000,000 committee spending restriction. Individual contributors could also bypass the $5,000 limit on contributions[58]

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53 One suggestion is to charge the Comptroller General with the enforcement powers. Because of his long-term appointment, he would be relatively isolated from partisan political pressure. Alexander, *Money, Politics and Public Reporting*, STUDIES IN MONEY IN POLITICS 60 (H. Alexander ed. 1962).

Alexander, Director of the Citizens' Research Foundation, has also recommended the creation of a Registry of Election Finance to be located in the Library of Congress. The Registry would set up a filing system and publish reports — although it would have no investigatory powers — and would be supervised by the Senate and House Committees on Rules and Administration. *Id.* at 63-65.

The most recent proposal, arising from the Kennedy Commission study and the Twentieth Century Fund proposals, suggests the establishment of a bipartisan Federal Elections Commission which would set up rules and regulations and also have investigatory powers. *See generally* TWENTIETH CENTURY FUND REPORT, *supra* note 24.

54 S. JOUR. 227 (May 26, 1966) (message of President Johnson to Congress).

55 2 U.S.C. § 248 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

56 18 U.S.C. § 609 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 204.

57 18 U.S.C. § 591 (1970), *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 201. The law stated that, "[t]he term 'political committee' includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors . . . in *two or more States* . . . ." (emphasis added).

58 The following figures illustrate how the prohibition in 18 U.S.C. § 608 (1970) against contributions in excess of $5,000 was totally ineffective.

by giving to several different committees supporting the same candidate or by making contributions through willing relatives. Further, if the contributor gave only to state-level committees which were exempted from reporting, he was able to hide all of his contributions.[59]

While all of this legal deception was taking place, the candidate, who was also required to file a report of his expenditures,[60] was presumed to be innocent of the activities of these state-level committees and groups which were operating in his behalf.[61] Regrettably, the candidates had no choice but to use such evasive schemes, because the legislative restrictions and prohibitions governing campaign contributions were so patently unrealistic.

Another example of poor drafting is the prohibition against contributions by corporations and labor unions.[62] Although corporations were prohibited from making direct contributions, they were able to contribute indirectly to the candidate of their choice. Contributions took the form of individual solicitation of high corporate officials, partisan advertising and contributions to corporate political action committees.[63] These business committees were supported by voluntary contributions from individuals and corporations. The

Political Contributions in Excess of $10,000 from 1952-1968

Year	Number of Individual Contributors	Total Contributions ($)
1952	110	1,936,870
1956	111	2,300,000
1960	95	1,552,009
1964	130	2,161,905
1968	424	12,187,863

H. ALEXANDER, *supra* note 6, at 167.

[59] Perhaps the most glaring example of the use of "dummy" state-level committees to hide the identity of contributors is provided by the 1970 Senate campaign of James Buckley (R., N.Y.). By the use of committees such as the League of Middle American Women and the Committee to Keep a Cop on the Beat, Buckley was able to hide the identity of persons contributing $400,000 to his campaign. David R. Jones, the Buckley campaign manager, summed up the role of these dummy committees in his statement that "we made a game out of it." *"False Front" Campaign Funds: How They Work*, U.S. NEWS & WORLD REP., Jan. 11, 1971, at 57.

[60] 2 U.S.C. § 246 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[61] Senator Gravel (D., Alas.) identified the truth when he said: "[W]e are technically violating the laws because we have knowledge of these great sums being spent on our behalf." *1971 Hearings on S. 382, supra* note 4, at 156.

[62] 18 U.S.C. § 610 (1970), *as amended by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, §§ 201, 205.

[63] Lambert, *supra* note 19, at 1039.

funds were then channeled to selected candidates, thus allowing the corporation a convenient way to make a "legal" contribution.[64]

Moreover, labor (and presumably corporations) was permitted to endorse candidates in its publications and to use voluntary funds in partisan broadcasts to the public.[65] Still, as was true for corporations, the political action committee was used as the conduit for the bulk of labor's political contributions.[66] Thus, while millions of dollars were channeled indirectly to candidates by labor unions and corporations, only those who carelessly made direct contributions were ever penalized.

III. THE ROAD TO REFORM

While numerous reform programs have been proposed by both legislators and private interests,[67] no constructive reform legislation

[64] In 1968 it was reported that more than $2 million was spent by business or professional committees. H. ALEXANDER, *supra* note 6, at 201. In addition to the large contributions from the political committees, Alexander reports that the officers and directors of the 25 largest defense and industrial companies contributed nearly $1.5 million in 1968. *Id.* at 186.

[65] Such endorsements did not violate 18 U.S.C. § 610 (1970) as long as they were part of regular union activities and were based upon voluntary contributions. United States v. Anchorage Central Labor Council, 193 F. Supp. 504 (D. Alas. 1961); United States v. C.I.O., 77 F. Supp. 355 (D.D.C. 1948).

[66] Labor National-Level Committees' Gross Disbursements

Year	Reporting Committees	Gross Disbursements ($)
1956	17	2.2 million
1960	21	2.3 million
1964	31	3.7 million
1968	37	7.1 million

H. ALEXANDER, *supra* note 6, at 194

[67] Shortly after he took office in 1961, President Kennedy appointed a Commission on Campaign Costs to examine the problem of campaign finance. The following year the commission recommended the following major actions, among others: (1) enactment of tax deductions for expenditures in connection with voluntary bipartisan political activities; (2) enactment of income tax credits and deductions for certain contributions to national parties and designated state committees; (3) establishment of a Registry of Election Finance to which all committees, parties or groups spending $2500 or more would be required to report; (4) repeal of 18 U.S.C. § 608 (1970), which places a ceiling on individual contributions; (5) repeal of 18 U.S.C. § 609 (1970), which places a ceiling on receipts and expenditures by political committees; (6) strict enforcement of all campaign finance statutes; (7) development of modern fund-raising practices; (8) encouragement of research techniques on campaign efficiency; (9) public subsidization of the presidential transition period; and (10) suspension of section 315 of the Federal Communications Act of 1934 [47 U.S.C. § 315(a) (1970)] which requires broadcast media to give free time equally to all candidates when one candidate receives free time. Alexander, *The Cost of Presidential Elections*, in PRACTICAL POLITICS IN THE UNITED STATES 308-10 (C. Cotter ed. 1969).

Another reform proposal came in 1962 from prominent Washington, D.C. attorney, Philip Stern. Stern proposed a system partially based on funding of campaigns through the U.S. Treasury. In Presidential years, the two National Committees would receive had been enacted until 1971. Although suggested improvements and alternative proposals have been many, they have had some combination of several familiar concepts in common: (1) the expansion of the base of political contributions to provide an additional source of funds, thereby reducing the reliance on the large contribution; (2) the implementation of realistic ceilings on expenditures; (3) prohibitions on contributions from certain sources that present a danger of conflicts of interest; (4) more accurate public disclosure of the source and application of funds; and (5) the effective enforcement of substantive provisions.

