

1966

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Recommended Citation

Lobel, Martin, "Federal Control of Campaign Contributions" (1966). *Minnesota Law Review*. 1902.
<https://scholarship.law.umn.edu/mlr/1902>

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Federal Control of Campaign Contributions

The author argues that the political system suffers several adverse consequences as a result of inadequate regulation of campaign contributions. For example, the present controls fail to provide incentive for mass contributions; accordingly, the influence of large contributors has not been curbed. The author rejects the sanction approach, now in use, in favor of structuring the system to encourage participation of large numbers of citizens. He then submits that contributions of substantial amounts should be more fully publicized, tax credit should be allowed for small contributors on an experimental basis, a direct government subsidy should be granted to political parties, and candidates should be able to deduct personal, unreimbursed campaign expenditures.

Martin Lobel*

I. MONEY AND POLITICS

A. LAW AND REALITY

Effective law reform must be based on a realistic concept of what exists, what can reasonably be accomplished, and what may be the probable consequences of a change in the law. This is particularly true when dealing with federal control of campaign contributions, reform of which is long overdue. Those who pass upon such laws are the ones who are most affected by them. More importantly, the consequences of ill-considered tampering with electoral processes favor a conservative approach. It is for these and other reasons which will become apparent that no attempt to "reform" present laws controlling campaign contributions should be undertaken without understanding how money flows through and affects our political system.

B. EFFECT OF MONEY ON THE OUTCOME OF ELECTIONS

Putting aside for the moment the candidate who, for lack of money, cannot enter the race for nomination,¹ the effects of money in a campaign will vary depending upon the nature of the

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1. See § I. D. *infra*.

campaign, the availability of money at critical junctures, and the rational allocation of available money.

"A campaign is a means to win only where the net result of all other factors will put within a narrow range opponents' totals of prospective votes."² Thus, the closer the contest, the more significant every contribution becomes, and the greater becomes the obligation felt by a candidate to contributors of critical sums. This problem increases as the size of the constituency decreases; it is almost axiomatic in politics that the smaller the constituency, the greater the influence a given amount of money attains.

Rational planning of campaign strategy is extremely difficult because of uncertainty as to whether enough money will be available when it is needed. Campaigners do not know when or how much money they will receive. Usually most contributions come at the end of a campaign when there is no time to change existing plans to spend the sudden influx of money rationally and rapidly.³ Indeed, many defeats can be attributed to lack of money at the right time, although the total monies received would seem quite sufficient.⁴ A candidate cannot, unless he can personally assume the expenses,⁵ run a deficit without some reasonable expectation of receiving sufficient contributions to cover it. Although this latter problem is quickly solved for the winner,⁶ many candidates, particularly those in party primaries, cannot reasonably rely upon this expectation.

The ebb and flow of funds reflect public interest in a campaign and contributors' expectations of the probable winner. Small contributions tend to reflect public interest, thus there is usually a spurt of such contributions at the beginning of a campaign and again at the end—when interest is highest.⁷ On the other hand, large contributions, which make up the bulk of money

2. BULLIT, *TO BE A POLITICIAN* 69 (1961).

3. See LEVIN, *THE COMPLETE POLITICIAN* 238-39 (1962).

4. See *Id.* at 231.

5. By so doing a candidate might run afoul of the statutory limitation upon the amount he can spend. See 43 Stat. 1073 (1925), 2 U.S.C. § 248 (1964). Although federal limitations are not applicable to candidates for nomination or to presidential candidates, whether this action would constitute a violation by congressional candidates is quite another matter. Most states impose lower limitations on candidate expenditures than does the federal statute; and many state statutes apply to campaigns for nomination. See ALEXANDER & DENNY, *REGULATION OF POLITICAL FINANCE* 59-61 (1966).

6. See ALEXANDER, *FINANCING THE PARTIES AND CAMPAIGNS, THE PRESIDENTIAL ELECTION AND TRANSITION, 1960-1961* 116 (1961).

7. See LEVIN, *op. cit. supra* note 3, at 238-39.

contributed, are more likely to "fluctuate according to the contributors' estimates of who is most likely to win."⁸ This leads to a form of self-fulfilling prophecy: the more money a candidate has, the more likely he is to win, and the more likely he is to receive even more money.⁹

Money alone, however, will not win an election. Although "most, but by no means all, winners had had the longer campaign purses . . . it seems equally clear that in the really great elections, the presidential sweepstakes, the size of the campaign chest does not in itself control the outcome"¹⁰ However, the real problem lies not in presidential elections, but in state and local elections, where money exerts greater influence because of the smaller size of the constituency and a greater need to purchase access to the public through mass media. But even here there are many factors inherent in a campaign which "may make it impossible to 'buy' an election."¹¹

Actually, the most important effect of money in a political campaign is not that the candidate with the most money will win, but that the candidate with the lesser amount of money will not be able to present his case to undecided voters.¹² Although most voters have made up their minds even before a campaign begins,¹³ those who have not are usually hardest to reach and inform. To do so takes a great deal of money or time, and since the poorer candidate cannot afford the money, he must expend more time campaigning to equalize his opponent's advantage. Probably many more potential candidates do not run because they cannot afford to take off the necessary time from work.

8. *Id.* at 239.

9. See *id.* at 240.

10. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 564 (4th ed. 1958).

11. LEVIN, *op. cit. supra* note 3, at 242-43. For example: Some well-heeled candidates may be inept when it comes to planning strategy; other candidates, who may have that sixth political sense, may be hindered in executing strategy by the uneven flow of funds. Some candidates waste sums on irrational or ineffective tactics. Even though big money can buy the best public-relations men and the best pollsters, the fact remains that even the "experts" do not yet know enough about the relative effectiveness of the various mass media in politics or about the "correct" political style to anticipate and control the responses of the electorate with precision. . . . Therefore, although one can say that a candidate who does not have money is clearly not in the running, it is not so easy to translate money into votes.

12. KEY, *op. cit. supra* note 10, at 564-65.

13. See Bicks & Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U.L. REV. 975, 976-77 (1953). See also CAMPBELL, *THE AMERICAN VOTER* (1960).

C. PARTY STRUCTURE

The most characteristic feature of the American party system is its political and financial decentralization.¹⁴ Although both major parties tend naturally to huddle in the center of the ideological spectrum,¹⁵ decentralization tends to obscure those ideological differences which may exist.¹⁶ Thus, since local candidates may or may not, depending upon local conditions,¹⁷ represent the ideological position taken by the national party, voters are often deprived of an opportunity to express their opinion about major national policies.¹⁸ One should not, however, belittle local interests, which a candidate should represent. Because of tension between national and local needs, all too often the former must give ground to the latter because party discipline is lacking. Even if alienated local money¹⁹ could be replaced on the national level, there should be no need to fear a strong national party because local candidates must represent local views in order to be elected.

Many causes for this decentralization may be cited: the federal system, combined federal and state elections,²⁰ lack of a

14. The American political system is diffused in two ways. *Vertically*, the parties are composed of layer upon layer of precinct, city, county, congressional district, and national committee, each layer tending toward autonomy and even commanding individual loyalties—and receiving individual contributions—based upon diverse personal and often parochial social, economic, and political interests. *Horizontally*, candidates, party and non-party committees, and labor and miscellaneous committees all campaign side by side, sometimes cooperating, sometimes not—but all competing for scarce political dollars.

ALEXANDER, RESPONSIBILITY IN PARTY FINANCE 31 (1963).

15. See HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

16. See Bicks & Friedman, *supra* note 13, at 997-98.

17. Since the parties lack funds to help individual candidates, most campaigns tend to reflect local conditions and needs more than policies of the national parties. Because a candidate cannot risk offending a large local contributor, all too often national party policy does not even get a hearing.

18. It must be realized, however, that the two parties will probably never have widely diverging platforms or programs for very long. The need to win forces politicians to bend to the desires of the people. See DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

19. The problem of alienating sources of local contributions is not as clear-cut as it might seem. Loss of money is important to a candidate, but he is even more concerned that lost money should not go to his opponent. Thus a candidate is more likely to follow a national party policy when his vote costs him money than when that vote will cost him money which will go to his opponent.

20. Combined federal and state elections create competition for contributions in which it is easier for state candidates to raise money. This is due to the greatest possible "return" to the average contributor to candidates for office on the state level.

national constituency, lack of effective national party sanctions or incentives,²¹ and laws which limit the amount of contributions each party committee can receive.²² Most of these causes relate to the fact that most campaign money is raised and spent at the local level.²³ Since money flows upward in our party system rather than downward, the parties and candidates must, unless the President is a member of the party, rely primarily upon local sources for their funds. Thus national funds, which could be used to help unify the party, are in short supply. Candidates, who must raise most of the money they need themselves, are thus encouraged to establish their own nonparty committees for this purpose.²⁴ While some justification does exist for such non party committees—they are the best means of garnering contributions from certain groups²⁵—the end results are to accentuate the difficulty of co-ordinating party campaigning and to encourage even more decentralization.

Getting the money from local sources is a difficult process. There is little that can be done to force recalcitrant local committees to contribute to national party coffers.²⁶ Most local committees which have adequate financing see no reason to share their money with the national party, although they appreciate publicity and information furnished them by their national committees, and they are more than willing to ride upon the coattails of a strong national candidate. Another, but usually unspoken reason, is that if a candidate receives money from the national committee rather than the state committee, he will not be dependent upon the state committee. The extent to which ideological divergence between national and state committees operates as a bar to contributions is, however, often overstated.

21. Despite a large degree of decentralization, British political parties have maintained rigid party discipline. See generally MCKENZIE, *BRITISH POLITICAL PARTIES* (1955). However, the British framework is not applicable to the American party system. See Newman, *Money & Elections in Great Britain—Guide for America?*, 10 *WESTERN POL. Q.* 582 (1957).

22. *E.g.*, 62 Stat. 723 (1948), 18 U.S.C. § 609 (1964), discussed in § III. D. *infra*.

23. HEARD, *THE COSTS OF DEMOCRACY* 258 (Anchor ed. 1962).

24. Successful candidates, then, owe their election to a variety of separate committees, rather than to the national party which is responsible for post-election effectuation of the party program. This obligation to local committees, in turn, loosens ties of successful candidates to the national platforms on which they supposedly ran and were elected.

Bicks & Friedman, *supra* note 13, at 997.

25. See § I. E. *infra* for a discussion of this fund raising technique.

26. See ALEXANDER, *op. cit. supra* note 14, at 41.

Most state committees are ideologically neutral or are more concerned with patronage than with ideology. And, since national party ideology must reflect the consensus of those in power in the party, strong ideological conflicts are very rare, except over such issues as race relations, which are likely to divide both parties.

Since the national parties cannot rely upon local sources for funds to enable them to operate on at least a minimal level, they have had to turn to large contributors, fund raising affairs, quotas, and direct mail solicitation. And even here, unless a national party committee has the power and prestige of the President behind it, it will run into competition from the congressional and senatorial party committees which have more to offer to large contributors²⁷ and candidates.²⁸

Given the present situation, there is some doubt whether unified fund raising will significantly unify the parties. The recent experience of the Republican Party, which had a highly integrated fund raising organization,²⁹ indicates that this alone is not sufficient to maintain a unified party.³⁰ Although the Republicans emphasized fiscal efficiency over political unity, aside from and in conjunction with the ideological split, the major reason for the intraparty dissension seemed to be that other organizations were able to offer more money than could regular national party committees.³¹ The Republican National Committee is making strenuous efforts to unify fund raising again and seems to be raising substantial sums of money independently of state committees.³² For the moment, however, all it can do to

27. See Pincus, *The Fight Over Money*, *The Atlantic Monthly*, April, 1966, p. 71, at 75.

28. See *ibid.*

29. In most of the states and in some subdivisions of states a Republican finance committee collects funds which are in turn allocated to the national committee, to the state committee, and to other campaign committees according to their relative need. This mode of operation reduces, although it has by no means entirely eliminated, the multiple solicitation of the same individual for contributions to different party committees.

KEY, *op. cit. supra* note 10, at 548.

30. See ALEXANDER, *op. cit. supra* note 14, at 33.

31. The ideological split contributed to the lack of national party funds, since most contributions from Goldwater supporters went into non-party committees, and most large contributors in the "eastern establishment" donated their money elsewhere. Pincus, *supra* note 27, at 74.

32. See *id.* at 73-74 for a description of the efforts of Ray Bliss, Republican National Committee Chairman. "Last year, more than three million mail appeals brought in \$1.7 million" *New York Times*, Feb. 20, 1966, p. 47, col. 1.

unify the party fiscally is to provide supplemental services, such as research and advertising, and, for a few key candidates, donate money or swing some contributions towards them which they would not otherwise receive. "But the assistance is usually a product of mutual respect and mutual interests already existing, and not of an effort to build party solidarity."³³ Thus it may be said that unified fund raising acts as a significant unifying influence only so long as it can supply more funds than any other source; and so long as the national parties lack a broad, continuing financial base, they cannot fulfill their goal of maintaining unified parties.

D. FINANCIAL NEEDS

That politics today is expensive is a truism,³⁴ but one should not be misled by it. Actually, most of the increased cost of campaigning is attributable to the increased size of the electorate. The cost per vote probably has remained almost stable because of the availability of mass communications media.³⁵

The greatest financial need is that of an individual candidate when running for nomination.³⁶ Unless a candidate is an incumbent or is "politically connected," he must depend upon inefficient short-lived political committees, which usually lack experienced fund raisers and lists of contributors. He must also overcome hesitancy of contributors who are unwilling to donate unless they think he has a good chance of nomination.³⁷ Few worthwhile candidates will run for nomination unless fairly sure of sufficient financial and public support.³⁸

The only alternative for a candidate who cannot raise enough money from the public to wage an effective nomination campaign

33. HEARD, *op. cit. supra* note 23, at 259-60.

34. See *Hearings on S. 227, 604, 1555 and 1623 and S. Res. 141, Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 87th Cong., 1st Sess. 77 (1961)* [hereinafter cited as *1961 Hearings*].

35. BULLIT, *op. cit. supra* note 2, at 67-68. This, however, may be overly optimistic. The leading authority on financing of campaigns, Herbert E. Alexander, estimates that the cost of campaigning in 1952 at all levels totaled about \$140 million. This was increased in 1956 to \$155 million, in 1960 to \$175 million, and finally in 1964 to over \$200 million. ALEXANDER, *FINANCING THE 1964 ELECTION*, 13 (1966).