Many reform plans have involved innovative schemes for implementing the above concepts. In recent years, for example, the idea of public subsidization of federal elections has been strongly advocated.[68] By many, the idea of public subsidization — with its cen-

10 cents for each vote cast in the last election, with minor party candidates to be alloted one-fourth as much. Candidates for Congress would receive 20 cents for each vote cast in the last congressional election. Stern also suggested a tax credit and abolition of the ceiling on private contributions over $100. In a rather novel approach to the partisan enforcement problem, Stern advocated the use of retired federal judges to administer the program. Stern, *A Cure for Political Fund-raising*, HARPER'S, May, 1962, at 59, 62-63.

In 1968, the Committee for Economic Development proposed a system of campaign finance reform. The committee recommended a tax credit of 50 percent of the contribution (with a credit limit of $25 per taxpayer), stringent disclosure requirements, strict enforcement of 18 U.S.C. § 610 (1970), repeal of all ceilings on spending and contributions, and repeal of the equal-time provision in § 315(a) of the Federal Communications Act of 1934 [47 U.S.C. § 315(a) (1970)]. THE COMMITTEE FOR ECONOMIC DEVELOPMENT, FINANCING A BETTER ELECTION SYSTEM 21-25 (1968).

The most recent reform program has come from the Twentieth Century Fund, a nonprofit and nonpartisan organization endowed by Edward A. Filene. The Fund has recommended several reform proposals, including: (1) full disclosure, requiring any committee raising or spending more than $1,000 a year to report; (2) creation of a Federal Elections Commission to audit and publicize the financial reports; (3) repeal of all statutory spending limitations; (4) repeal of the limits on the size of individual contributions; (5) vigorous enforcement of section 610 of the Federal Corrupt Practices Act; and (6) centralization of finance under one official campaign committee. TWENTIETH CENTURY FUND REPORT, *supra* note 20, at 15-21. While none of these programs has been translated into specific legislation, they have succeeded in stimulating public interest in the need for the reform of existing campaign finance laws, and some of the proposals contained therein are incorporated in reform legislation yet to be discussed.

It is interesting to note that most of these reform programs have come from individuals or organizations isolated from political pressure. This further illustrates the belief that politicians are reluctant to police themselves. Congress, however, has at various times held hearings on campaign finance reform. *See, e.g., Hearings on S. 219 Before the Special Sen. Comm. to Investigate Political Activities, Lobbying and Campaign Contributions*, 84th Cong., 1st Sess. (1955); S. REP. NO. 176, 85th Cong., 1st Sess. (1957); S. REP. NO. 101, 79th Cong., 1st Sess. (1945); S. REP. NO. 47, 77th Cong., 1st Sess. (1941).

[68] *See generally* the programs referred to in note 67 *supra*.

Puerto Rico is the only American jurisdiction where elections are partially subsidized by the public. In Puerto Rico, each party may draw up to $75,000 in a nonelection year and $150,000 in an election year. For a complete examination of the system tral theme of expanding the base of contributions — has been deemed a cure-all for the ills presently affecting campaign finance. Differing motives may control a particular proponent of this kind of plan; *i.e.*, the candidate seeks additional sources of money, and the reformer hopes to prevent the political pressure of potentially harmful special interests by decreasing the need to rely on the large contribution. But regardless of motive, the end result of public subsidization seems to be that the interests of both candidate and reformer will be satisfied. And if the subsidization provisions are joined with realistic spending restrictions, the politician's burden will be reduced to an even greater degree, entirely eliminating the reliance on the large contribution.

In its purest form, public subsidization would involve the federal funding of congressional and presidential election campaigns from the Government's general funds. The more popular forms of subsidization, however, are the tax credit and the tax deduction.[69] A tax credit would allow the voting taxpayer to take a certain amount of money from his final liability and earmark it for political contribution, while the tax deduction would allow the political contribution to be subtracted from taxable income. Several states have presently adopted some form of the tax credit or tax deduction for their respective state income taxes.[70]

On December 10, 1971 the Presidential Election Campaign Fund Act[71] — signed into law as part of the Revenue Act of 1971 — created a new plan of public subsidization for presidential elections

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of public subsidization in Puerto Rico, see Wells, *Government Financing of Political Parties in Puerto Rico*, in STUDIES IN MONEY IN POLITICS 7 (H. Alexander ed. 1962).

One plan of public subsidization created by Senator Russell Long (D., La.) did catch congressional fancy for a short time. In late 1966, Congress enacted the Presidential Election Campaign Fund Act, 31 U.S.C. § 971 (1970). Under this plan, each taxpayer could designate one dollar of his federal income tax to go into the fund. The money would have been split by the Democrats and Republicans. In 1967, however, the Act was amended to provide that funds be disbursed only after adoption by law of guidelines governing distribution. Act of June 13, 1967, Pub. L. No. 90-26, 81 Stat. 58. *See generally* 23 CONG. Q. ALMANAC 286 (1967). Guidelines were never promulgated and the operable provisions of the Act were recently repealed. Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. VIII, § 802(b)(1), *repealing* Act of Nov. 13, 1966, Pub. L. No. 89-809, tit. III, §§ 303, 304, 305.

69 *See generally* the proposals of the Kennedy Commission, the Committee for Economic Development, and Philip Stern in note 67 *supra.*

70 *See, e.g.*, CAL. REV. & TAX. CODE § 17234 (West 1968) (which allows a tax deduction of up to $100 a year for political contributions); MINN. STAT. ANN. § 290.21 (3)(e)(1) (1961) (which allows a personal deduction for contributions up to $100).

71 Act of Dec. 10, 1971, Pub. L. No. 92-178, §§ 9001-13. The plan is similar to the earlier plan devised by Senator Long which passed Congress in 1966, but was repealed in 1967. *See* note 68 *supra.*

to take effect in 1973.[72] The new legislation, commonly known as Tax Checkoff, allows a taxpayer to designate one dollar of his yearly tax to be paid over to the Presidential Election Campaign Fund.[73] From this fund, eligible candidates[74] from "major parties"[75] can receive payments equal to 15 cents multiplied by the number of U.S. residents over 18 on June 1st of the year preceding a presidential election year.[76] A "minor party" candidate[77] would be entitled to receive a similar sum based on the number of votes received by the party's candidate in the last presidential election.[78] In addition, new political parties and other parties that failed to receive enough votes to qualify as a minor party are eligible for certain payments.[79]

Had Tax Checkoff been law in the 1968 election, and had the principal candidates opted to utilize public subsidization, the Democratic and Republican presidential candidates would have received $20.4 million each, and George Wallace would have received $6.3 million.[80]

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[72] Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. VIII, § 9013. The Tax Checkoff plan will not apply to the 1972 presidential election, primarily because of political facts surrounding its introduction and passage. The idea arose from a Democratic party meeting on July 14, 1971. *See* The Plain Dealer (Cleveland, Ohio), Dec. 10, 1971, at 14, col. 1. The Democrats were still deep in debt from the 1968 election and were expected to have a problem raising campaign funds; whereas the Republicans already had a campaign surplus and, with an incumbent in the White House, a substantial advantage in attracting additional contributions. *See* The Washington Evening Star, Dec. 3, 1971, at A-6, col. 1. The application of Tax Checkoff to the 1972 election would allow the Democrats to erase the Republican advantage.

The Democrats tied Tax Checkoff to the Revenue Act of 1971, feeling that the President would not veto such an integral part of his economic program. Nevertheless, repeated veto threats forced a compromise and an effective date of January 1, 1973. Even then, the applicability of Tax Checkoff to the 1976 election is far from certain: sources indicate that President Nixon will attempt a repeal of the provision. *See* The Washington Post, Dec. 3, 1971, at 1, col. 8.

It seems ironic, albeit not surprising, that legislation designed to remove presidential campaign finance from the arena of politics should be motivated by such partisan desires. It does, however, point to the desperate need of candidates and political parties for funds.

[73] Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. VIII, § 9006.

[74] *Id.* § 9002(4).

[75] *Id.* § 9002(6) (which defines a "major party" as "a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 25 percent or more of the total number of popular votes received by all candidates for such office").

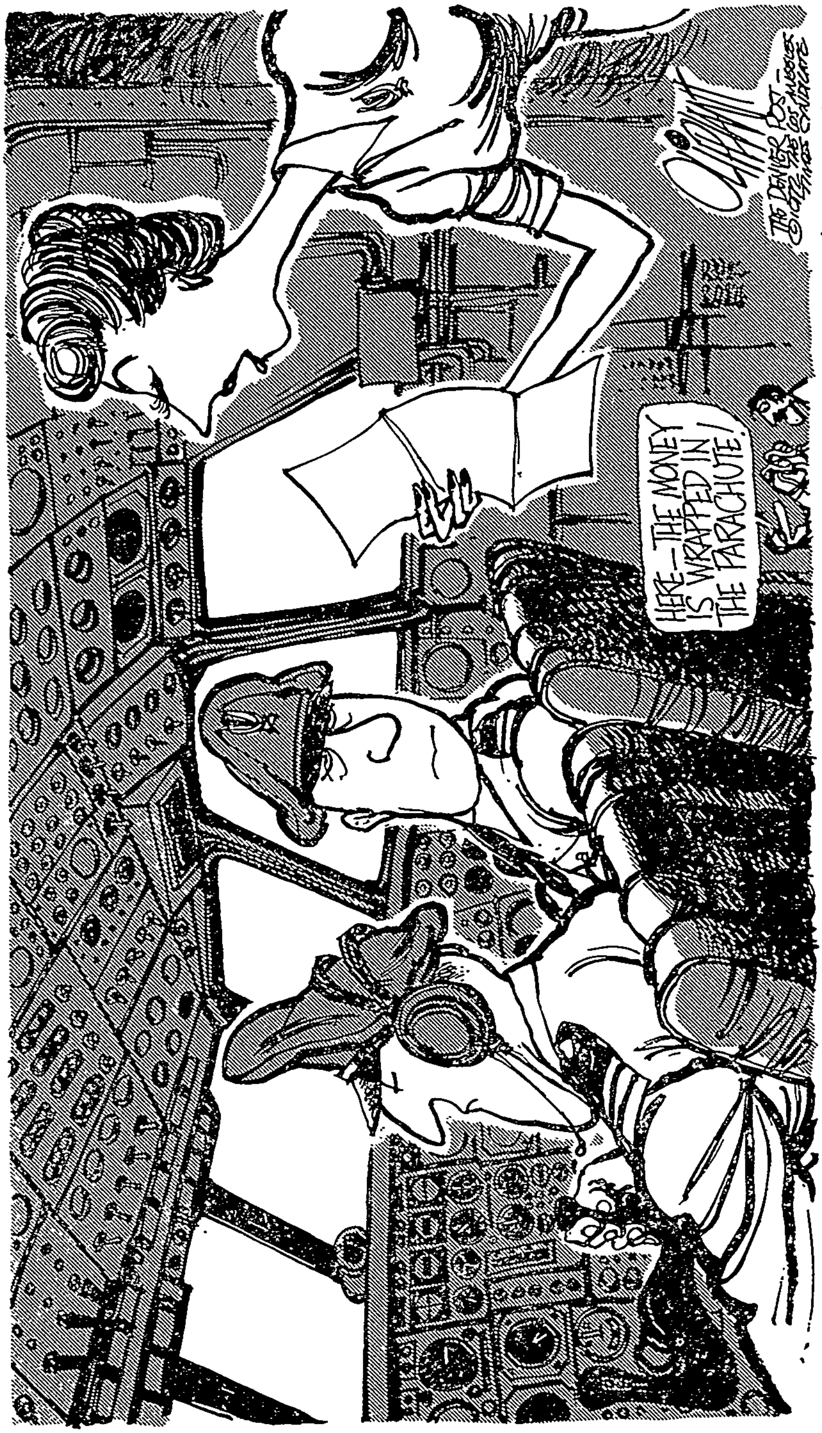
[76] *Id.* § 9004(a)(1).

[77] *Id.* § 9002(7) (which defines a "minor party" as "a political party whose candidate for the office of President in the preceding presidential election received, as the candidate of such party, 5 percent or more but less than 25 percent of the total number of popular votes received by all candidates for such office").

[78] *Id.* § 9004(a)(2).

[79] *Id.* § 9004(a)(3).

[80] These figures are taken from an article on the Tax Checkoff plan in The Plain



'THE DEMOCRATIC CONVENTION COMMITTEE FUND DRIVE WOULD LIKE $500,000 AND A PARACHUTE!'

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In its present form, Tax Checkoff contains a number of problems which will limit its effectiveness as a comprehensive plan of campaign finance reform: (1) it is limited to the presidential election; (2) it is applicable only to expenditures incurred within a period commencing on the date a major party nominates its candidate at its national convention and ending 30 days after the election,[81] and thus contains no restrictions on the amount of money a candidate may spend in attaining the nomination; and (3) its funding base, the designation of one dollar of yearly tax, is completely optional with the taxpayer.

The plan also will probably encourage splinter parties and an increase in the number of presidential candidates.[82] Whether this is a desired effect depends on one's political philosophy, but Tax Checkoff certainly provides a better opportunity for a candidate with limited financial support to campaign for the presidency. In addition, because Tax Checkoff provides the candidate with a new source of funds, it might reduce his reliance on the large contribution. But such an effect is less than certain because the candidate or party must still be able to absorb all the campaign costs incurred prior to the commencement of the period when he begins to benefit from Tax Checkoff.

If a candidate is to benefit under the plan, he and his authorized committees must certify to the Comptroller General that they will not incur qualified campaign expenses in excess of the aggregate payments he is entitled to, and that no contribution to defray qualified expenses will be accepted, unless the Checkoff fund is insufficient to cover them.[83] This provision thus places a ceiling on campaign expenditures during the period when the candidate receives

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Dealer (Cleveland, Ohio), Nov. 23, 1971, at 3, col. 1. Under section 9006(a), the Secretary of the Treasury is to establish a separate account for each political party and make payments into these accounts after certification by the Comptroller General under section 9005(a). Prior to certification, the Comptroller General must examine the records furnished by the candidates who are seeking Tax Checkoff funds. In addition, after each presidential election, the Comptroller General is required by section 9007 to make a thorough audit of each candidate to ensure that the party: (1) did not incur expenses in excess of the allotment allowed by section 9004; (2) did not accept contributions in addition to Tax Checkoff; and (3) did not use the payments for other than campaign expenses. If violations are found, the Comptroller General must demand appropriate repayments. Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. VIII, § 9007(b).