36. See KEY, *op. cit. supra* note 10, at 542.

37. See *1961 Hearings* 199-200.

38. See *Hearings Before the Special Senate Committee to Investigate Political Activities, Lobbying, and Campaign Contributions on S. Res. 219, 84th Cong., and S. Res. 47, 85th Cong., 84th Cong., 2d Sess. 1210 (1956-1957)* [hereinafter cited as *1956 Hearings*].

is to be born rich. Most competent candidates, of course, are not rich. One exception was John F. Kennedy, who expended about one half million dollars of personal and family resources in his campaign for nomination.³⁹ The really unfortunate part of this is that, while a national nomination is certainly expensive to obtain, the proportion of this cost to the total cost of a campaign is probably less than at the state or district level.

Once a candidate has won nomination, he can count on some help from his party; but he still must bear the responsibility for raising the bulk of his campaign funds himself.⁴⁰ This may result in a candidate's being "bought," although most campaigns are well enough financed to make such "purchases" fairly rare occurrences.⁴¹ Unfortunately, "buying" candidates is not so rare in nomination campaigns, where each sum of money takes on added significance because money is so scarce and the major sources of nomination funds are "political." Thus many candidates are forced to incur unwanted obligations to special interests during nomination campaigns, while during election campaigns, funds from less interested sources are available.

E. FUND RAISING

1. Large Contributions

Although large contributions have often been condemned, perhaps unjustly,⁴² because they interfere with the workings of the democratic process,⁴³ they still remain the largest single source of funds for the parties and candidates. Part of the reason seems to be that the parties have never had enough funds both to wage a campaign and to establish a year round fund raising organization. A more important reason, however, is that the easiest way to raise the necessary money to run a campaign without upsetting the status quo is through large contributions.⁴⁴ Thus,

39. See ALEXANDER, *op. cit. supra* note 6, at 120 for examples of his expenditures.

40. KEY, *op. cit. supra* note 10, at 542. Although there is no doubt that party identification helps to raise funds, one can wonder how much of those funds comes in because a candidate is a member of a particular party, and how much comes in because of his own personality now that he is an officially recognized candidate.

41. See 1956 *Hearings* 1215 (Whitaker).

42. They are one means by which economic interests obtain functional representation. Indeed, "The activities of fund raisers often expose more rational political alignments than do party lines." HEARD, *op. cit. supra* note 23, at 247-48.

43. See BULLIT, *TO BE A POLITICIAN* 68 (1961).

44. For an example of the success of an appeal to large contributors, see Pincus, *supra* note 27, at 74. See 1961 *Hearings* 144 (Morton).

neither parties nor candidates have had much incentive to go beyond large contributors.

Although admittedly understated,⁴⁵ figures from the 1957 Gore Committee Report, the most thorough investigation of campaign spending that has been done, indicate the importance of the large contributor. One individual alone contributed \$73,164; individuals contributing over \$5,000 apiece gave a total of \$3,809,689; those who contributed over \$500 apiece gave a total of \$10,885,562; and 12 families contributed a total of \$1,153,735.⁴⁶ These figures are, however, somewhat misleading because they do not include the "educational expenditures" on behalf of the Democrats by labor unions.⁴⁷ It should also be remembered that since Eisenhower, who was at the peak of his popularity, was running for re-election, the figures overemphasize the normal disparity between resources of the Republicans and Democrats.⁴⁸

2. Political Functions

Political functions, particularly dinners, have been very popular as a means of raising funds. Since a large number of dinners can be held at the same time and linked together by TV, large sums of money can be raised quickly and efficiently.⁴⁹ Dinners are a particularly good fund raising method because people are more willing to contribute if their contributions are visible to their peers.⁵⁰

45. *Report of the Subcommittee on Privileges and Elections of the Committee on Rules and Administration, pursuant to S. Res. 176, of the 84th Cong., 85th Cong., 1st Sess. 4 (1957)* [hereinafter cited as the *Gore Report*].

46. *Gore Report* 12.

47. See dissent of Senator Curtis, *id.* at 25.

48. The influence a President can have on his party's fund raising is exemplified by a recent Republican report which shows a significantly higher *percentage* of large contributions by individuals to the incumbent's party as compared to the "out" party. See *The Sunday Star*, Washington D.C., Dec. 19, 1965, p. A-18, col. 3.

49. For example, the 1960 Republicans' television linkup of eighty-three cities for a "Dinner with Ike" netted \$3,000,000. See ALEXANDER, *FINANCING THE PARTIES AND CAMPAIGNS, THE PRESIDENTIAL ELECTION IN TRANSITION, 1960-61* 130 (1961). Similar dinners were held in 1965 to celebrate Ike's 75th birthday, but netted only about \$200,000. Pincus *supra* note 27, at 74. Part of the reason these dinners failed to raise substantial sums of money is that they did not occur during a campaign. The major reasons, however, are that Eisenhower was no longer President, and there was no reasonable expectation that the Republicans would come back to power in the near future.

50. See 1961 *Hearings* 201 (Bailey, Democratic National Committee Chairman). This is, however, not true of those who contribute to both sides. Indeed, one politician estimated that at least one half of those

Such functions are also an ideal method of "hiding" corporate contributions, particularly when the functions are combined, as they usually have been, with an ad book. The most recent and blatant example was the Democratic Party's plan to hold movie premieres in congressional districts and to hand out a 178 page extravaganza entitled "Toward an Age of Greatness." Ads were sold at \$15,000 per page to such advertisers as eleven of the top twenty-five defense contractors and to many industries under government regulation or which received government subsidies.⁵¹ Such ads probably violated two or three express statutory prohibitions,⁵² and about half the cost of each ad was paid by the taxpayers.⁵³ Even though the Republicans remained silent because a dinner for Senator Everett Dirksen cleared about \$380,000,⁵⁴ a great public furor arose which led to two results. The Democrats decided to contribute the \$600,000 they netted from the ad book to a group established to conduct a nonpartisan voter registration drive,⁵⁵ rather than to use it to register Democrats, as was originally intended.⁵⁶ More important, public furor resulted in passage of a bill which prohibits a tax deduction of the cost of tickets or ads at any affair when the proceeds are likely to benefit any candidate for nomination or election to local, state or national office.⁵⁷ What effect this will have on the future of such affairs is not clear. Although corporation execu-

who attended political dinners were guests of those who purchased tables but did not attend. Whether section 276 of the Internal Revenue Code, which prohibits deduction of the cost of political dinner tickets, will cut too deeply into this source of funds remains to be seen. It probably will not, since much of this money was neither reported nor deducted.

51. See Peirce, *Financing Our Parties*, The Reporter, Feb. 10, 1966, p. 29, at 34.

52. See 18 U.S.C. § 610 (Supp. 1965) (prohibiting corporate contributions); 18 U.S.C. § 611 (1950) (prohibiting contributions from firms doing business with the federal government); 49 Stat. 823 (1935), 15 U.S.C. § 79(1)(h) (1963) (prohibiting contributions from public utilities).

53. Section 162 of the Internal Revenue Code allows a deduction for "reasonable business expenses," presumably including such advertisements. Since the effective tax rate on corporations is 48%, the government is contributing about half the cost. It could, however, easily be shown that the cost of such advertising was not reasonable under almost any standard. The cost per thousand copies for such an ad was \$60, "compared with just over \$5 for distribution to each thousand readers of a national magazine like 'Time'." Peirce, *supra* note 51, at 32.

54. See Pincus, *supra* note 27, at 73.

55. N.Y. Times, March 6, 1966, p. 48, col. 3.

56. See Peirce, *supra* note 51, at 34.

57. Pub. L. No. 368, 89th Cong., 2d Sess. tit. III (March 15, 1966); INT. REV. CODE OF 1954, § 276. See § III. F. *infra* for further discussion.

tives can still buy tickets as individuals, it seems certain that this bill will dampen enthusiasm for such affairs.

3. *Mass Solicitation*

Direct personal solicitation is the most efficient way of raising large amounts of money in small sums from many people. Charities have been very successful in raising the bulk of their money this way because they have many volunteers, charitable donations are accepted as socially useful, and such donations are tax deductible.⁵⁸ However, these elements which make such charitable drives successful are not now present in political fund raising.

Ironically, the national parties, which are most in need of funds, are least able to mount a national door-to-door campaign. At best, the national parties can provide publicity and co-ordinate a national campaign for mass funds. They must rely upon local party organizations for manpower⁵⁹ and organization, without which a campaign cannot succeed. However, most local organizations are hesitant to join such a campaign⁶⁰ and the national parties cannot coerce them because the local organizations control the money supply.

Other problems also would have to be overcome to run a successful fund raising campaign. If a local organization is a personal one, there is no incentive to raise money to be spent on the national level. If there is a hard fight locally, all monies are needed in the local area. In many rural areas the population is too thinly spread to make mass solicitation worthwhile. Many low income urban areas have insufficient political money available to risk walking the streets. And many local fights re-

58. INT. REV. CODE OF 1954, § 170. But there is some doubt as to how influential this deduction is to most small givers, who take the standard deduction rather than itemizing charitable and other deductions. When taken in conjunction with social approval of such donations, however, there is probably some significant psychological impact.

59. [A] paradox exists; manpower rather than money may be a more important factor in winning elections, but money is needed in part because there is not enough manpower; money is needed in part to buy services that are not volunteered. Yet to raise funds from a broad base requires manpower not otherwise readily available.

ALEXANDER, RESPONSIBILITY IN PARTY FINANCE 30 (1963):

60. In most local committees, a few politicians who perform all the tasks and receive all the recognition and power do not want volunteers to upset the status quo. Nor do they want to risk threatening their established sources of money or share the money they raise with the national party. See ALEXANDER, *op. cit. supra* note 49, at 146-48.

quire more money than can be raised locally.

In view of these difficulties, the President's Commission on Campaign Costs "doubted that the parties could in the near future organize themselves to collect enough money in truly small amounts to meet necessary campaign costs."⁶¹ Although this problem may exist at least on the national level, the parties should start to organize such programs. Even if the effort were not financially successful, it would operate effectively to activate large numbers of supporters. Not only would small contributors be likely to feel a vested interest in the success of their party, they would also probably endeavor to share their partisan views. Such an effort could also accomplish the additional desirable result of reaching a large untapped pool of funds. A Gallup poll taken in 1961 indicates that between twelve and seventeen million families would contribute five dollars or more if asked to do so.⁶² Although the results are probably somewhat high because the answer "yes" is a prestige answer, the potential pool would swell as political giving became more respectable. The national Dollars for Democrats fund raising campaign is often cited to show the futility of such mass personal solicitations because only \$121,060 reached the Democratic National Committee.⁶³ But one committee, in Minnesota, showed what could be done if solicitation were seriously attempted: it raised its collection from \$40,000 in 1958 to \$94,000 in 1960.⁶⁴

To be successful, a fund raising drive should have local solicitors, be partisan, take place when partisan feeling is high, and be co-ordinated with a publicity campaign to make political contributions respectable. Getting publicity, at least in presidential election years, should not be difficult.⁶⁵ However, in nonpresidential election years there is less interest, less advertising, and consequently less money raised. Although there may

61. UNITED STATES PRESIDENT'S COMMISSION ON CAMPAIGN COSTS, FINANCING PRESIDENTIAL CAMPAIGNS 17 (1962) [hereinafter cited as PRESIDENT'S COMMISSION].

62. See 1961 *Hearings* 34.

63. ALEXANDER, *op. cit. supra* note 49, at 134.

64. *Ibid.*

65. In 1960 the American Heritage Foundation and the Advertising Council contributed \$12 million of free advertising which urged citizens to contribute to and vote for the party of their choice. This seems to have had an effect on the percentage of voters who contributed. In 1952 only 4% contributed; this increased to 10% in 1956 and to 11.5% in 1960. ALEXANDER, *op. cit. supra* note 49, at 133. These figures, though over-optimistic, may indicate a trend toward making political contributions socially acceptable, which could have tremendous fiscal and organizational implications for the parties.

be some cumulative effect from advertising, and the need for money may be less because no national campaign has to be mounted, this is little solace to the candidate who might have to resort to "fat cats" for money needed to run his campaign. Perhaps the answer lies in a continuing publicity and fund raising drive which would help raise money in off year elections.

Solicitation should be partisan because it is easier to get partisans to volunteer.⁶⁶ For the same reasons, solicitation should take place when partisan feeling is high.⁶⁷ Although partisan feeling is highest just before the election, it is too late to solicit because most of the money should be spent at that time, not collected. The most practical time is approximately two weeks before the election, when money is available early enough so that it can be spent rationally, and partisan feeling has a chance to grow without becoming stale.

Direct mail solicitation may be the easiest way to build a national party membership which can keep the national parties supplied with enough money in small sums to limit significantly the influence of large contributors. Although the parties in the past have expressed doubts as to whether the effort involved was worth the return,⁶⁸ and the Democrats have not had much success with direct mail solicitation,⁶⁹ the Republicans have made this a mainstay of national support, receiving over \$5.8 million in the fall of 1966.⁷⁰

Nor, apparently, is the success of the Republican effort merely a response to special conditions, such as Senator Barry Goldwater's campaign, because in 1965 three million mail appeals brought in \$1.7 million.⁷¹ The Republican National Committee, at least, is convinced that this is not a temporary phenomenon. They expect forty per cent of the Committee's 1966 budget of \$6.1 million to come from six million letters seeking ten dollar contributions.⁷² In addition to increased participation of a mass of people and the independence the Committee has acquired, the plan has proven to be an inexpensive means of raising money.⁷³

66. See 1956 *Hearings* 1212 (Whitaker).

67. See *id.* at 1214 (Whitaker).

68. See 1961 *Hearings* 192 (Bailey).

69. See *Hearings Before the Subcommittee on Elections of the Committee on House Administration on H.R. 9255*, 87th Cong., 2d Sess. 45 (1962) [hereinafter cited as the 1962 *Hearings*] (Bailey).

70. See Pincus, *The Fight Over Money*, *The Atlantic Monthly*, April, 1966, p. 71, at 72.

71. *N.Y. Times*, Feb. 20, 1966, p. 47, col. 1.