[81] *Id.* § 9002(12).

[82] A small party could not receive payments from the fund and then not use the money for campaign expenses, because the Comptroller General must audit the expenses after each presidential election and demand repayment if the money is not used for campaign expenses. *Id.* § 9007(a)-(b).

[83] *Id.* § 9003(b)-(c).

the Tax Checkoff funds — a period when a candidate's media expenses are at their peak. It is unlikely, however, that this limitation would significantly impede a candidate since it is at least high enough to permit continued spending at present levels.

Tax Checkoff also provides for a comprehensive system of financial disclosure administered by the Comptroller General's office. The eligible candidates must submit to the Comptroller General periodic, detailed statements as to the qualified expenses incurred by them and their authorized committees.[84] At a reasonable time after the election, the Comptroller General must submit a full report to the Senate and House of Representatives.[85] In addition, he is authorized to prescribe such rules and regulations, to conduct such examinations and audits, to conduct such investigations, and to require the keeping and submission of such books, records and information as are necessary to carry out his function.[86] In vesting the Comptroller General with the administration of the plan's substantive provisions, Congress has alleviated many of the problems associated with the self-policing mechanisms of prior legislation.

Another major attribute of the plan lies in its enforcement mechanism, especially with respect to those who have standing to allege a violation. The Comptroller General, the national committee of any political party, and *individuals eligible to vote* in presidential elections are authorized to institute actions in the district courts to implement any provision of the law.[87] This broad grant of standing goes a long way towards creating effective enforcement and obviating the problems of partisanship which existed under previous legislation that authorized only the Justice Department to bring suit. Regarding any certification, determination or other action by the Comptroller General, any interested person has the right to the judicial review of such action in the Court of Appeals for the District of Columbia.[88] The act also provides criminal sanctions for viola-

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[84] *Id.* § 9008.

[85] *Id.* § 9009(a).

[86] *Id.* § 9009(b).

[87] *Id.* § 9011(b)(1) (which states: "[t]he Comptroller General, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provision of this chapter.") It appears from this that any individual bringing suit would have available a broad scope of remedies, possibly including damages or even an injunction to prevent an elected official from taking office.

[88] *Id.* § 9011(a).

tions of various substantive provisions.[89] The important point, however, is that the enforcement provisions are no longer mere placebo.

The Tax Checkoff plan is undoubtedly a major step towards reforming the entire area of campaign finance legislation. Nonetheless, it was never intended to be a comprehensive overhaul of existing legislation, and in fact, most likely owes its existence to the need of the Democrats to work out some means to facilitate their campaign financing and their tactical ploy of tieing the proposal to legislation which the President would not veto.[90]

Almost buried by the controversy over Tax Checkoff is a significant improvement in campaign finance legislation. Title VII of the Revenue Act of 1971 provides for limited tax credits and deductions. An individual taxpayer is allowed a credit against his tax of up to $12.50[91] or, in the alternative, a deduction of up to $50.00.[92] These provisions, applicable to the 1972 elections,[93] have the potential to expand the contribution base by providing an incentive to the small contributor. In practice, however, the effect of these tax incentives will be minimal unless they receive more media coverage, because the taxpayer will be unaware of the various options available to him.

IV. The Campaign Act of 1971

Finally, after considerable legislative manipulation, President Nixon signed into law the Federal Election Campaign Act of 1971,[94]

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[89] *Id.* § 9012.

[90] *See* note 72 *supra.*

[91] Act of Dec. 10, 1971, Pub. L. No. 92-178, tit. VII, §§ 41(a), (b)(1).

[92] *Id.* § 218.

[93] *Id.* § 703.

[94] Act of Feb. 7, 1972, Pub. L. No. 92-225. The legislative path of the Federal E'ection Campaign Act of 1971 took well over a year from introduction to enactment. The actual beginning of Senate Bill 382 stems from the veto of Senate Bill 3637 by President Nixon on October 12, 1970. 6 WEEKLY COMP. PRES. DOCUMENTS 1367. Senate Bill 3637 permanently suspended the equal time requirement of section 315(a) of the Federal Communications Act of 1934 [47 U.S.C. § 315(a) (1970) (originally enacted as Act of June 19, 1934, ch. 652, tit. III, § 315, 48 Stat. 1088)] which, for presidential campaigns required broadcast stations to charge candidates at their own established lowest unit rate for comparable commercial time; and placed a ceiling on the amount of money candidates for federal elective office, the offices of governor or lieutenant governor, or anyone on their behalf could spend for radio and television time. President Nixon vetoed this bill, calling for more comprehensive reform in the area of campaign finance, rather than a bill dealing only with media advertising.

Early in January 1971, several campaign reform bills were introduced in the Senate. During the March hearings, the major controversies concerned the possibility of repealing the equal time requirement of the Federal Communications Act of 1934, the need for a spending limitation, and the proper mechanism for public disclosure. On August 5, 1971, the Senate passed Senate Bill 382 by a vote of 88 to 2 which repealed the equal time requirement with respect to presidential and vice presidential candidates.

which — in addition to establishing new substantive provisions — repealed the Federal Corrupt Practices Act and repealed or amended certain sections of the Election and Political Activities Laws. The act is unique in that it is the first piece of legislation attempting a comprehensive overhaul of the campaign finance laws. While it contains numerous provisions, the Campaign Act is primarily directed at campaign expenditures, especially those involving the various communications media.[95] The act is structured in four parts: Title I requires that broadcast stations give reduced rates to legally qualified candidates and establishes an aggregate ceiling on a candidate's expenditures; Title II is a series of amendments to the Election and Political Activities Laws, including limitations on expenditures from the candidates' personal funds, a repeal of the maximum contribution and expenditure restrictions, and a strengthening of the prohibition on contributions by national banks, corporations and labor unions; Title III is original legislation establishing a detailed system

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in both primary and general elections, and set a spending limitation of five cents times the number of potential votes for broadcast advertising and an equal amount for non-broadcast advertising. Senate Bill 382 also delegated enforcement of the disclosure requirements to an independent Federal Elections Commission, composed of members appointed by the President, with the advice and consent of the Senate for relatively long terms.

Just as the House was to take up this campaign reform bill, the bitter partisan controversy surrounding Tax Checkoff forced its postponement, thus precluding enactment until December when the House passed a bill significantly different from the Senate-passed bill. The House-passed bill failed to include any repeal of the equal time requirement and divided the disclosure duties with the Clerk of the House, the Secretary of the Senate, and the Comptroller General rather than the Federal Elections Commission. In the Senate-House conference, the Senate receded on both of these major provisions, indicating that the Federal Election Campaign Act would be substantially weaker than the Senate-passed bill.