72. *Ibid.*

73. See *id.* at p. 47, col. 1.

In unusual circumstances, direct mail can also be used to provide emergency cash from large contributors.⁷⁴ Usually such sums are raised by making contributors members of a special club, such as the President's Club.⁷⁵

Television appeals for funds have been used, as have telephone solicitations, but to be successful both must occur during the height of a campaign. In 1964 in response "to one half-hour appeal and several shorter appeals by John Wayne and Ronald Reagan, more than \$2 million was collected within five days before the election."⁷⁶ Nomination campaign telephone blitzes at key times were also used to raise a substantial portion of the \$5.5 million spent in winning the 1964 Republican nomination.⁷⁷ Such techniques will, however, probably not succeed when partisan feeling is quiescent, during nonelection years or for candidates for less important offices than the Presidency.⁷⁸

Use of corporations as bipartisan conduits for employee contributions has been suggested as a means of generating small contributions. The results achieved by some corporations which have put on full scale campaigns show the enormous potential inherent in such programs: Aerojet-General raised \$136,000 in 1964, an increase in the average contribution from \$4 in 1962 to \$6.85 in 1964; Hughes Aircraft Company received an average contribution of \$13.76 from twenty-six per cent of its total personnel; and G.E.'s Cleveland drive generated an average gift of \$15.33, although this represents only slightly more than fifty cents per employee.⁷⁹ The only adverse reaction to these proposals seems to come from politically active unions which fear these activities will cut into their own fund raising drives. In view of the ease of mounting such drives among these captive audiences, and their potential value, it seems evident that corporations should be encouraged to sponsor them. Perhaps allowing a corporation to deduct the cost of such a program would be sufficient incentive.⁸⁰ One caveat should be noted, however. It

74. See Pincus, *supra* note 70, at 74.

75. In 1964 this organization had 3,801 members, each having contributed over \$1,000. ALEXANDER, FINANCING THE 1964 ELECTION 137 (1966).

76. Pincus, *supra* note 70, at 72.

77. *Ibid.*

78. See The Boston Globe, Jan. 31, 1966, p. 3, col. 4, for the disappointing experience of Congressman Wright.

79. ALEXANDER, *op. cit.* *supra* note 75, at 104-07.

80. See notes 222, 225, 319 *infra*. Rev. Rul. 156, 1962-2 CUM. BULL. 47, seems to allow such a deduction, seems correct as a matter of policy. Few corporations, however, have made use of it, perhaps be-

is essential that an employer be unaware of the party to whom his employee is contributing, else there is too great a danger of abuse.

4. Quotas

The effectiveness of quotas—shares assigned to each state party for financial support of the national party—varies greatly. For example, although Nevada's Republicans improved their quota performance from forty-two per cent in 1960 to 262 per cent of the 1964 quota, New York Republican contributions dropped from 132 per cent of the 1960 quota to sixty-two per cent of the 1964 quota.⁸¹ The Democrats, on the other hand, now that they have a consummate politician as President, have abandoned the whole quota system and presently negotiate with each state party for support of the national party.⁸² Effectiveness of a quota system probably depends on whether the party has captured the Presidency⁸³ or whether the Presidential candidate strongly appeals to a moneyed group within the party. Thus quotas, in and of themselves, probably only constitute a measure of the parties' popularity and do not, by their mere existence, significantly increase contributions.

5. Candidate's Pocketbook

We come now to the poor candidate whose pocketbook is usually the source of a substantial portion of his expenditures.⁸⁴ Unfortunately such expenditures cannot be deducted as a reasonable business expense from his income tax,⁸⁵ nor can they be amortized as a capital investment over the term of his office.⁸⁶ Although the reasoning given by the courts is contradictory, support for this result may be drawn from the Internal Revenue Code.⁸⁷ If one were inclined to be cynical, the result could be

cause of a general unawareness of the ruling or uncertainty as to its effect. See INT. REV. CODE OF 1954, § 276.

81. ALEXANDER, *op. cit. supra* note 75, at 74.

82. *Id.* at 76.

83. One indication of the potential of such a scheme to a party which captures the Presidency is that in 1961, four Democratic state committees, New York, Pennsylvania, Illinois, and California, agreed to a substantial increase of quota payments to \$250,000 each. ALEXANDER, *op. cit. supra* note 49, at 142.

84. See BULLITT, *TO BE A POLITICIAN* 68 (1961). This may force the candidate to incur "obligations" if the necessary money is to be raised and modernization encouraged.

85. McDonald v. Commissioner, 323 U.S. 57 (1944).

86. Mays v. Bowers, 201 F.2d 401 (4th Cir. 1953).

87. See § IV. A. 1., *infra*, for discussion of taxation of political contributions.

attributed to Congress' intent to give an additional advantage to the incumbent, who does have many deductible activities even during a campaign.⁸⁸ This seems unjustifiable in theory and result. A much better solution is to be found in the Minnesota statutes which allow a candidate to deduct unreimbursed expenditures from gross income subject to state tax, up to the statutory amounts of permissible spending.⁸⁹

F. INEFFECTIVE REFORM EFFORTS

In almost every session of Congress, bills to reform the Corrupt Practices Act are introduced. Almost as often the Senate passes a reform bill, but it gets lost in the House.⁹⁰ The importance the House has attached to election reform is exemplified by the handling of S. 2436, which was passed by a large majority in the Senate in January, 1960, but was not given its half day hearing in the Subcommittee on Elections of the Committee on House Administration until three days before adjournment.⁹¹ Perhaps the only reason the bill got a hearing in the committee is attributable to the party leaders' public pronouncement of support.⁹²

Ineffective reform efforts were not due entirely to legislative hypocrisy; the "organization of campaign activity presents almost insurmountable technical obstacles to the control of finance."⁹³ The fact remains, however, that it is to the advantage of most members of the House to keep the statutes as they are. Incumbents have many built-in advantages, such as free publicity, staffs which are paid by the government, and free mailing privileges. Thus, limitations on spending, no matter how theoretical, benefit incumbents far more than challengers. Another reason, which is probably more important, is that most campaign receipts and expenditures go unreported, since intrastate com-

88. *E.g.*, the cost of printing and mailing a report of a Congressman's activities with a "brief personal message" is fully deductible, even if done during a campaign. I.T. 4095, 1952-2 CUM. BULL. 90.

89. See MINN. STAT. ANN. 290.09(2) (c) (Supp. 1965).

90. The one exception is the Williams' Amendment to the Tax Adjustment Act of 1966 which prohibits corporate purchases of tickets or advertisements, proceeds of which might inure to the benefit of a political party or candidate. Pub. L. No. 368, 89th Cong., 2d Sess., tit. III, § 276, (March 15, 1966); INT. REV. CODE OF 1954, § 276. See § IV. A. I. *infra* for discussion. But see note 344 *infra*.

91. *Hearings Before the Subcommittee on Elections of the Committee on House Administration*, 86th Cong., 2d Sess., 29 (1960).

92. 1962 *Hearings* 42 (Bailey's statement in support of the bill).

93. KEY, POLITICS, PARTIES, AND PRESSURE GROUPS 552 (4th ed. 1958).

mittees need not report under the present federal statute.⁹⁴ This is a particularly appealing provision for members of the House because of the old axiom—the smaller the constituency, the more important a given sum of money becomes—and few congressmen want their contributors publicized for fear of scaring away scarce sources of money.

It must be recognized, however, that such a cynical explanation would not account for the behavior of all members of the House. Probably the basic conservatism of the House about changing the structure of society is a more important reason. In this area, such conservatism is not unjustified because of the serious effects which could result from ill-considered changes. But it is just as apparent that this conservatism has been carried too far; it is breeding disrespect for the law.⁹⁵ Possible bad effects of change should not be used as a justification for refusing to change those parts of the law which are universally evaded, such as the limitation on the amount of money a political committee can receive.⁹⁶

II. GOALS

A. ELIMINATION OF CORRUPT INFLUENCES AND OBLIGATIONS

Everyone wants to eliminate “corrupt” influences and obligations. No one, however, seems to want to define the term “corrupt.” Probably the most fruitful definitional source is in the context of democratic theory, where actions which are likely to result in political “favoritism” taking precedence over the public welfare are corrupt. “Favoritism” can then be defined as actions influenced by considerations other than providing the most benefit to the most people. Favoritism is considered wrongful *per se* because it impairs confidence in government by disappointing expectations held by the electorate of evenhanded treatment by government according to known rules of law. Favoritism thus constitutes a breach of a fiduciary position and may encourage the wrong type of candidate to run for public office.

Since favoritism cannot be eliminated altogether, the goal

94. 43 Stat. 1071 (1925), 2 U.S.C. § 244 (1964) (political committees required to report); 43 Stat. 1070 (1925), 2 U.S.C. § 241(c) (1964) (“political committee” is only an interstate committee or a branch of a national committee). Although candidates are supposed to report money contributed or spent by them or others, if they have knowledge of it, 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964), these provisions are totally ineffective. See § III. C. *infra*.

95. See generally PRESIDENT’S COMMISSION.

96. See § III. D. *infra*.

should be to contain it within those bounds which will best keep society functioning at maximum feasible efficiency. The initial premise is that

There is nothing evil per se about expenditures of funds upon elections. Indeed, if the electorate is to make a wise choice, then the issues of a contest, the records and views of opposing candidates, should receive wide dissemination. . . . The evil which threatens our elective processes arises from the improper use of the money, money in excessive amounts, sometimes from questionable sources, and heavily in favor of special interest candidates, or without full disclosure to the public.⁹⁷

Bribery, which involves a quid pro quo, is clearly corrupt. Although rarely occurring, it should be severely punished. The line between campaign contributions and bribery may be so fine as to be invisible, but it need not be of concern, except insofar as a penalty is concerned. If a contribution falls close to this line, it would almost by definition be outside permissible bounds. So also are contributions⁹⁸ from illegal sources, such as organized crime, which by definition is given to subverting enforcement of law, and which often drives away competent candidates.⁹⁹ Although it has been estimated that as much as fifteen per cent of total contributions come from the underworld,¹⁰⁰ it may be questioned, perhaps with tongue in cheek, whether candidates know of the sources, because they never receive any "dirty" money; it is always the other fellow who is so compromised.¹⁰¹

The more important issues, however, concern ordinary contributions, which are given primarily to gain access to the "inner workings" of government in order to enable a contributor effectively to present his arguments. While it might be contended that this is a perversion of democratic processes,¹⁰² it is a fact of life which probably helps as much as it harms the political system. The really significant question concerns the degree of influence which should be permitted to be exerted: whether contributions should be allowed from otherwise legitimate groups, and how much money can be contributed by an individual or group before a presumption of favoritism arises. The answer depends in part upon the existence of other sources of funds. Although these questions will be discussed in detail below, suf-

97. 1961 *Hearings* 50-51 (Senator Gore).

98. This includes not only money but, more importantly, workers. See Boston Herald, Dec. 2, 1961, p. 1, col. 3.

99. See LEVIN, *THE COMPLETE POLITICIAN* 242 (1962).

100. HEARD, *THE COSTS OF DEMOCRACY* 142 (Anchor ed. 1962).

101. See LEVIN, *op. cit. supra* note 99, at 236.

102. See BULLIT, *TO BE A POLITITION* 68 (1961).

fice it to say for now that the problem revolves around the proposition that, although politicians should and do behave in the common interest when perceived, the difficulty of discerning the common interest too often leads to prevalence of more concrete interests closer to home.

B. ENCOURAGING COMPETENT CANDIDATES WITHOUT MONEY

The system under which we currently finance our campaigns is inadequate because it precludes Americans of limited financial resources from serving in elective office. . . . [A]s the cost of campaigning increases, it becomes an almost unwritten amendment to the Constitution that only those Americans with money, or access to it, are able to participate in governing.¹⁰³

The correction of this weakness should be one of the prime goals of any election reform. However, attaining this goal will be very difficult, since at the time of the most crucial need for money—the nomination campaign—the most obvious source of money, the parties, cannot intervene.¹⁰⁴ Somehow people must be encouraged to contribute to candidates with limited access to money. Otherwise many competent candidates will not run or will be forced to incur obligations they would like to avoid.¹⁰⁵ Government subsidy is the only other alternative and may prove to be the most feasible.¹⁰⁶

C. STRUCTURE VS. SANCTIONS

Unfortunately, the rationale underlying present campaign regulation "assumes that its prime task is to prevent expenditures of too much money in political campaigns."¹⁰⁷ Perhaps this suspicion "stems from an idealized view of the American voter as a 'free agent' better able to select the 'best man' without propaganda distractions, plus the fear that unchecked election financing opens the doors to purchases of favors by monied interests."¹⁰⁸ But whether these premises are valid is irrelevant because the present statutory scheme based on sanctions, which are never or so rarely enforced that candidates can safely ignore

103. 1961 *Hearings* 76 (Senator Neuberger).

104. This situation would occur unless, as in Massachusetts and Minnesota, the primary occurs after the party convention. But even here the parties justly hesitate to interfere because often each primary contestant controls large blocks of party support.

105. See BULLIT, *op. cit. supra* note 102, at 68.

106. See § IV. B. *infra*.

107. Bicks & Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U.L. Rev. 975, 998 (1953).

108. *Id.* at 977-78.

them, has served only to make people contemptuous of the law.¹⁰⁹

Reform can take one of two courses of action: it can attempt to structure the situation so that it is within campaigners' interests to stay inside permissible grounds, or it can impose effective sanctions in an attempt to prevent impermissible action.¹¹⁰ Since the sanction approach has not worked well, it would seem that effective reform will have to rely primarily upon structuring rather than sanctions. By using sanctions selectively and emphasizing structuring, it should be possible to eliminate most "corrupt practices" and to improve the quality of campaigning. The goal to be sought is not to limit the amount of money spent, but rather "to remove, not create, barriers to divergent group expression, and, more positively, to bare to public view party support and policies."¹¹¹

D. CONSTITUTIONAL LIMITATIONS

State interest in its own elections is no impediment to federal control of contributions to candidates for federal office. Although it could be claimed that the rule still is that Congress has no general power over state and local elections,¹¹² it would also have to be admitted that the general rule has been swallowed by exceptions. As early as 1888 the Supreme Court upheld a federal indictment of a state official who interfered with ballots cast in an election for state and federal offices, although the official did not intend to influence the federal election.¹¹³ In *Burroughs & Cannon v. United States*¹¹⁴ the Supreme Court held that in order to protect its own officers the federal government has the power to "safeguard such an election from the improper use of money."¹¹⁵ Indeed, it has been suggested that

These decisions, and the fact that the Federal Government is now permitted to control some state election activities on such diverse grounds as the power over interstate commerce, the control over federal employees, and the disposition of federal funds, make it clear that there is no inviolable and exclusive state interest in its own elections.¹¹⁶

109. See *Gore Report* 3.

110. See Peters, *Political Campaign Financing: Tax Incentive for Small Contributors*, 18 LA. L. REV. 414, 420 (1958).

111. Bicks & Friedman, *supra* note 107, at 998.

112. See *United States v. Reese*, 92 U.S. 214, 218 (1875).

113. *In re Coy*, 127 U.S. 731 (1888).