The major reason for the failure to repeal section 315(a) was that President Nixon threatened a veto unless the repeal was extended to all candidates for federal office, rather than just President and Vice president. Congress, probably unwilling to give free air time to their lesser known opponents, decided that the best course was to leave section 315(a) intact.

The Federal Elections Commission, originally a component of the administration-supported Scott-Mathias bill, was included by the Senate despite Democratic opposition. As administration support for the independent commission waned, however, the supervisory function was embodied in more traditional organs: the Secretary of the Senate, the Clerk of the House and the Comptroller General.

Finally, on February 7, 1972, President Nixon signed the Federal Election Campaign Act of 1971 (Pub. L. No. 92-225) into law. The law took effect on April 7, 1972, thus exempting the New Hampshire, Florida, Illinois and Wisconsin primaries from its provisions.

95 Communications media include "broadcasting stations, newspapers, magazines, outdoor advertising facilities and telephones." Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I, § 102(1).

of disclosure of federal campaign funds; and Title IV is basically a repeal of the Federal Corrupt Practices Act.[96]

A. *Title I*

Title I of the Campaign Act strives to halt the spiraling cost of political campaigning by requiring broadcast stations, during the 45 days preceding the primary and the 60 days preceding the general election, to charge the lowest unit rate that the station would otherwise charge for the same class and time of advertising.[97] But this will not really diminish broadcast expenditures as much as anticipated because most stations already give discounts to political candidates.[98]

Originally, the Campaign Act was drafted to include, as well, an amendment to the Communications Act of 1934 that would repeal the equal time provision[99] — which requires that, if a broadcast station gives free time to one candidate, it must give an equal amount of free time to each of the other candidates, including those of minor parties.[100] The purpose of the amendment, in addition to aiding the reduction of broadcasting expenditures, was to give candidates for public office greater access to the media so that they could better explain their stand on the issues and more completely inform the voters.[101]

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[96] 2 U.S.C. §§ 241-56 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

[97] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I, § 103. This is an amendment to the Communications Act of 1934 [47 U.S.C. § 315(b) (1970)] which stated that "the charges made for the use of any broadcast station for any of the purposes set forth in section 315 may not exceed the charges made for comparable use of the station for other purposes." Under section 315(b), political candidates were often charged more for the same amount of space or time than were major advertisers. Thus, the amendment ensures that the lowest advertising rate will always be charged.

[98] CBS network stations already charge the lowest net rate. *1971 Hearings on S. 382, supra* note 4, at 328 (letter from Frank Stanton, President of CBS, to Senator Hugh Scott, Feb. 12, 1971). ABC gives a 33 percent discount. *Id.* at 329 (letter from Everett Erlich of ABC to Senator Scott, Feb. 12, 1971). NBC gives a 50 percent discount. *Id.* at 408 (testimony of Julian Goodman, President of NBC).

These discounts also exist on a non-network basis. A survey of stations in the Cleveland area (compiled by the author from conversations with advertising managers at Cleveland radio stations WKYC, WJW and WEWS) found discounts ranging from 25 to 50 percent for political candidates.

[99] 47 U.S.C. § 315(a) (1970).

[100] S. 382, 92d Cong., 1st Sess. § 101(a)(1) (1971).

[101] Section 315 (a) of the Federal Communications Act of 1934 — the "equal time" provision — was suspended in 1960 for presidential candidates to allow the Nixon-Kennedy debates. S.J. RES. 207, 86th Cong., 2d Sess., 106 CONG. REC. 17739 (1960). Without such suspension the networks would have had to give all the minor party candidates equal time.

The repeal of the equal time provision most likely would have achieved these results, and Congress apparently missed an opportunity to significantly lower political broadcast expenditures when it dropped the repeal amendment from the final version of the act.[102] While Congress' failure to act is primarily attributable to political exigencies, it would also seem that a repeal of the equal time provision would have conflicted with the policy and rationale behind the prohibition against political contributions by corporations. A radio or television station permitted to give unrestricted amounts of free time to candidates of their choice, without reciprocal treatment to others, would be no different than the corporate body of that station directly contributing cash to the candidate.

The spending limitations imposed by Title I provide that a candidate may spend for the use of communications media the greater of: (1) $50,000; or (2) 10 cents multiplied by the voting age population[103] of the electorate.[104] And the candidate is permitted to spend up to 60 percent of this amount on the broadcast media.[105] In order to take account of inflationary cost increases, the act provides for periodic adjustments to the spending formula based on the Consumer Price Index.[106] Because of the broad definition of the term

As the table below illustrates, little free time is presently being offered to political candidates.

Free Time to All Candidates on TV

Year	Hours and Minutes
1956	29:38
1960	39:22
1964	4:28
1968	3:01

H. ALEXANDER, *supra* note 6, at 102.

[102] If the equal time provision had been repealed, CBS would have offered 8 hours of free network time to each party. NBC pledged an additional 4 hours to each party. *1971 Hearings on S. 382, supra* note 4, at 388, 408.

[103] Voting age population is defined as the resident population 18 years and older. Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I, § 102(5).

[104] *Id.* § 104(a)(1)(A). Under section 104(a)(1)(C)(5), during the first week of January in each year, the Secretary of Commerce "shall certify to the Comptroller General and publish in the Federal Register an estimate of the voting age population of each state and congressional district for the last calendar year ending before the date of certification."

[105] *Id.* § 104(a)(1)(B). Under section 104 of the Senate bill, the candidate, at his discretion, could spend between 30 and 70 percent of his total allocation on broadcast advertising.

[106] *Id.* § 104(a)(4). The mechanism for adjustment of the spending limitation formula is detailed in section 104(a)(4)(B). "At the beginning of each calendar year . . . , the Secretary of Labor shall certify to the Comptroller General and publish in the Federal Register the per centum difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period."

"communications media,"[107] these limitations cover all the important kinds of campaign media advertising.

Critical to an understanding of the mechanics of the spending limitations, is the separation of primary and general election contests. Each primary, general, special or run-off election is treated as a separate election and has a separate expenditure limitation applicable to it. And for all candidates, other than presidential, the limitations applicable to the use of the communications media are the same for both a primary and a general election;[108] *i.e.*, 10 cents times the number of voters or $50,000, whichever is greater. Thus, a typical candidate for the Senate would be permitted to spend a total of 20 cents per eligible voter, or $100,000.[109]

In the case of a presidential candidate, the separate election concept is equally applicable, but the aggregate amount of his spending limitation is allocated on a state-by-state basis. A presidential candidate may spend, for use of the communications media in a state primary, an amount equal to that available to a Senate candidate from that state.[110] And for the general presidential election, the limitations on the use of the communication media in any one state are likewise based upon the eligible electorate in that state.[111]

The concept of an aggregate expenditure ceiling is not new, as evidenced by the discussion of the Federal Corrupt Practices Act. But the crucial questions regarding any such scheme still remain: is a ceiling advisable at all; and if so, are the given limitations workable within the realities of campaign finance. In his testimony before the Communications Subcommittee holding hearings on the act, Herbert Alexander, a leading expert on campaign finance, stated that an aggregate ceiling would favor the incumbent candidate while the absence of a ceiling would conversely permit the high spending usually necessary to challenge an incumbent.[112] Rather than a ceiling, Alexander favored the idea of a publicly subsidized minimum amount sufficient to guarantee a candidate adequate expo-

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Then the amounts determined under the spending limitation formula will be increased by the per centum difference.