114. 290 U.S. 534 (1934).

115. *Id.* at 545.

116. Note, 66 HARV. L. REV. 1259, 1262 (1953). This conclusion is further borne out by the cases, see e.g., *South Carolina v. Katzenbach*,

There are, however, other more serious constitutional limitations to reform efforts, particularly those based upon disclosure, since the first amendment might constrict the permissible sphere of action. Since these limitations are applicable to specific proposals, they will be discussed under appropriate headings.

III. PRESENT STATUTORY CONTROLS

A. SCOPE OF COVERAGE

Present federal statutes, except for prohibition of certain specific contributions¹¹⁷ and publication or distribution of unsigned political statements,¹¹⁸ cover only *elections* to Congress,¹¹⁹ political committees operating in more than one state, and branches of national committees.¹²⁰ They specifically do not cover nominating primaries,¹²¹ most political committees operating in only one state,¹²² and presidential and vice-presidential candidates.¹²³

There was some justification for excluding primaries from coverage when the Federal Corrupt Practices Act was first passed, since it had been held that Congress' power over elections did not extend to primaries.¹²⁴ This case was, however, overruled by *Classic v. United States*.¹²⁵ The real question is

383 U.S. 301 (1966), which have arisen under the Voting Rights Act of 1965, 79 Stat. 437 (1965), 42 U.S.C.A. 1971 (Supp. I. 1965).

117. 18 U.S.C. § 608 (1964) (\$5,000 limitation on individual contributions); 18 U.S.C. § 610 (1964) (prohibition on union and corporate contributions); 18 U.S.C. § 611 (1964) (those contracting with the United States forbidden to contribute); 49 Stat. 823 (1935), 15 U.S.C. § 79(1) (h) (1964) (public utility holding companies prohibited from making political contributions).

118. 18 U.S.C. § 612 (1964).

119. "The term 'election' includes a general or special election, but does not include a primary election or convention of a political party" 60 Stat. 1352 (1946), 2 U.S.C. § 241(a) (1964). "The term 'candidate' means an individual whose name is presented at an election for election as Senator or Representative in . . . the Congress of the United States, whether or not such individual is elected" 43 Stat. 1070 (1925), 2 U.S.C. § 241(b) (1964). These provisions are substantially identical to the provisions found in 18 U.S.C. § 591 (1964).

120. 43 Stat. 1070 (1925), 2 U.S.C. § 241(c) (1964). This is precisely the same provision as 18 U.S.C. § 591 (1964).

121. See note 119 *supra*.

122. See note 120 *supra*. No one, however, seems to have attempted to distinguish between subsidiary and state committees.

123. See note 119 *supra* (definition of "candidate"). However, interstate committees supporting them must report. See note 120 *supra* and accompanying text.

124. *Newberry v. United States*, 256 U.S. 232 (1921).

125. 313 U.S. 299 (1941).

why Congress, in light of its extended powers, did not extend the coverage of at least the later statutes to include primaries. Coverage has in certain instances been so extended,¹²⁶ even before *Classic*,¹²⁷ but the basic coverage remains the same. Unfortunately, the most probable answer is that Congress did not want to pass an effective control on campaign contributions. When Congress has been serious about controls, it has extended coverage to include primaries.¹²⁸ However, the most encompassing and simple control on campaign contributions occurs, not in statutes dealing specifically with that subject, but in provisions dealing with regulation of securities and holding companies.¹²⁹

B. LIMITATION ON INDIVIDUAL CONTRIBUTIONS

Whoever, directly or indirectly, makes contributions in an aggregate amount in excess of \$5,000 during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office, including the offices of President of the United States and Presidential and Vice Presidential electors, or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

This subsection shall not apply to contributions made to or by a State or local committee or other State or local organization or to similar committees or organizations in the District of Columbia or in any Territory or Possession of the United States.¹³⁰

Although this section was added after the *Classic*¹³¹ decision and applies to primaries and party conventions, as well as general and special elections, it continues to exclude state and local committees from coverage. Thus a contributor can donate as much as he wants to state and local committees; he can contribute the maximum to as many committees as he pleases;¹³²

126. See notes 117 and 118 *supra* and accompanying text.

127. 313 U.S. 299 (1941); see 49 Stat. 823 (1935), 15 U.S.C. § 79(1) (h) (1964) (prohibition of all contributions by public utility holding companies). Although this was based upon the power over interstate commerce and was upheld on this ground, *Egan v. United States*, 137 F.2d 369 (8th Cir. 1943), rather than on Congress' power over elections, it shows what Congress can accomplish when it has a mind to do so.

128. See e.g., note 127 *supra*; 18 U.S.C. § 610 (Supp. 1964) (prohibition of union or corporate contributions "in connection with" elections or primaries).

129. See note 127 *supra*.

130. 18 U.S.C. § 608(a) (1964).

131. 313 U.S. 299 (1941).

132. It should be noted, however, that a California court interpreted

or he can give money to members of his family for them to contribute.¹³³ The reason for this exception is not clear. Perhaps Congress felt that regulation of state and local committees belonged within the province of state law. In view, however, of Congress' knowledge of the use which is made of this loophole, the ineffectiveness of state laws,¹³⁴ and other provisions which "invade the states' province,"¹³⁵ this suggestion is not persuasive. Unfortunately, a more accurate reason probably is that Congress had no compunction about imposing this easily avoided limit on those who contribute to national parties or Presidential committees, but wanted no part of a law which could affect the prime source of congressmen's support—local committees. Contributions to local committees supporting congressional candidates are supposed to be controlled by publicity attendant to filing required reports.¹³⁶ This has not, however, turned out to be the case, since there is no enforcement, and the reports, even if filed, are often incomplete and chaotic.

By limiting the amount a person can contribute, this section might violate a person's first amendment right to free speech and to associate with others in propagating shared views.¹³⁷

a similar statute to prohibit such a series of gifts. *Mathewson v. Bean*, 114 Cal. App. 519, 522, 300 Pac. 56, 57 (1931).

133. The \$3,000 exemption from the federal gift tax seems to be a stronger factor in limiting campaign contributions than this paper tiger. See 1961 *Hearings* 201 (Bailey); INT. REV. CODE OF 1954, § 2521.

134. *E.g.*, MASS. ANN. LAWS ch. 55, § 16 (Supp. 1965) (candidate must file statement). The ineffectiveness of this law was demonstrated in the campaigns of Edward Kennedy and Edward McCormack for election to the United States Senate, where neither candidate came close to complying with disclosure requirements. This is hardly an enviable record, despite the quality of the candidates. See LEVIN, KENNEDY CAMPAIGNING (1966). For a complete list of state recording statutes, see ALEXANDER & DENNY, REGULATION OF POLITICAL FINANCE 55 (1966).

135. *E.g.*, 18 U.S.C. §§ 602, 608, 610, 612; 49 Stat. 823 (1935), 15 U.S.C. § 79(1) (h) (1964).

136. 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964).

137. This is particularly applicable to the provision which absolutely prohibits anyone negotiating or performing a contract with the federal government from contributing. 18 U.S.C. § 611 (1964). See § III. F. *infra* for discussion.

The Republicans have chosen an interesting manner of dealing with this possible objection: they would limit to \$5,000 the amount anyone can contribute to a candidate or committee supporting a candidate, but would set no limit on the amount a person could contribute to party committees. See H.R. 16203, 89th Cong., 2d Sess. § 102(a) (1966). However, this still leaves, admittedly in mitigated form, the problem of large contributors garnering excess influence. Perhaps narrowing this gap by allowing large contributions to be made to the national party committees in addition to those made to candidates would be much more justifiable. But even this would not alleviate the basic problem that

Since the protection of free speech extends to many means of influencing public opinion, which is the very purpose of protecting free speech, it would seem that financial contributions aimed at influencing public opinion should be protected. This is particularly true during elections when free speech is most essential and effective. On the other hand, it might be contended that this provision does not unduly prevent a person from expressing his opinion; rather it protects the integrity of the election processes by allowing the electorate to choose between candidates who do not owe anything to hidden interests.

There is some judicial indication that reasonable election regulations which impinge upon ability to sway the public may be upheld, although these decisions, being limited to corporations, can be distinguished from cases involving individuals.¹³⁸ Like most constitutional questions this is probably a question of degree, and the answer is most likely to be found in application of the provision. If there is a significant danger that contributions over \$5,000, for instance, may deprive voters of ability to choose between free agents, then such a provision is probably constitutional. On the other hand, if \$5,000 does not endanger the electoral process because it constitutes only a small portion of the money raised from other large contributions or preferably from mass contributions, this provision is probably unconstitutional. Constitutionality of this provision may also depend upon who is subject to its enforcement: it might be constitutional if applied to congressional campaign contributors, but not if applied to Presidential campaign contributors.¹³⁹ However, such

\$5,000 per candidate, even though it encompasses both nomination and election campaigns, seems an excessive amount. Surely the opinion of a \$5,000 contributor to a congressman could have excessive weight.

138. Although corporations have an economic interest in the outcome of elections, they are artificial entities representing a certain number of voters. And since no voter may exercise greater influence than any other voter, *Reynolds v. Sims*, 377 U.S. 533 (1964), corporate election activity may be absolutely prohibited, cf. *United States v. United States Brewers Ass'n*, 239 Fed. 163 (W.D. Pa. 1916) (dictum). Another possible distinguishing factor is that minority shareholders would be forced to contribute to candidates they oppose. See *IAM v. Street*, 367 U.S. 740 (1961) (applying this rationale to unions); Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1 (1948) (intent of proponents of 18 U.S.C. § 610). See also § III. E. *infra* for cases upholding restraints on unions, which may rest upon the same bases as those upholding corporate restrictions. However, the wisdom of ignoring group influence, which may be the only way to assert an individual's views, is another matter.

139. Roughly, a contribution of \$1,000 at the congressional level may well achieve the same significance that a \$5,000 contribution has on the national level.

an interpretation may run afoul of the law's need for certainty, and thus a court might very well hold the statute must stand or fall as it is applied to any reasonable situation.

Section 608(b) which absolutely prohibits sale of goods if the proceeds thereof inure to the benefit of any federal candidate for election or a political committee supporting a candidate for nomination or election,¹⁴⁰ suffers from the same infirmities to an even greater degree. No justification for such an absolute prohibition or for exempting candidates for nomination from the provisions of this section is to be found in either the statute or the legislative history. It might therefore be concluded that the section is an unconstitutional infringement upon expression.¹⁴¹

Actually, this discussion is merely academic, since these sections have almost never been enforced, nor are they likely to be enforced in the future because of the political implications of their criminal sanctions. Even if an attempt were made to enforce the provisions, they could be so easily evaded that the effort would be futile.¹⁴²

Reform is clearly needed if the goal of limiting influence of large contributors is to be achieved. The greatest danger from such large contributors is their ability to influence political decisions concerning unforeseen situations arising after an election. Their contributions gain them access to politicians, which, in conjunction with the information, time, and money available to large contributors, leads to an advantage in the attempt to make an effective presentation of their views.

To be effective, law must be enforceable, that is, there must be a desire and an ability to compel compliance. Because of the sensitivity of the issue of campaign contributions, the only sanctions that can reasonably be expected to be enforced are those which are applicable to contributions which are clearly unreasonable.¹⁴³ Control of contributions which are not

140. 18 U.S.C. § 608(b) (1964). The provision, however, "shall not interfere with the usual and known business, trade, or profession of any candidate."

141. Most of the reform bills have tried to attack the problem by allowing sales of campaign paraphernalia which cost less than \$5. *E.g.*, S. 3435, 89th Cong., 2d Sess. § 102(d) (1966) (President Johnson's bill) and H.R. 16203, 89th Cong., 2d Sess. § 102(d) (1966) (Republican bill which is basically the same but clarifies a candidate's right to continue in his customary business).

142. See *Gore Report 4*.

143. For example, the situation might be structured so that any unpublicized contribution over a certain amount is per se unreasonable. This would eliminate all problems of showing intent to "corrupt" by

so clearly unreasonable must rest upon devices other than legal sanctions, such as publicity.

Reasonableness is a rather elusive factor. Contributions from the underworld are unreasonable, without regard to amount, because they are aimed at subverting the law. Sanctions should be the means of controlling such contributions because no other alternatives would be effective. Unfortunately, even sanctions are not likely to be effective. Laws imposing sanctions must be strictly construed to protect innocent parties, and underworld contributions are extremely difficult to identify as such. All unpublicized contributions could be made criminal, but unless limited to fairly large contributions, such a proposal would be too Draconian to be enforceable. Although sanctions should be available, probably the only real remedy is to supply enough money from other sources so that candidates can refuse underworld money or unpublicized cash without severely injuring their campaigns.

One of the reasons that effective limitations have not been passed is that few congressmen are altruistic enough about election reform to risk injuring their major sources of funds.¹⁴⁴ If a contributor can only give a limited sum of money, that means congressional, senatorial, and national committees are all in competition for that money; whereas, if reasonable separate limits were established for each level,¹⁴⁵ the only competition

setting up an arbitrary, but simple and easily enforceable standard. One penalty should be provided for inadvertent breach of this standard and another for intentional breach. If the level of reportable contributions were set high enough so that it would be likely that contributors would know of the statute's requirements, and the penalty for an unintentional breach were not set at Draconian levels, problems of enforcing such a statute should be fairly simple. The largest problem would then be discovering violations and initiating prosecutions.

144. President Johnson's proposal would have imposed an aggregate limit of \$5,000 in any one year or campaign. S. 3435, 89th Cong., 2d Sess. § 102 (1966). Other proposals would limit individual contributions to an aggregate of \$10,000 per year for all federal offices, including the presidency. S. 604 § 302, S. 2436 § 302, 86th Cong., 2d Sess. (1960). Others would place the limit as low as \$1,000. S. 1623 § 302, S. 604 § 302, H.R. 2396 § 302, H.R. 33 § 302, 87th Cong., 1st Sess. (1961). And still others would leave the limits as they are now. S. 2426 § 302, H.R. 9255 § 302, 87th Cong., 1st and 2d Sess. (1961-1962). Interestingly enough, the Senate rejected by voice vote an amendment to S. 2426 which would have placed a ceiling of \$20,000 a year on individual contributions. 107 CONG. REC. 19665 (1961). The reason for such rejection is, however, not clear.

145. The major weakness in such proposals, however, is that they do not cope with problems of allocating contributions to candidates within multi-candidate committees, which serve the function of pro-

would be between candidates for nomination and nominees. If proper limits were drawn, they might help to allay fears of congressmen that their campaigns would be financially starved by limitations, while protecting the public against undue influence exerted upon candidates. Such a statute might even encourage mass contributions, which are the ultimate means of controlling undue influence.¹⁴⁶

People should be able to contribute some money to candidates in other states, since they may advocate a policy which the contributor favors. On the other hand, the people of a state are entitled to a candidate who, subject to national needs, will represent their interests instead of those of someone outside the state.¹⁴⁷ One proposal would limit an extraterritorial contribution to a candidate for the Senate or the House to \$250, and national party committees would be limited to a \$10,000 contribution to a senatorial candidate and \$3,000 to a congressional candidate.¹⁴⁸ The first part of the proposal seems worthwhile, although it is probably unenforceable as a practical matter. But the second part would seem only to inhibit development of responsible parties by limiting one of the few means of encouraging party unity.

Finally, there is a question whether absolute prohibition of political contributions by federal employees should be continued.¹⁴⁹ Although there is some complaint, particularly in the

moting party unity. Allocation could be based on the proportion of money spent by the committee for each candidate, but this is an event after the fact and might cause an individual unknowingly to exceed his limit. Perhaps one could allocate along arbitrary lines: if a committee supports two candidates, contributions would be allocated equally. But this is an invitation to avoid the limitation by forming one committee to support a candidate who needs money and one who does not. A more likely solution, however, is prohibition of contributions by one person to more than one committee supporting a candidate, excepting, of course, the national party committee or a designated state party committee. There should be no problem under the first amendment because an individual could still contribute to whichever candidate he wishes. This solution should also increase party strength and, by eliminating a primary reason for the present plethora of committees, should ease problems of control.

146. See Bicks & Friedman, *supra* note 107, at 999. See also Bottomly, *Corrupt Practices in Political Campaigns*, 30 B.U.L. REV. 331, 350 (1950).

147. Cf. *Gore Report* 5; 1961 *Hearings* 52.

148. S. 1623, 87th Cong., 1st Sess. § 302 (1961). This statute would also have limited individual aggregate contributions to \$1,000.

149. See 18 U.S.C. § 607 (1964). Bailey, Chairman of the National Democratic Party Committee, has complained that federal employees hide behind this provision and shirk their duties as citizens. 1961 *Hearings* 208.

Washington, D.C. enclave, that the restriction inhibits good government,¹⁵⁰ the statute has worked very well in removing federal employees from possible political pressures. Perhaps, however, some limited exceptions might cautiously be tried, such as allowing an aggregate contribution of \$100 to local and state campaigns.

All of these proposals can be evaded if the desire is strong enough, although certain things can be done to make evasion more difficult. The contributor who reasonably expects to contribute a yearly total over \$100 should be required each time he contributes to swear, under penalty of perjury, that the money he is contributing is his own¹⁵¹ and that he has not exceeded statutory limits. Further, anyone who contributes in the aggregate more than a total of \$500 in a single year should be required to report those contributions to a central depository.¹⁵² Prohibiting contributions over \$100 per year by minors would eliminate excessive contributions through the medium of the family. Whether the benefits of such proposals are worth the problems of administration is quite another matter. As a practical matter they probably are not. The only real solution to the problem of undue influence from large contributors is not to impose sanctions, but to provide adequate funds supplied either by mass contributions¹⁵³ or by direct government subsidy.

C. LIMITATION ON CANDIDATE EXPENDITURES

Under the present statute no candidate for United States Senator may spend more than \$25,000, and no candidate for the House of Representatives may spend more than \$5,000 on their respective campaigns.¹⁵⁴ Although these sums do not include certain major enumerated expenses, such as travel, stationery,

150. See *Hearings Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration*, 89th Cong., 1st Sess. (1965).

151. This would not stop a person from making a "gift" to someone three months before an election with the "understanding" that the money would be contributed to a certain candidate. Such a proposal, however, might inhibit contributions of expense account money and other like sources because few people are anxious to risk perjury. The reluctant contributor might even use this requirement as an excuse to limit his contribution.

152. This would also provide a check against reports filed by candidates and political committees. Its effectiveness may be questioned, however, since it is not likely to catch "dirty" money, which is usually in the form of cash.

153. See PRESIDENT'S COMMISSION 17.

154. 43 Stat. 1073 (1925), 2 U.S.C. § 248 (1964).

printing, postage, posters, telephones, and the like,¹⁵⁵ these limitations are only an invitation to hypocrisy. Evasion through various means is the rule rather than the exception. Even in the case which is most often cited as the epitome of the worst type of campaigning, and which was marked by clear and continuous evasions of the law, the candidate was not denied his seat in Congress.¹⁵⁶ Few candidates are likely to have sufficient scruples about such a rarely enforced provision to refrain from digging into their pockets to cover a "necessary" last minute expenditure.

Perhaps it could be argued that the limited scope of coverage redeems this provision somewhat. Since this section does not apply to campaigns for nomination,¹⁵⁷ the time when a candidate is most likely to have to spend his own money, he is not likely to have enough money left to exceed the statutory limitation. In fact, he might even be able to use the limit as an excuse when asking the party to cover necessary campaign expenses. Of course, this argument is spurious and misses the thrust of the section, which was intended to prevent rich men from buying elective office. But so long as the statute does not cover primaries, where the rich man has the greatest advantage,¹⁵⁸ it will only encourage hypocrisy. A candidate for Senator could, without violating this provision, spend \$1,000,000 for statewide publicity in an uncontested campaign for his party's nomination, and then spend only \$25,000 in his campaign for election.

Another oddity of this provision is that, while it limits the amounts of expenditures a candidate can make, it does not limit the amount of contributions he can receive. All that is required is a filed report listing all known contributions and expenditures made by others on his behalf.¹⁵⁹ An interesting proposal might be based upon this provision. In order to fulfill the purpose of this section, which is to prevent rich men from buying an

155. See *id.*

156. Although the Senate was moved to investigate the 1950 Maryland senatorial campaign because of the vicious smear tactics which pervaded it, its cursory examination of the campaign financing proved that at least \$27,000 in contributions was not reported. See generally *Hearings on S. Res. 250 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration*, 82d Cong., 1st Sess. (1951).

157. The definition of candidate, "an individual whose name is presented at an election for election as Senator or Representative . . .," does not include a candidate for nomination or for the presidency or vice presidency. 43 Stat. 1070 (1925), 2 U.S.C. § 241 (b) (1964).

158. See § I.D. *supra*.

159. 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964).

election,¹⁶⁰ a candidate should be allowed, without adverse tax consequences,¹⁶¹ to give unexpended contributions to his party to be used in his behalf in the next election. Although this would strengthen party finances and there would not be much chance for abuse, three facts mitigate against the success of such a plan: most candidates have no money left over after an election; independent candidates would receive no benefit; and this proposal would probably run afoul of section 501(c)(3) of the Internal Revenue Code, which disqualifies political organizations from obtaining a nonprofit exemption. Nevertheless, in order to strengthen the parties, such a proposal is worthy of consideration.

If limitations are thought desirable, and it is not at all certain they are,¹⁶² they should include primaries and should be set at a more realistic level. One proposal would have increased the limit to either \$50,000 or an amount obtained by multiplying twenty cents by the total number of votes, not to exceed 1,000,000, cast in the last general election for that office, and ten cents for each vote in excess of 1,000,000; or the number of people registered to vote for the particular office could be substituted in lieu of the number of votes cast in the last general election.¹⁶³ A better plan would be to eliminate separate limitations on candidates and political committees and to impose an aggregate limitation on the campaign made by or on behalf of a candidate for nomination or election.¹⁶⁴ The greatest problem with limitations, however, is that they must be drawn large enough so that a candidate is not forced, as a practical matter, to find ways

160. See *McDonald v. Commissioner*, 323 U.S. 57, 69 (1944) (Black, J., dissenting).

161. A candidate's campaign expenditures are not tax deductible. *McDonald v. Commissioner*, 323 U.S. 57 (1944). See § IV. A.1. *infra* for discussion.

162. Even Senator Long (Mo.), sponsor of S. 604, 87th Cong., 1st Sess. (1961), stated he would have no objection to having no ceilings. 1961 *Hearings* 173. President Johnson's reform proposal imposes no limitations, S. 3435, 89th Cong., 2d Sess. (1966), nor does the House Republican bill, H.R. 16203, 89th Cong., 2d Sess. (1966).

163. S. 2541, 89th Cong., 2d Sess. § 208 (1966): This bill, which was reported out favorably by the Senate Committee on Rules and Administration, S. REP. NO. 1457, 89th Cong., 2d Sess. (1966), is exactly the same bill that was introduced in 1961. S. 2426 § 208, H.R. 9255 § 208, 87th Cong., 1st Sess. (1961).

164. The problems with aggregate ceilings lie in dealing with unauthorized expenditures and identifying expenditures as being made on behalf of a candidate. Requiring committees to register might solve some of the problems, but the problem of dealing with committees supporting a public policy, whose leading advocate just happens to be a candidate, still remains.

to evade them. But at the same time, if they are placed beyond what a candidate can reasonably expect to spend, limitations are of no use. For example, in the proposed change cited above, twenty cents per vote is allowed, although national party campaign costs, disregarding spending by labor and miscellaneous committees, were about sixteen cents per vote for the number of votes cast in the 1960 presidential election.¹⁶⁵

D. LIMITATION ON POLITICAL COMMITTEES

A political committee, as defined by the statute, is one which operates in more than one state or is a branch of a national committee.¹⁶⁶ Such a committee is prohibited from spending or accepting more than \$3,000,000 during any year¹⁶⁷ and must file certain required reports, dealing with contributions to and expenditures by and on behalf of the committee, with the Clerk of the House of Representatives.¹⁶⁸

Putting aside problems of reporting for the moment, there are two major deficiencies in the present statute: its limitation on contributions and its coverage.

The \$3,000,000 limitation was never effective. The parties simply formed a plethora of committees, each of which accepted up to \$3,000,000 in contributions, thus flouting the original congressional intent to make \$3,000,000 an aggregate amount for each national party.¹⁶⁹ Most informed opinion suggests that the limitation be done away with completely.¹⁷⁰ Its only effect has

165. ALEXANDER, *FINANCING THE PARTIES AND CAMPAIGNS, THE PRESIDENTIAL ELECTION AND TRANSITION 1960-1961*, 116 (1961).

166. 43 Stat. 1070 (1925), 2 U.S.C. § 241(c) (1964). 18 U.S.C. § 591 (1964) is exactly the same.

167. 18 U.S.C. § 609 (1964).

168. 43 Stat. 1071 (1925), 2 U.S.C. § 244 (1964). There is a latent problem in this section. The treasurer is presumed to have knowledge of contributions and expenditures of the committee in the usual course of business. *United States v. Burroughs*, 65 F.2d 796 (D.C. Cir. 1933), *aff'd*, 290 U.S. 534 (1933). But the section makes him responsible for expenditures on behalf of the committee. Since this is a criminal statute, probably the presumption of knowledge cannot apply, although the statute makes no textual distinction between knowledge and responsibility.

169. See Overacker, *Campaign Finance in the Presidential Election of 1940*, 35 AM. POL. SCI. REV. 701, 705 (1941). See also Lederle, *Political Committee Expenditures and the Hatch Act*, 44 MICH. L. REV. 294, 296 (1945).

170. See *Gore Report* 21. This is just as true today as it was twenty-five years ago. The Republicans specifically made repeal of the \$3,000,000 limitation part of their proposals for reform this year. The Washington D.C., Sunday Star, Dec. 19, 1965, § A. p.18, col. 3. H.R. 16203, 89th Cong., 2d Sess. (1966). President Johnson's reform proposal

been to encourage decentralized parties,¹⁷¹ and effective enforcement of any limitation would not be worth the effort, even if it could be enforced.

Effective enforcement of limitations presents almost insuperable problems. For example, what is to be done with committees which are not affiliated with any candidate, but support a policy coincidentally supported by a candidate.¹⁷² Forcing committees to get the candidate's authorization¹⁷³ is probably a violation of the first amendment right to free speech.¹⁷⁴ Even if not, it would impede political participation by interested individuals—hardly a proper aim for election reform. Another problem with limitations is fixing their amount.¹⁷⁵

The best solution would, therefore, seem not to be limitations on the amount of contributions political committees and candidates could receive. Rather, it would be to publicize before the election those contributions they do receive.¹⁷⁶

Too limited coverage is another serious loophole which should be closed. The statute does not reach intrastate committees other than branches of a national committee.¹⁷⁷ Thus, most committees supporting congressional candidates are subject only to whatever state controls happen to be available,¹⁷⁸ even though candidates are supposed to file reports covering contributions received by others in their behalf, with their knowledge and consent.¹⁷⁹ This leaves a large gap in control.¹⁸⁰ Addressing itself to this problem the Gore Committee stated: "Senatorial

would also eliminate this unjustifiable limitation. S. 3435, 89th Cong., 2d Sess. (1966).

171. See HEARD, *THE COSTS OF DEMOCRACY* 255 (Anchor ed. 1962).

172. Whether such a committee would be subject to the statute would depend on whether its actions were "done for the purpose of influencing the election in that particular congressional district. . . ." 1961 *Hearings* 67. Such intent defies proof. Nor would the problem be solved by a change in the definition of "political committee." See Note, 66 HARV. L. REV. 1259, 1264 (1953).

173. E.g., S. 1623, 87th Cong., 1st Sess. § 202(h) (i) (1961), which tried to avoid the constitutional question by permitting unauthorized committees to spend up to \$1,000. See also Newman, *Money and Elections in Great Britain—Guide for America*, 10 W. POL. Q. 582 (1957).

174. Cf. Note, 66 HARV. L. REV. 1259, 1267-68 (1953).

175. See notes 163 and 165 *supra* and accompanying text.

176. See § III. G. *infra* for a discussion of disclosure as a remedy.

177. 43 Stat. 1070 (1925), 2 U.S.C. § 241(c) (1964); 18 U.S.C. § 591 (1964).

178. See ALEXANDER & DENNY, *REGULATION OF POLITICAL FINANCE* 59 (1966).

179. 43 Stat. 1072 (1925), 2 U.S.C. § 246 (Supp. 1965).