107 *See* note 95 *supra* & accompanying text.

108 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. I, § 104(a)(2).

109 The spending limitations for each election must be accounted separately. Thus, a candidate could not "save up" from the primary and then spend more than the $50,000 or 10 cents per voter limitation in the general election.

110 *Id.* § 104(a)(3).

111 *Id.* § 104(a).

112 *1971 Hearings on S. 382, supra* note 4, at 644-45 (testimony of Herbert Alexander).

sure to the public.[113] But Alexander's criticism may be less pertinent than it appears at first blush: even with no effective spending limitations, there has been a very high rate of incumbent reelection.[114] Consequently, the imposition of a ceiling should not portend any significant increase in that rate.

Overall, the most persuasive argument for a ceiling is the continuing upward spiral in the cost of running for office. The problem, then, is to create a ceiling which curbs rising costs but is high enough to permit the challenger to adequately present himself to the public. The major difficulty in ascertaining whether spending limitations are realistic is the unavailability of appropriate statistics concerning past expenditures. One recent survey shows that 70 percent of the U.S. Senators spent over $100,000 on their last campaigns, 40 percent spent over $200,000,[115] and three of every 10 members of the House spent over $60,000.[116] But these figures are difficult to assess in terms of the Campaign Finance Act because they reflect total campaign expenditures — including salary and travel expenses and public opinion polls — while the act regulates only expenses for the communications media.

Although few statistics are available to provide an overall analysis of the Campaign Act's per-vote formula for computing the ceiling, a partial study has been made which compared 1970 broadcast advertising expenditures by Senate candidates with the highest possible expenditure for broadcast advertising available to the candidate under the Campaign Act.[117] The comparison indicated that the typical candidate must decrease his spending for broadcast advertising in order to comply with the new law, in direct contrast to the upward spiral of campaign spending that currently exists.[118]

The present broadcast spending limitation is certainly more reasonable than that provided under the defunct Federal Corrupt Practices Act.[119] Still, because candidates will be required to adjust their campaign expenditures downward, emphasis must once again be placed on the need for a workable system of disclosure and enforcement to prohibit a candidate from violating the new law.

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[113] *Id.*

[114] From 1954 to 1968, 85 percent of all Senators who ran for reelection won, while 92 percent of all House members who ran for reelection won. TWENTIETH CENTURY FUND REPORT, *supra* note 24, at 3.

[115] The statistics quoted are cited in *Hearings on S. 2876 before the Committee on Commerce*, 91st Cong., 1st Sess., ser. 91-29, at 51 (1971).

[116] *Id.*

[117] *1971 Hearings on S. 382, supra* note 4, at 612 (testimony of Professor David Adamany of Wesleyan University).

B. *Title II*

The amendments to the Election and Political Activities Laws constituting Title II of the Campaign Act contain several substantial revisions of campaign finance laws, including: (1) a repeal of the limitation on the amount of individual contributions; (2) a limitation of the amount of expenditures a candidate may make from his personal funds; (3) a redefining of "political committee" to do away with the requirement of operating in two or more states; (4) an amendment of the prohibition against contributions from corporations and labor unions; (5) a redefining of "election" to include primaries; and (6) an expansion of the definition of political contribution and expenditure.

The most significant of these revisions, in terms of the earlier discussion concerning the problems associated with the large individual contribution, is the repeal of the $5,000 limitation for anyone making a political contribution.[120] It would seem that this change directly contradicts the rationale behind the reform concept of protecting against the dangers of the large individual contribution. In committee, the following reasons were put forth to justify the repeal of the old limitation: (1) such a limitation is probably uncon-

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Comparison between actual amounts spent on broadcast media by senatorial candidates in the 1970 general election and the permissible broadcast spending the limitation applicable to senatorial candidates under Pub. L. No. 92-225.

State	Individual Candidate 1970 Expenses	Pub. L. No. 92-225	Change Difference
Alaska	34,006	31,290	-2,716
Arizona	85,388	63,988	-21,400
Hawaii	64,954	31,290	-33,664
Indiana	353,012	181,847	-171,165
Missouri	231,518	168,027	-63,491
Nevada	73,788	31,290	-42,498
New Jersey	391,485	261,689	-129,796
New Mexico	35,451	31,290	-4,161
North Dakota	71,491	31,290	-40,201
Utah	115,312	31,290	-84,022
Vermont	69,668	31,290	-38,378
Wyoming	47,596	31,290	-16,306

Act of Feb. 7, 1972, Pub. L. No. 92-225 (Table A, Legislative History), U.S. CODE CONG. & AD. NEWS 88 (1972). The expenditures for candidates under Pub. L. No. 92-225 were determined by use of the 60 percent allotment for broadcast advertising as allowed under section 104(a)(1)(B) and includes an additional 4.3 percent to reflect inflationary increases.

[118] *See* note 2 *supra* & accompanying text.

[119] *See* note 36 *supra* & accompanying text.

[120] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 203, *amending* 18 U.S.C. § 608 (1970).

stitutional; (2) it is completely unworkable; and (3) full disclosure makes such limitations unnecessary.[121] Although the unconstitutionality argument may be well taken,[122] the most convincing rationale for repeal of any contribution limitation is the presence of the full disclosure requirement (the specifics of which will be discussed shortly). The requirement that campaign contributions be fully disclosed, makes the politician readily subject to any accurate charges of misconduct or conflict of interest, thereby precluding the need to continue restrictions on personal contributions. Moreover, in the context of the entire scheme of campaign finance legislation, if means are provided for obtaining funds which would reduce the reliance on the large contribution, a statutory limitation on personal contributions becomes much less relevant.

One kind of quasi-contribution limitation was included, however. Perhaps with a view towards preventing the situation in which the rich candidate is in a better position to gain access to an elected

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[121] S. REP. NO. 92-229, 92d Cong., 1st Sess. 131 (1971).

[122] For a number of years, various commentators have argued that restrictions on the amount of spending in a political campaign and requirements of public disclosure of contributions and contributors were violations of the first amendment. A recent discussion of this issue comes from Martin H. Redish. Redish, *Campaign Spending Laws and the First Amendment*, 46 N.Y.U.L. REV. 900 (1971).

Redish uses New York Times v. Sullivan, 376 U.S. 254 (1964), in conjunction with Red Lion Broadcasting Co. v. FCC, 393 U.S. 367 (1964), and Mills v. Alabama, 384 U.S. 214 (1966), to support his theory that the "first amendment . . . renders suspect any regulations which have the effect of reducing total amount of expression on public questions." Redish, *supra*, at 910. But despite his theory, Redish admits that the Supreme Court, if faced with the issue directly, might feel that neutralization of the upward spiral of campaign spending would justify such a limited infringement upon free expression of information and opinion — particularly in view of the relatively high ceiling imposed by the new law.