180. *Gore Report* 21.

candidates are usually supported by statewide committees which receive and expend funds on behalf of an entire ticket, and allocations of funds to the particular candidates or their committees are difficult to make and only infrequently appear in the reports.”¹⁸¹ Intrastate committees which support candidates for nomination or election to Congress or the Presidency should be required to report and, if a limitation upon receipt of contributions is desirable, should be included within the limitation. Arguments against control of intrastate committees, on the ground that it would constitute interference with state control, sound rather hollow in view of all the federal election laws which cover exclusively intrastate affairs¹⁸² and the broad grounds upon which courts have upheld Congress’ power over federal elections.¹⁸³ To ease the administrative burden, however, coverage could be limited to committees which receive or expend more than \$2,500.¹⁸⁴

E. LIMITATION ON UNIONS

It is unlawful for . . . any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in . . . 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.¹⁸⁵

This is different from the provisions which have been previously examined. There is here a complete prohibition of expenditures and contributions at all levels, not merely at the interstate or final election level. The policies involved in such a provision are also different. Congress has decided that contributions or expenditures by unions “in connection with” the election of federal candidates are wrongful per se. They are therefore prohibited. Part of the reason for passing the statute was clearly the fear that unions would gain a disproportionate amount of

181. *Id.* at 7.

182. *E.g.*, 18 U.S.C. §§ 602 (solicitation from federal employees), 608 (individual limitation on contributions), 610 (prohibition of corporate and union contributions), and 612 (publication or distribution of anonymous political statements).

183. See § II. D. *supra*. President Johnson and House Republicans recognized this and would require all political committees, interstate and intrastate, to report. S. 3435, 89th Cong., 2d Sess. §§ 201(c), 204 (1966); H.R. 16203, 89th Cong., 2d Sess. § 201(c) (1966).

184. *E.g.*, S. 2436, 86th Cong., 2d Sess. § 102(3) (1960); S. 604, 87th Cong., 1st Sess. § 102(3) (1961).

185. 18 U.S.C. § 610 (Supp. 1965).

influence because of the massive amounts of money and manpower available to them. The usual reason given, however, was the need to protect the rights of the minority who were forced to join unions, but who did not desire to contribute to the party chosen by union leaders.¹⁸⁶

There are, however, grave doubts about the constitutional validity of this section, particularly as applied to the prohibition on expenditures, because of its impact "upon the freedom of individuals organized into an association to carry on political activities directly related to the welfare of the members of the group."¹⁸⁷

The Supreme Court has persistently refused to face the crucial issue of the section's constitutionality. In the first case to reach the Court,¹⁸⁸ the CIO had opposed a candidate in a newspaper which it had distributed in his election district during the campaign. The majority held that since the newspaper was primarily for internal consumption, it was not within the prohibitions.¹⁸⁹ The real reason for the majority opinion, however, seems to have been the knowledge that the decision, which would be very controversial, would be handed down on the eve of a presidential election campaign.¹⁹⁰ The four dissenting Justices concluded that such publications were clearly within the congressional intent,¹⁹¹ but that such a prohibition was unconstitutional because it was not needed to protect the rights of minority members of the union.¹⁹² The next case to reach the Supreme Court¹⁹³ was again decided on the internal-external distribution test, although the constitutional issue was again presented.¹⁹⁴ This case held that use of union dues to sponsor

186. Kallenbach, *The Taft-Hartley Act and Union Political Contributions and Expenditures*, 33 MINN. L. REV. 1 (1948).

187. *Id.* at 20.

188. *United States v. CIO*, 335 U.S. 106 (1947).

189. *Id.* at 123. See Kallenbach, *supra* note 186, at 17 for biting criticism of the decision.

190. Kallenbach, *supra* note 186, at 17.

191. 335 U.S. at 129-30. Senator Taft believed the prohibition would apply to periodicals supported by union dues, 93 CONG. REC. 6436, 6437, 6440 (1947), but would not prevent endorsements in union publications supported by voluntary subscriptions. 93 CONG. REC. 6437 (1947).

192. 335 U.S. at 149.

193. *United States v. UAW*, 352 U.S. 567 (1956).

194. The Government's brief presented the issue as follows: "[Whether] the actual restraint upon union political activity imposed by the statute is so narrowly limited that Congress did not exceed its powers to protect the political process from undue influence of large aggregations of capital and to promote individual responsibility for democratic government." 352 U.S. 567, 590 (1956).

television broadcasts to influence a congressional election was unlawful.¹⁹⁵ The three dissenters argued that the section was an unconstitutional abridgement of a union's right to "express its views on the issues of an election and on the merits of the candidates, unrestrained and unfettered by the Congress."¹⁹⁶

Finally, in 1960 a suit was brought by some members of a union to enjoin the union from expending money to disseminate information and the union's views about certain candidates.¹⁹⁷ Although violation of the section was not argued,¹⁹⁸ the four man opinion implied that the section would have been found unconstitutional.¹⁹⁹ While recognizing the right of the minority to the return of its money or to enjoin spending of its money on political causes with which it disagreed, the decision forbade the minority from obtaining a total injunction against any political expenditures, for fear of unduly impeding unions' freedom of action.²⁰⁰ Mr. Justice Douglas concurred to make a majority, although he felt that subordinating an individual's right to speak to the majority's views violated his first amendment freedom.²⁰¹ The minority correctly pointed out that the effect of the majority's decision was to leave the union's minority without effective protection against the majority, since the cost of obtaining relief through the avenues left open by the majority of the Court is prohibitive. Thus, as a practical matter, the minority has no way of preventing union leaders from spending union money as they see fit.²⁰²

195. 352 U.S. at 585. A later case, however, held that such action was not a violation if done in the regular course of union activity and if supported by voluntary contributions. *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504 (D. Alaska 1961).

196. 352 U.S. at 593 (Douglas, J., dissenting). Mr. Justice Douglas went on further to say that:

It usually costs money to communicate an idea to a large audience. . . . Nor can the fact that it costs money to make a speech . . . make the speech any less an exercise of First Amendment rights. Yet this statute, as construed and applied in this indictment, makes criminal any "expenditure" by a union for the purpose of expressing its views on the issues of an election and the candidates.

Id. at 594.

197. *IAM v. Street*, 367 U.S. 740 (1961).

198. *Id.* at 773.

199. See *id.* at 775.

200. *Id.* at 774.

201. *Id.* at 778.

202. Aside from the constitutional question, if the Court had allowed members to seek injunctions against political expenditures by their unions, they would be forced to rely upon voluntary contributions for political expenditures. See, e.g., *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504 (D. Alaska 1961), which approved television

Moreover, it is almost impossible to draw a line between political and "educational" expenditures. Union leadership should be permitted much more latitude in educational expenditures, since their very purpose would be defeated by allowing a minority to stop such activity, merely because of disagreement with leadership's positions. Perhaps the rule of thumb used by courts to distinguish between educational and political expenditures is the best that can be devised. If a publication is primarily internal, it is educational and therefore permissible;²⁰³ if a publication is primarily aimed at nonmembers, it is political and therefore impermissible.²⁰⁴

The question, however, whether unions should be permitted, consonant with minority rights, to express their interests through political expenditures is still open. Arguments in favor of this position are that unions are multipurpose organizations including, among other objectives, protection of their members through legislation,²⁰⁵ and that allowing unions to express their views will help to clarify the voters' choice.²⁰⁶ The opposing argument is that, since each citizen has a vote, it would be unfair discrimination against those citizens who do not belong to a union to allow a union more influence than the sum total of its members' votes. This argument lacks persuasiveness because, as a practical matter, the only way most individuals can exert influence upon society is through group action. Whatever should be the policy regarding external political expenditures, there seems to be little reason to prevent a union from presenting information to its own members.²⁰⁷

In any case, it is true that unions do exert great political influence, which is not likely to diminish greatly in the future, if only because of their sizeable membership. In addition, unions have a wide range of permissible activities, which can have a great effect on the outcome of elections: they can carry endorsements in their own newspapers,²⁰⁸ take paid advertising in

broadcasting by the union in the regular course of business so long as it was supported by voluntary contributions. This would seem to be in line with congressional intent. See note 191 *supra*.

203. See *United States v. CIO*, 335 U.S. 106 (1948).

204. See *United States v. UAW*, 352 U.S. 567 (1957).

205. See, e.g., *Hearings on H. Res. 558 Before Special Committee to Investigate Campaign Expenditures*, 82d Cong., 2d Sess. 219 (1952); Bicks & Friedman, *Regulation of Federal Election Finance: A Case of Misguided Morality*, 28 N.Y.U.L. Rev. 975, 992 n.88; Kallenbach, *supra* note 186, at 24.

206. See Bicks & Friedman, *supra* note 205, at 997.

207. See Kallenbach, *supra* note 186, at 24.

208. *United States v. CIO*, 335 U.S. 106 (1948).

outside newspapers,²⁰⁹ systematically conduct voter registration drives²¹⁰ and "educational" campaigns,²¹¹ and even continue to pay salaries of union employees while at work for a candidate.²¹²

It would seem, therefore, that the question is not whether unions should be able to exert influence through political expenditures, but whether the law protects rights of union minorities. The answer must be that present law does not adequately protect those rights. Congress should continue the present ban on direct union contributions, but should recognize that unions are a legitimate conduit for members to make voluntary political contributions. Such contributions should be permitted with proper safeguards to ensure that contributions are indeed voluntary. Congress should also, despite problems of definition, encourage unions to make bipartisan expenditures.²¹³

F. LIMITATION ON CORPORATIONS

Corporate political activity is prohibited in three different sections, which tend to overlap but vary in coverage. Section 610²¹⁴ is the basic provision and is typical of the lack of thought that went into drafting election controls. After prohibiting national banks and corporations organized by Congress from contributing or expending money in certain elections and activities, the section goes on alternatively to prohibit "any corporation whatever" from contributing or expending money in a much wider range of activities.²¹⁵ The second provision prohibits direct

209. *United States v. Painters Union*, 172 F.2d 854 (2d Cir. 1949).

210. *Gore Report* 24; 1961 *Hearings* 178-79. See note 212 *infra*.

211. These are the primary means used to avoid prohibition against expenditures "in connection with" elections. *Gore Report* 25-26 (Curtis, dissenting). These are, however, supposedly financed primarily by voluntary contributions. 1956 *Hearings* 309. One rather extreme case of "educational" expenditures of this sort was upheld in *United States v. Anchorage Cent. Labor Council*, 193 F. Supp. 504 (D. Alaska 1961).

212. *United States v. Construction Union*, 101 F. Supp. 869 (W.D. Mo. 1951). This case seems clearly erroneous because no theoretical distinction can be drawn between furnishing cash directly to a candidate or indirectly by paying his workers. Nor did the court consider whether this action was in violation of 18 U.S.C. § 611 (1964) (prohibition of contributions or expenditures by one negotiating or performing a federal contract).

213. PRESIDENT'S COMMISSION 12.

214. See text accompanying note 229 *supra*, substituting the word "corporation" for "labor organization." For historical perspective, see Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y. U.L. Rev. 1033 (1965).

215. The section was held constitutional in *United States v. Brewers' Ass'n*, 239 Fed. 163 (W.D. Pa. 1916).

or indirect political contributions by anyone contracting with the federal government, either during negotiation or performance of the contract.²¹⁶ The coverage of this section is not clear because the usual definitions are not applicable.²¹⁷ Perhaps the prohibitions will be judicially extended to the state level,²¹⁸ as is the third provision,²¹⁹ which is the Part of the Public Utilities Holding Company Act. It shows what can be done when Congress is serious about prohibiting political contributions. That provision prohibits by clear, all inclusive language any political contribution on the state or federal level "in connection with the candidacy, nomination, election or appointment . . . to any office or position in the Government. . . ." ²²⁰

216. 18 U.S.C. § 611 (1964).

217. The definitional section, 18 U.S.C. § 591 (1964), applies only to §§ 597, 599, 602, 609, and 610. Also, since § 611 is not confined to nominations or elections, it should be held to apply to all forms of political activities between elections. Although the legislative history indicates that § 611 was not intended to apply to corporations, it seems that this was based on the misapprehension that § 610 covered all corporations. See 86 CONG. REC. 2982 (1940); Lambert, *supra* note 214, at 1059 n.103.

218. A possible rationale for this result can be based on the fact that this section is derived from the power over appropriations. See 86 CONG. REC. 2338 (1940). See generally H.R. REP. NO. 2376, 76th Cong., 3d Sess. (1940).

219. It shall be unlawful for any registered holding company, or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly—

(1) to make any contribution whatsoever in connection with the candidacy, nomination, election or appointment of any person for or to any office or position in the Government of the United States, a State, or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing; or

(2) to make any contribution to or in support of any political party or any committee or agency thereof.

The term "contribution" as used in this subsection includes any gift, subscription, loan, advance, or deposit of money or anything of value, and includes any contract, agreement, or promise whether or not legally enforceable, to make a contribution.

49 Stat. 824-25 (1935), 15 U.S.C. § 79(l) (h) (1964).

220. This provision was held to be constitutional in *Egan v. United States*, 137 F.2d 369, *cert. denied*, 320 U.S. 788 (1943) because contributions would be reflected in utility rates and are thus within Congress' power to control interstate commerce. None of these provisions, however, has ever been tested as a violation of a corporation's right to free speech. For discussion of the relationship between corporations and the first amendment, see *Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936).

"Corporations have been held within the first amendment's protection against restrictions upon the circulation of their media of expres-

It is probable that Congress intended to make no distinction between prohibition of union and corporate contributions,²²¹ thus the same arguments can be advanced against both: such contributions are outside the legitimate goals of these organizations, force minorities to support candidates they may oppose, discriminate against nonmembers or nonshareholders, and enable contributing organizations to exert undue influence upon elections. Only the last is a serious justification for the prohibition against corporations. Corporations are established to make money, and in order to operate at a profit within a framework of complex regulations, they must have governmental neutrality, if not its cooperation. Thus, a cogent argument can be advanced that insuring this neutrality through contributions is a legitimate goal for a profit making organization. Nor are corporate contributions likely to seriously impinge upon the rights of shareholders, since shareholders are much more fluid as a group than are union members. The real problem is that corporations control such large amounts of money that, if uncontrolled, they could literally buy elections to the United States Senate, as they were able to do in the late nineteenth century.

Prohibitions against direct corporate contributions are clearly justified²²² and should be continued; however, the most

sion." *United States v. CIO*, 335 U.S. 106, 154-55 (1948) (concurring opinion). See also King, *Corporate Political Spending and The First Amendment*, 23 U. PITT. L. REV. 847, 854-61 (1962); 27 *FORDHAM L. REV.* 599, 604-6 (1959); 31 *ROCKY MT. L. REV.* 370, 378-9 (1959). Lambert even goes so far as to state that these provisions all violate a corporation's right to free speech. See Lambert, *supra* note 214, at 1065-66. On the other hand, it has been argued that corporations are not within the first amendment. Ruah, *Legality of Union Political Expenditures*, 34 *So. CAL. L. REV.* 152, 162 n.49 (1961). See also *Hague v. CIO*, 307 U.S. 496, 514 (1939); *Hemphill v. Orloff*, 277 U.S. 537, 548-50 (1928).

There has even been a suggestion that these provisions are unconstitutionally vague and therefore void. Lambert, *supra* note 214, at 1063-64. This argument, however, seems weak at best.

221. *PRESIDENT'S COMMISSION* 20. See also *United States v. CIO*, 335 U.S. 106, 154-55 (1948) (Rutledge, J., concurring); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

222. However, it has been argued that since even partisan advertising is informative, it should be encouraged. Comment, 69 *YALE L.J.* 1017, 1051-52 (1960). Lambert would go one step further to allow corporations and unions to deduct as much of the cost of partisan advertising as was an ordinary and necessary business expense if the advertising stated who paid for it. Lambert, *supra* note 214, at 1076. However, this would not seem wise. Although advertising is a visible expenditure and therefore more easily controllable, it is almost impossible to envisage a situation in which, within the democratic context, partisan political advertising could be deemed an ordinary and necessary business expense.

that can be accomplished is limitation, not elimination of corporate influence. Although large contributions by corporate directors are an important source of political funds,²²³ directors, as individuals, cannot be forbidden to contribute because this would violate their first amendment rights. Corporations make use of many techniques, such as padded expense accounts, free use of corporate property by candidates, etc., which are difficult to detect and almost impossible to control.²²⁴ Some of these abuses may be controlled because they can no longer be deducted from gross income,²²⁵ and the Internal Revenue Service is not known for its inclination to allow deductions.²²⁶ Other techniques, in view of permissible union activities and congressional intent to treat unions and corporations alike,²²⁷ would seem to be permissible means of exercising corporate influence. For example, the Gore Committee found that

corporations have been advised in broadly disseminated publications of the United States Chamber of Commerce and legal opinions that they may engage in the following political activities:

- (1) pay salaries and wages of officers and regular employees which engage in political activities;²²⁸
- (2) publish opinions and arguments of a political nature, ex-

223. See *Gore Report* 13; ALEXANDER, *FINANCING THE 1964 ELECTION* 91 (1966).

224. See *id.* at 24. See also Norton-Taylor, *How to Give Money to Politicians*, *Fortune*, May 1956, p. 113, 238.

225. Pub. L. No. 368, 89th Cong., 2d Sess. tit. III, § 301 (March 15, 1966) (INT. REV. CODE OF 1954, § 276). However, even prior to passage of this section partisan campaign contributions were not deductible. Several rationales were suggested. One found such contributions not to be sufficiently related to business survival to be ordinary and necessary expenses within the meaning of INT. REV. CODE OF 1954, § 162. This rationale, however, was not always followed. See Rev. Rul. 156, 1962-2 CUM. BULL. 47, allowing deductions for bipartisan support; Lambert, *supra* note 214, at 1069-76. Another rationale was that to allow corporations to deduct campaign contributions would be to disrupt the tax equilibrium between corporations and individuals. See 69 YALE L.J. 1017 (1960). The real reason for disallowing such deductions, however, was that allowance would have been violative of clear statutory policy embodied in the provisions prohibiting campaign contributions by corporations. *Cammarano v. United States*, 358 U.S. 498, 508 (1959).

226. However, the Internal Revenue Service views its position as a tax collector, not as a policeman. See *Hearings Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration*, 82d Cong., 1st & 2d Sess. 516-529 (1952) (investigation into 1950 Ohio senatorial campaign).

227. See note 221 *supra* and accompanying text.

228. Since this has been held to be permissible union activity, *United States v. Construction Union*, 101 F. Supp. 869 (W.D. Mo. 1951), by analogy this should also be permissible corporate activity. See note 212 *supra*.

pressed as views of the corporation, in any house organ or other printed document circulated at the expense of the corporation;²²⁹

(3) purchase radio and television time or newspaper space for the presentation of the corporation's political views;²³⁰

(4) use any other means of expressing the political views of the corporate management, publicly or privately;

(5) encourage people to register and vote, and disseminate information and opinions concerning public issues without regard to parties and candidates.²³¹

Even traditionally conservative bankers have commonly violated the statute. Despite prohibition of contributions by national banks²³² and the definition of contribution which specifically includes loans,²³³ it seems that such loans are commonly made.²³⁴ Some bankers seem to have the mistaken belief that such loans are permissible if made in the ordinary course of business,²³⁵ but there is nothing in the statute to support this view. A more important problem arises when an individual negotiates a personal loan and turns the proceeds over to a political committee which pays back the interest and principal. The bank should not be considered to violate the statute only in the unusual situation where the bank has no knowledge of the loan's purpose and the formal borrower also remains personally obligated on the loan. The loan would then be to the individual who, in view of the definition of a contribution,²³⁶ would be deemed to have made a contribution of the face amount of the loan.

G. DISCLOSURE

Effective publicity is required if effective control of campaign contributions is to be achieved, but the present publicity provisions are totally inadequate. Reports are presently required from political committees,²³⁷ candidates,²³⁸ and individuals who independently expend more than fifty dollars to influence elections in two or more states.²³⁹ However, except for a require-

229. *Cf. United States v. Lewis Food Co.*, 236 F. Supp. 849 (S.D. Cal. 1964) upheld this as a proper corporate activity.

230. *Cf. Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

231. *Gore Report* 24.

232. 18 U.S.C. § 610 (1964).

233. 18 U.S.C. § 591 (1964). "The term 'contribution' includes a gift, subscription, loan, advance, or deposit of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable to make a contribution." 2 U.S.C. § 241(d) (1964).

234. See *Gore Report* 64-65 for an illustrative list of loans.

235. *Id.* at 16.

236. See note 233 *supra*.

237. 43 Stat. 1071 (1925), 2 U.S.C. § 244 (1964).

238. 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964).

239. 43 Stat. 1072 (1925), 2 U.S.C. § 245 (1964).

ment that each of these reports be verified under oath by the person submitting them,²⁴⁰ the requirements are not uniform,²⁴¹ and the coverage omits most important sources of congressional campaign contributions.

Lack of coverage is the most glaring defect in the present statutes. Since the definition of a political committee does not include intrastate committees,²⁴² most contributions to congressional elections, except as required by state law, go unreported.²⁴³ Nor do reports by candidates close this gap, because they need only report those contributions received by them or by a person with their knowledge or consent,²⁴⁴ and candidates have interpreted that requirement as excluding contributions to intrastate committees. An even more glaring loophole is that candidates are not required to report contributions received during primaries,²⁴⁵ when they are most in danger of being "bought."

Although the Supreme Court has upheld present publicity provisions,²⁴⁶ it has not yet faced the question whether these provisions violate first amendment rights of contributors by forcing them to expose their political beliefs. The question is whether the inhibitory effects of publicity upon expression of opinion by persons who would prefer to remain anonymous,²⁴⁷ is outweighed by the dangers of unpublicized contributions, which can pervert democratic processes by depriving the electorate of a chance to elect a person to represent their interests.²⁴⁸ The answer would

240. 43 Stat. 1072 (1925), 2 U.S.C. § 247 (1964).

241. *E.g.*, candidates must report only the names of all their contributors, 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964), but political committees must report names and addresses of contributors of over \$100, 43 Stat. 1071 (1925), 2 U.S.C. § 244 (1964). In view of the size of the reports, the cutoff point for political committees seems to be necessary, but there seems to be no justification for requiring candidates to report all contributions but not the addresses of the contributors.

242. 43 Stat. 1070 (1925), 2 U.S.C. § 241(c) (1964).

243. See *Gore Report* 8.

244. 43 Stat. 1072 (1925), 2 U.S.C. § 246 (1964).

245. 60 Stat. 1352 (1946), 2 U.S.C. § 241(a) (Supp. 1965). However, since 2 U.S.C. § 246(a) (1) requires a candidate to report all contributions known to him that are made "in aid or support of his candidacy for election or for the purpose of influencing the result of the election," it could be argued that candidates for election should include contributions made during primary campaigns. Unfortunately, this is not the interpretation given to this section by candidates, and it would not be applicable to losers of primaries because they would not be "candidates." See 2 U.S.C. 241(b) (1964).

246. *Burroughs v. Cannon*, 290 U.S. 534 (1934).

247. *Cf. Talley v. California*, 362 U.S. 60 (1960); *Rumely v. United States*, 197 F.2d 166, 174 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953).

248. *Cf. Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Smith v. ICC*, 245

seem to be clear: the potential inhibition from contributing to a political party, compared with the potentiality of large sums of unreported contributions, weighs heavily in favor of finding such a provision constitutional. As a practical matter, the person most likely to be deterred by publicity from contributing—the “little man” who cannot afford to offend his superiors—is least likely to have his contribution publicized. It is hard to conceive of someone going up to the repository of reports to see whether an underling contributed to the “proper” political party, and newspapers are unlikely to list small or medium contributions.

While disclosure does have certain disadvantages, it does offer two types of advantages:

informative and group-pressure effects can be achieved without legislative determination of the bounds of permissible conduct; the enforcement effect, on the other hand, may simplify the administration of substantive standards and perhaps make possible the substitution of private for public enforcement.²⁴⁹

In effect, disclosure and an effective publicity system leave the final judgment about candidates and contributions in the hands of the voters, where it belongs.²⁵⁰ Indeed, mere existence of a disclosure procedure might tend to inhibit contributors' expectations and legislators' willingness to accommodate them.²⁵¹ However, disclosure is least likely to reach those contributions which should be prohibited. Although a disclosure statute may offer a means of punishing those underworld contributors whose unreported cash contributions do not reach the level of bribery, the principal purpose of disclosure is to identify sources and expenditures, not to regulate them.²⁵²

Disclosure, to be effective, must be combined with wide ranging publicity, preferably by the mass media. This requires reports to be uniform, intelligible, and filed in enough time to allow publicity about their contents to reach the electorate before they go to the polls.²⁵³ While none of these elements is now present in federal laws,²⁵⁴ the Florida experience shows that if the information is available in usable form,²⁵⁵ it will be given

U.S. 33 (1917); Nutting, *Freedom of Speech: Constitutional Protection Against Governmental Intrusions in Political Affairs*, 47 MICH. L. REV. 181, 202 (1948).

249. Note, 76 HARV. L. REV. 1273, 1292 (1963).

250. See 1956 *Hearings* 1283.

251. Cf. DOUGLAS, *ETHICS IN GOVERNMENT* 97-100 (1952).

252. ALEXANDER, *MONEY, POLITICS AND PUBLIC REPORTING* 7 (1960).

253. See Peters, *Political Campaign Financing: Tax Incentive for Small Contributors*, 18 LA. L. REV. 414, 418 (1958).

254. See *Gore Report* 3.

255. FLA. STAT. § 99.161(4) (a) (1965) states that no one can make

wide publicity.²⁵⁶

It is clear that if effective disclosure and publicity of campaign contributions are to be possible, extensive changes must be made in present statutes. The first thing which must be done is to enlarge coverage to include "all political committees inter and intra state, state and local, party and non-party, subsidiary and independent, campaigning directly or indirectly for candidates for nomination or election as President or Vice President [and other federal offices] raising or spending as much as \$2,500 in a year."²⁵⁷ It might even be suggested that individuals who contributed an aggregate of \$100 or more in a year to political committees or candidates should be required to report,²⁵⁸ as a check upon the accuracy of other reports. This would not be a radical change from the present statute, under which individuals who contribute more than fifty dollars in elections in two or more states have to report.²⁵⁹

There should be one standard reporting form, so that information is easily accessible and comparable with reports of other candidates.²⁶⁰ The information required should be fairly detailed, so that it will record significant contributions and gifts,

a contribution or expenditure on behalf of a candidate for state office except through a duly appointed treasurer. The Florida Supreme Court in a four to two decision upheld this section as constitutional. *Smith v. Ervin*, 64 So. 2d 166 (Fla. 1953). But grave doubts exist as to whether the same result would be reached by the United States Supreme Court. It could be cogently argued that this violates the first amendment right to free speech. Cf. *State v. Pierce*, 163 Wis. 615, 158 N.W. 696 (1916) (similar statute held to violate the state bill of rights). But the Court might not be persuaded because of the unlikelihood of a candidate's refusing a contribution, and the danger of undisclosed contributions.

256. See Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434 (1962); *Hearings, House Special Committee to Investigate Campaign Expenditures*, 82d Cong., 2d Sess. 175 (1952).

257. PRESIDENT'S COMMISSION 18. President Johnson's proposal would go even further by requiring all committees supporting candidates to report. S. 3435, 89th Cong., 2d Sess. §§ 201(c), 204 (1966); as would the House Republican bill. H.R. 16203, 89th Cong., 2d Sess. § 201(c) (1966). This might be a better solution since it would probably pay a candidate to establish numerous committees to evade the limitation.

258. S. 3435, 89th Cong., 2d Sess. § 205 (1966). Other proposals would have raised the limit to \$500. E.g., S. 2541, 89th Cong., 2d Sess. § 203 (1966).

259. 43 Stat. 1072 (1925), 2 U.S.C. § 245 (1964).

260. Cf. S. 2541, § 203, S. 3435, 89th Cong., 2d Sess. § 206(a) (1966) (President Johnson's Bill); S. 2426, § 204(a), H.R. 9255, 87th Cong., 1st Sess. § 204(a) (1961), which place a duty on the Clerk of the House and the Secretary of the Senate to prescribe and provide forms. The Republicans, on the other hand, would give this duty to an independent agency. H.R. 16203, 89th Cong., 2d Sess. § 207(1) (1966).

but not so detailed that all contributions and gifts get lost in a mass of insignificant detail.²⁶¹ Ideally, the reports should disclose candidates' total financial status so that questionable gifts and "investments" would be disclosed.²⁶² These reports should be open to the public within twenty-four hours of receipt,²⁶³ and the public should also be free to copy them.²⁶⁴ As it stands now, even a senatorial committee cannot copy reports in the Office of the Clerk of the House without permission of the Speaker of the House.²⁶⁵ Also, the number of reports should be increased to a maximum of eight per year in order to assure effective publicity.²⁶⁶ Political committees should have to file four quarterly reports in April, July, October, and December, one ten days before a primary or election, and a final one thirty days after the primary or election. These reports would break down information enough to be digested and publicized, would include annual fund raising dinners usually held between February and June, and would give a report within one month of elections.