In the area of public disclosure, Redish links United States v. Rumley, 345 U.S. 41 (1953), NAACP v. Alabama, 337 U.S. 449 (1953), Shelton v. Tucker, 364 U.S. 479 (1960), and Talley v. California, 362 U.S. 60 (1960) (cases protecting the privacy of membership lists and organization affiliations), to develop a first amendment right of anonymity which would protect the candidate and political parties from mandatory disclosure. While the validity of such a first amendment right is questionable, there are strong government interests in requiring full disclosure of campaign contributions and contributors. Foremost among these is that full disclosure provides the electorate a measure of protection from political favoritism — both legal and illegal — toward campaign benefactors.

Almost any campaign finance regulation is likely to have some effect on first amendment rights. In the area of spending limitations, it would seem that infringement on the first amendment rights would be minimal if a candidate was forced by the spending limitation to show only 75 television commercials instead of the 100 planned. The compelling governmental interest in giving candidates virtual spending equality and in requiring disclosure to prevent possible corruption seems to outweigh the mild disturbance of first amendment rights.

Perhaps the most interesting comment upon these first amendment questions is the total absence of pertinent case law. Of course, this again attests to the fact that the Federal Corrupt Practices Act was virtually unenforced.

office, Congress set limitations on the expenditures a candidate may make from his personal funds (including those of his immediate family): $50,000 in the case of a candidate for President or Vice-President; $35,000 for a Senate candidate; and $25,000 for a House candidate.[123]

Other amendments in Title II are directed at closing the obvious loopholes existing in the old laws. No longer is a candidate able to decentralize his campaign finances by using state-level committees. Under the Campaign Act, the old definition of "political committee" (requiring operation in two or more states) is replaced by "any individual, committee, association, or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."[124] The ultimate effect of this change will be to centralize a candidate's finances under one major committee, which will incidentally lessen the burden imposed by the reporting provisions.

Unfortunately, Congress failed to close the loophole which permits corporations and labor unions to contribute millions of dollars through political action committees. Indeed, the amendment to the general prohibition against corporate and union contributions actually serves to sanction the committee device by specifically permitting it.[125] This is particularly disconcerting since the amendment also broadens the phrase "contribution or expenditure" as used in this prohibition,[126] and because, without the explicit congressional approval of the political action committee contribution, the courts might have been persuaded to close this blatant loophole.

Title II further provides a criminal sanction for any direct or indirect promise of employment or other benefit by a candidate to a

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[123] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 203. Realistically, however, it seems possible to avoid this restriction by using various relatives, friends and other conduits through which personal funds could be funneled into the campaign. A recent example of just such contribution practices can be seen in the disclosure of campaign contributions and contributors by several Democratic presidential candidates before the effective date of Pub. L. No. 92-225. The sums attributed to numerous contributors are in excess of the $5,000 limitation which existed under 18 U.S.C. § 608 (1970), but the contributors simply spread the contribution among relatives and friends or gave the contributions to various decentralized committees. Although the latter loophole has been eliminated, the former still remains available to the candidate seeking to avoid the personal funds limitation.

[124] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 201, *amending* 18 U.S.C. § 591 (1970).

[125] *Id.*

[126] *Id.*

contributor.[127] But this prohibition, which is a reenactment of a section of the Federal Corrupt Practices Act, is most likely unenforceable.[128] Aside from the obvious evidentiary problems, the idea of what would constitute an indirect promise is extremely vague. Other revisions which merit mention are: the change in the term "election," as used in the Election and Political Activities Laws, to include primary and special runoff elections;[129] and the expansion of the term "contribution" to include the payment of compensation to a person who is working for a political candidate.[130]

C. *Title III*

In the last analysis, it is the disclosure system which will determine whether the provisions of the Campaign Act are adhered to. The disclosure scheme must be capable of determining whether the expenditure ceiling has been violated and of fully informing the public of the nature and amount of the contributions to a candidate's campaign. Thus, the disclosure requirements under Title III of the Act should be examined for their effectiveness in eliminating the reporting deficiencies evident under past legislation and in insulating the enforcement mechanisms from political pressures.

Under the reporting scheme, a "political committee" is defined — as it was for purposes of Title II — as any committee, association, or organization which accepts contributions or makes expenditures in an aggregate amount exceeding $1,000.[131] The minimum dollar requirement seems reasonable since circumvention of any disclosure provision would occur only if a candidate created a multitude of small committees to hide donations — an unlikely possibility considering the potential for impairing the candidate's public image if he violated the spirit of the law in such a way.

Each political committee is required to have a chairman and a

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[127] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 202, *amending* 18 U.S.C. § 600 (1970).

[128] Since section 600 is essentially unenforceable, it might appear that stronger means of preventing favoritism to big contributors is warranted. An absolute prohibition on extending employment or any other benefit to a person who contributed over a certain amount would be one way of minimizing the problem. Of course, this method also prevents qualified contributors from employment; but if the problem of favoritism is deemed serious enough, such broad measures would be desirable.

[129] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. II, § 201, *amending* 18 U.S.C. § 591 (1970).

[130] *Id.*

[131] Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. III, § 301(d). The $1,000 limitation was found to be the most feasible by the Twentieth Century Fund. TWENTIETH CENTURY FUND REPORT, *supra* note 24, at 16.

treasurer.[132] The treasurer must keep a detailed accounting of all contributions in excess of $10, including the amount, the name, and the address of the contributor.[133] Likewise, the treasurer must keep an accounting of all committee expenditures in excess of $100.[134] Each treasurer of a political committee and each candidate must file with a supervisory officer (as designated by the act)[135] formal reports of receipts and expenditures.[136] These reports are due on the 10th day of March, June and September of each year, and on the 15th and fifth days preceding the date of an election.[137]

The reports are extremely detailed and require the disclosure of: (1) cash on hand at the beginning of the reporting period; (2) the name and address of each person who makes a contribution in an aggregate amount in excess of $100 and the amount of such contribution; (3) the total sum of individual contributions; (4) the amount of funds transferred between political committees; (5) any loans to or from any person in an aggregate amount in excess of $100; (6) the proceeds obtained from fund raising events and the sale of campaign materials; (7) all other receipts in excess of $100, if not otherwise listed; (8) the total sum of all receipts; (9) the name and address of each person to whom an expenditure is made in an aggregate amount exceeding $100 and the amount and purpose of the expenditure; (10) the name and address of each person, as well as the amount and to whom an expenditure is made in excess of $100 for personal services or salaries; (11) the total sum of expenditures made; (12) the amount and nature of all debts and obligations; and (13) such other information as required by the supervisory officer.[138]

Furthermore, additional comprehensive reports must be filed with the Comptroller General concerning the financing of national party conventions.[139] If these accounting and reporting requirements are adhered to, they should provide all the information necessary to determine any spending or contribution violations. And the exten-

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132 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. III, § 302(a).

133 *Id.* § 302(c).

134 *Id.* § 302(d).

135 *Id.* § 301(g).

136 *Id.* § 304(a).

137 *Id.*

138 *Id.* § 304(b)(1)-(13).

139 *Id.* § 307. The report on convention financing must be filed not more than 60 days following the convention. The Comptroller General is to prescribe requirements for the report, which must include the sources of campaign funds and the purposes for which such funds were expended.

sive disclosure requirements should in themselves be sufficient to discourage any such violations.

The supervisory officer to whom the above reports are made is required to develop an indexing and filing system for the reports, publish the reports no more than two days after they are received, and prepare a comprehensive annual report.[140] The supervisory officer must also report "apparent violations" to the Justice Department.[141] Moreover, any person (including a corporation, etc.) is given standing to file a complaint with the supervisory officer.[142] Upon such a complaint, the officer must determine if there is a substantial reason to believe that a violation has occurred. If so, he is to expedite an investigation; and if a hearing shows that "any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation . . . the Attorney General . . . shall institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order . . . ."[143]

On its face, this procedure seems to provide for a relatively adequate system of enforcement. Yet it masks several problems, the most important being that the supervisory officer is the Secretary of the Senate or the Clerk of the House, for Senate and House candidates, respectively.[144] Consequently, with the exception of presidential candidates, whose supervisory officer is the Comptroller Gen-

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140 *Id.* § 308(a).

141 *Id.* § 308(a)(12).

142 *Id.* § 308(d).

143 *Id.*

144 *Id.* § 301(g).

The Secretary of the Senate and the Clerk of the House are not isolated from politics. (*Cf.* U.S. GOV'T. ORG. MANUAL 1971-72, 19-20 (1971), which describes the duties of these individuals.) In fact, the very people whom they must regulate and investigate under the Campaign Act elected them to their positions. Professor David Adamany of Wesleyan University expressed the problem of using the Secretary of the Senate and the Clerk of the House as Supervisory Officers:

> For decades the Secretary [of the Senate] and the Clerk [of the House] have been filing officers under the existing Federal statutes. In these decades a pattern has been created of accepting reports without question and simply making them available to the public. I do not believe that a change in the statutory rules will change the deeply ingrained view that the Secretary and the Clerk are merely filing officers. An Elections Commission, on the other hand, because it is freshly created, would be more likely dramatically to alter the reporting forms effectively to obtain information. It would also because of its bi-partisan composition, be more likely to investigate thoroughly and report violations in the reports.

1971 Hearings on S. 382, *supra* note 4, at 609 (testimony of Professor David Adamany of Wesleyan University).

eral[145] (a long-term appointee), candidates must report to partisan officers who are not only subject to political pressures but are also chosen for their respective positions by the very persons whom they have the duty to investigate.

The Senate version of the Campaign Act would have given the role of the supervisory officers to an independent Federal Elections Commission consisting of six members appointed by the President to serve staggered 12-year terms.[146] Although not as potentially effective as the Senate version, the conference committee substitute is not as ineffective as its predecessor under the Federal Corrupt Practices Act, where the Clerk of the House and the Secretary of the Senate were also entrusted with the administration and enforcement of the disclosure provisions. The principal distinction between the two is that, under the Campaign Act, the respective officials acting as supervisory officers are *required* to publish the individual reports as they receive them, and also to publish a comprehensive annual report.[147] Under the Federal Corrupt Practices Act, the officers merely held open for inspection those reports that had been submitted.[148] The publication requirements are a considerable improvement and should be sufficient to counteract any laxness on the part of the supervisory officers. Similarly, the officers' diligence should be encouraged by the provision allowing any person to charge a violation and file a complaint with the supervisory officer — although this mechanism is not as strong as it might be because the officer still has the unfettered power to conclude that there is no substantial reason to conduct an investigation.[149] Again, however, the requirement of public disclosure of the campaign finance reports should act to guard against nonaction where the facts warrant an investigation.

The Justice Department remains the ultimate repository for enforcement of the Act's provisions; and if criminal action is warranted, it is always within the discretion of the Department to prosecute. Unfortunately, serious problems are presented by the highly political nature of the actions involved and the political character of the Justice Department itself. But the Campaign Act does provide that the Attorney General *shall* institute a civil action if, in the judgment of the supervisory officer, a violation has occurred or is

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145 *Id.*

146 S. 382, 92d Cong., 1st Sess. § 310 (1971).

147 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. III, § 308(a).

148 2 U.S.C. § 247 (1970), *repealed by* Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. IV, § 405.

149 Act of Feb. 7, 1972, Pub. L. No. 92-225, tit. III, § 308(d).

about to occur.[150] This terminology indicates that the Justice Department has no discretion in filing suit, although this interpretation is partially undercut by the precondition of the supervisory officer's determination. Once again, however, public disclosure should help secure a fair and impartial determination.

Nevertheless, the conference committee compromise deleting the machinery of the Federal Elections Commission represents a substantial shortcoming in the Campaign Act. The establishment of a purely independent and politically autonomous commission,[151] as contained in the Senate version, would have ensured the effective enforcement of the Campaign Act's regulatory provisions.

V. CONCLUSION

Virtually any new legislation would be an improvement over the ancient, unrealistic and unenforced campaign finance laws which have existed since 1925. Doubts remain, however, as to how substantial an improvement the Campaign Act is over previous legislation, and whether the new law is a complete answer to the problems of campaign finance, or whether it is merely a stop-gap means of regulation.

The new law creates relatively realistic spending limitations in place of the impracticably low limits set by the Federal Corrupt Practices Act, which led to nonenforcement and commonplace avoidance. The law also centralizes campaign finance under one committee for each candidate, rather than encouraging a system of decentralized committees which were immune from effective regulation and were speciously deemed to operate without the candidate's knowledge. The crux of the new legislation is a system of public disclosure requiring that reports be filed and published before the general election. In addition, the new law gives any individual standing to file a complaint alleging a campaign violation.

Despite these improvements, however, the Campaign Act is hampered by several problems. Given spending limitations which, although realistic, will represent a spending decrease for most candidates, the legislation should have attempted to lower campaign costs (presuming, as Congress did, that campaign activity should be maintained at its present level). The second problem with the new legislation is the failure to vest disclosure supervision, with respect to congressional candidates, in an independent commission. But re-

150 *Id.* § 308(d)(1).

151 S. 382, 92d Cong., 1st Sess. § 310 (1971).

gardless of these shortcomings, the Federal Election Campaign Act has the potential to curb excessive campaign spending and provide a workable system of public disclosure.

In assessing the Campaign Act as a final solution to the problems of campaign finance, it is clear that the legislators could have gone further. But it must be remembered that — unlike other regulatory areas — Congress here is regulating its own conduct. Thus, a somewhat "soft" approach may be politically unavoidable and the Campaign Act of 1971 may be the best regulation of campaign finance that could have been enacted.

As long as campaign finance is based on a system of private contributions, the large contributor will have the power to influence the politician. One alternative to the present system of financing campaigns is a program of public subsidization, which will be available for the 1976 presidential election under Tax Checkoff. Although there is some sentiment for repealing Tax Checkoff, hopefully the plan will be allowed to take effect, if only to give the legislators a unique opportunity to compare the effectiveness of a partial system of public subsidization with that of a relatively well-regulated system based on private contributions.

JOEL M. COCKRELL