261. See ALEXANDER, *op. cit. supra* note 252, at 48-51; H.R. 16203, 89th Cong., 2d Sess. (1966).

262. The Dodd affair indicates the need for such a plan but passage of such a proposal is highly unlikely. This may be the reason that the Senate Committee on Rules and Administration ignored President Johnson's bill which would require reporting of all compensation and gifts, except from one's immediate family. S. 3435, 89th Cong., 2d Sess. §§ 304(c), (d) (1966); see S. 3435, 89th Cong., 2d Sess. §§ 301-03 (1966); H.R. 16203, 89th Cong., 2d Sess. §§ 301-03 (1966).

The Republicans, however, have pursued such a plan fairly vigorously. The House Republican Policy Committee bill would require candidates to reveal, prior to election, a detailed statement of all income received during the immediately preceeding twelve months and, if elected, a yearly statement thereafter. This yearly statement would also disclose all gifts received by their immediate families except those from other family members. The bill wisely goes one step further by requiring similar reports from policy level employees of the executive department, defined as those in the top five pay grades, even though acceptance of gifts of more than nominal value is prohibited by Exec. Order No. 11222 of May 8, 1965. H.R. 16203, 89th Cong., 2d Sess. §§ 301-06 (1966).

263. See, e.g., S. 1623, 87th Cong., 1st Sess. §§ 216, 217 (1961); S. 2436, 86th Cong., 2d Sess. §§ 206(3), 207(4) (1960).

264. See S. 2541, 89th Cong., 2d Sess. § 206(4) (1966); S. 3435, 89th Cong., 2d Sess. §§ 304(c), (d) (1966); H.R. 16203, 89th Cong., 2d Sess. § 207(4) (1966). S. 2426, 87th Cong., 1st Sess. §§ 206(4), 207(5), H.R. 9255, 87th Cong., 1st Sess. §§ 206(4), 207(5) (1961) specified that copies were to be provided at cost.

265. *Gore Report* 8.

266. But see S. 2436, 86th Cong., 2d Sess. § 202(a) (1960) which would have cut down the required number of reports from four to two in non-election years. S. 2426, 87th Cong., 1st Sess. § 202(a), H.R. 9255, 87th Cong., 1st Sess. § 202(a) (1961) also adopted this idea.

It is generally agreed that these reports should be placed in a central repository. The problem is where. The executive branch may be quickly dismissed because Congress would never permit it. Probably the same fate would befall a nonpartisan or bipartisan independent agency such as suggested by the President's Commission on Campaign Costs.²⁶⁷ The Comptroller General would be ideal, since the office is already equipped to handle such reports,²⁶⁸ but the Comptroller would not want the job because it would place him in the anomalous position of having to report on his own employer. The final and most original suggestion is to establish a Registry of Election Finance in the Office of the Library of Congress, not to analyze and interpret the reports,²⁶⁹ but to assure availability of accurate and uniform facts, leaving analysis and interpretation to others. The Registry would also have the positive duty to see that all reports are filed, that they are accurate and complete, and that matters calling for action are referred to the Attorney General or to a congressional committee.²⁷⁰ These reports should also be filed in the states, either in the clerk's office of the federal district courts²⁷¹ or in the offices of state secretaries of state,²⁷² in order to insure

267. See PRESIDENT'S COMMISSION 19-20. This proposal was adopted in S. 2080, 87th Cong., 1st Sess. § 301 (1961), but it, like all reform bills, failed to pass. This ambitious plan might work if limited only to tabulation of presidential candidates' reports, but it seems wasteful to separate the repository of congressional and presidential candidates' reports. Besides, it is almost impossible to imagine a truly bipartisan agency in such a sensitive field as campaign contributions. However, the Republicans have adopted the suggestion of the President's Commission and, despite the fact there is a Democratic President, would create an administrative agency called the Federal Elections Commission. H.R. 16203, 89th Cong., 2d Sess. § 202 (1966). See H.R. 18162, 89th Cong., 2d Sess. (1966).

268. Cf. S. 1623, 87th Cong., 1st Sess. § 214 (1961).

269. Analysis and interpretation by any such "impartial" governmental agency would call for too many "political" decisions. One of the hardest would arise when an individual or group, not publicly associated with a candidate, made expenditures to advance a candidacy without the consent of the candidate. Whether such a candidate should be credited with those expenditures could have grave political consequences. He might thereby violate the statutory ceiling, or even worse, he might be identified with a fringe group in the minds of the electorate.

270. See ALEXANDER, *op. cit. supra* note 252, at 63-65, for suggested list of duties. See H.R. 16203 & H.R. 18162, 89th Cong., 2d Sess. (1966).

271. See, e.g., S. 2541, 89th Cong., 2d Sess. § 202(a) (1966); S. 2436, 86th Cong., 2d Sess. § 205 (1960).

272. See, e.g., S. 1623, 87th Cong., 1st Sess. § 214, S. 2426, 87th Cong., 1st Sess. § 203, H.R. 9255, 87th Cong., 1st Sess. § 203 (1961). Although at first it was thought that reports should be filed with clerks of federal district courts, it was thought to be easier to give the function of receiving reports to the secretaries of state of the various states. *Hearings*

easy accessibility to interested parties.

Whether compulsory publication of these reports should be required is doubtful. The cost and time required to prepare a summary voter pamphlet would be prohibitory and probably would not provide the necessary focus or analysis to make the reports intelligible to the electorate. It is probably sufficient to make the information available to the press in an intelligible form and to rely upon them to analyze the reports for the electorate.

Several other suggestions have been made to insure accuracy of reports: contributors should be required to contribute under their true names, and knowing receipt of contributions made under a false name should be punished;²⁷³ a central depository should be established for all funds²⁷⁴ to simplify control and the parties' bookkeeping; and the number of committees could be controlled by either requiring them to have the approval of the candidate they are supporting²⁷⁵ or requiring them to register. Although politicians are split as to whether committees should be required to get a candidate's approval,²⁷⁶ such a provision would probably prove to be unworkable and might even constitute a violation of the first amendment, because it would condition an individual's right to speech upon prior approval of another person.²⁷⁷ Registration of committees which reasonably expect to raise or spend more than \$1,000 per year would avoid this constitutional question and would provide the public at an early date with knowledge of existing committees and whom they were supporting. In addition, this arrangement might serve to strengthen the party system by reducing the number of committees.

Before the Subcommittee on Elections of the Committee on House Administration, 87th Cong., 2d Sess. (1962). Surprisingly enough, President Johnson's proposal made no such provision. S. 3435, 89th Cong., 2d Sess. (1966).

273. See MASS. GEN. LAWS ANN. ch. 55, §§ 8, 16 (1964); N.Y. ELECTION LAW § 326.

274. FLA. STAT. ANN. § 99.161 (1965) (see note 255 *supra*); MASS. GEN. LAWS ANN. ch. 55, § 17 (1964); N.J. STAT. ANN. §§ 19:41-2 (1964) (campaign manager must deposit), 19:44-5 (depository must report within 20 days after election).

275. See, e.g., S. 1623, 87th Cong., 1st Sess. §§ 102(3), 209 (1961).

276. 1956 *Hearings* 1291-1307.

277. However, it could be argued that a candidate's approval is a foregone conclusion, except for those groups whose support he does not want, and who should not be able to solicit money on his behalf or even "smear" his name by identification with them. It would also prevent his opponent from making use of committees allegedly supporting him but which are only used to impede his campaign.

Although there is general agreement that reporting reforms are needed,²⁷⁸ and most of the reform bills would have extended coverage to include primaries,²⁷⁹ the House has "lost" all of them.²⁸⁰ In view of the apparent lack of enthusiasm for reform, it seems that only great public pressure, sparked by a blatant abuse like the publication "Toward an Age of Greatness," will move Congress to action.

H. ENFORCEMENT

Enforcement of federal laws regulating campaign financing has been practically nonexistent. Poor draftsmanship, lack of enforcement provisions within existing law, and political conservatism have combined to make enforcement an empty threat.²⁸¹

There is no public official charged with the responsibility of compelling submission of reports required by law, examining them, and reporting apparent violations to the Department of Justice. The present repositories, the Clerk of the House and the Secretary of the Senate, are merely custodians. Their only responsibility is to receive reports, preserve them for two years, and make them available for public inspection.²⁸² But if reports are apparently missing, they will send out a letter to the candidate as a reminder.²⁸³ This "lack of provision for regular audit breeds irresponsibility in campaign bookkeeping and a corresponding lack of confidence in the accuracy and completeness of reports."²⁸⁴ Perhaps it is here that a central campaign

278. *E.g.*, 1961 *Hearings* 181 (Senator Proxmire), 196 (Bailey, Chairman Democratic National Committee).

279. *E.g.*, S. 1555, 87th Cong., 1st Sess. § 102(a), S. 1623, 87th Cong., 1st Sess. § 102(1) (1961); S. 2436, 86th Cong., 2d Sess. § 102(a) (1960).

280. Even the Senate, which usually passes reform bills, turned down by a vote of forty-four to thirty an amendment specifically covering primary elections, 107 CONG. REC. 19663-64 (1961), despite the fact that such a provision was passed the year before by a vote of fifty to thirty-nine, and forty-seven of the same Senators were still in the Senate. 107 CONG. REC. 19661 (1961). By a vote of forty-three to thirty the same fate befell an amendment to include intrastate committees spending more than \$2,500. 107 CONG. REC. 19661 (1961). One of the alleged reasons for these actions was the totally unconvincing one of fear of intruding into state government. 107 CONG. REC. 19660 (1961). But see H.R. 18162, 89th Cong., 2d Sess. (1966).

281. See generally *Hearings before the Senate Subcommittee on Privileges and Elections of the Committee on Rules and Administration*, 84th Cong., 1st Sess. 199 (1955).

282. 43 Stat. 1073 (1925), 2 U.S.C. § 247 (1964).

283. ALEXANDER, *op. cit. supra* note 252, at 28.

284. *Id.* at 10.

depository can provide the most benefit because, although it might not discover transactions, it does simplify auditing procedures and increase the probability that any avoidance of the law has been deliberate. It is much easier to show an intent to avoid recording contributions when there is an official central depository than when records are, as now, kept in a haphazard fashion.

Even if there were some agency to audit candidates' reports, the law would still have to be changed to make it enforceable. As it stands now, the Attorney General does not want to enforce the reporting provisions because they "are in some instances at best very inadequate."²⁸⁵ Congress, however, has on occasion refused to seat a member who spent more than was "proper." But since a "proper amount" has not always been gauged by the statutory ceilings, this sanction has been sporadic and partisan in application.²⁸⁶

Some have suggested allowing citizens to enforce the law through court action,²⁸⁷ but such actions require a certain political atmosphere before they will be brought,²⁸⁸ and even then there is some doubt as to their utility.²⁸⁹

Thus, sanctions must be available to require disclosure and to control certain activities; however, disclosure seems to be the best means of enforcing political morality and curbing "undue influence." This also leaves the definition of "undue influence" where it belongs—in the electorate. Requiring disclosure has another benefit: because "dirty" money is not likely to be reported for fear of public reaction, prosecution of such contributors and recipients will be simplified. The prosecutor need not undertake the almost impossible task of proving intent to "corrupt," he need only show that such a contribution was not reported or was reported under a false name.

285. 1961 Hearings 198.

286. Cf. Barnett, *Contested Congressional Elections in Recent Years*, 54 Pol. Sci. Q. 187 (1939).

287. See, e.g., MASS. GEN. LAWS ANN. ch. 55, § 28 (1953). Five voters can bring a petition to invalidate an election, but the provision is not applicable to candidates for Congress or the state legislature. Section 30 permits one voter to request an election inquest, but this is subject to judicial discretion.

288. It is a circle: without the requisite atmosphere no one will bring suit, but suits are necessary to create that atmosphere.

289. Courts are very reluctant to allow such suits and, where they are a matter of judicial discretion, they are usually denied. *Irwin v. Justice Brighton Mun. Ct.*, 298 Mass. 158, 10 N.E.2d 92 (1937). Part of the reason seems to be a fear of undue harassment. This might be alleviated by limiting the remedy to candidates. However, this

IV. OTHER ALTERNATIVES

A. TAX INCENTIVE

1. *Present Tax Treatment*

Although contributions were not per se deductible, deductions were formerly obtained by contributors by claiming the cost of testimonial dinner tickets or political advertisements as an ordinary business expense. This is no longer possible. As a result of public furor over the Democratic fund raising ad book entitled "Toward an Age of Greatness," Congress passed a statute specifically denying deductions for the cost of dinner tickets or advertisements if a candidate or political party is the direct or indirect beneficiary of such activities.²⁹⁰ The Supreme Court has decided, in a five to four decision, that candidates do not come within the general rule that only net income is taxed; therefore they cannot deduct the costs of running for election.²⁹¹ Drawing heavily upon the structure of the Internal Revenue Code, the Court has denied a deduction for unreimbursed campaign expenses as an ordinary business expense²⁹² or as a loss incurred in a transaction entered into for profit. Although a strict reading of the Internal Revenue Code may support such a decision,²⁹³ it was a particularly unfortunate result. Mr. Justice Black's dissent would seem to be much more justifiable in the context of democratic theory: "Unless our democratic philosophy is wrong, there can be no evil in a candidate spending a legally permissible and necessary sum to approach the electorate and enable them to pass an informed judgment upon his qualifications."²⁹⁴

might negate the usefulness of the remedy because few candidates are willing to cast the first stone.

290. Pub. L. No. 368, 89th Cong., 2d Sess. tit. III (March 15, 1966), INT. REV. CODE OF 1954, § 276.

291. *McDonald v. Commissioner*, 323 U.S. 57 (1944).

292. *Id.* at 60. INT. REV. CODE OF 1954, § 162.

293. INT. REV. CODE OF 1954, § 271 disallows a deduction for contributions as a bad debt under §§ 165(g) and 166. Section 162(e) allows certain lobbying costs as a deductible ordinary and necessary business expense, but it specifically excludes contributions to political parties from this provision. INT. REV. CODE OF 1954, § 162(e)(2). A distinction could be drawn between a candidate's contribution and another person's, and the exclusion of section 162(e)(2) could be said to apply only to that part of the provision referring to lobbying expenses. But this argument would seem to be very weak, particularly in view of INT. REV. CODE OF 1954 § 276. See note 290 *supra* and accompanying text.

294. *McDonald v. Commissioner*, 323 U.S. 57, 69 (1944).

The end results of this ill-considered opinion have been to place an even heavier burden on candidates without wealthy friends, and to

Although courts have denied direct tax benefits to successful candidates,²⁹⁵ in line with *McDonald's* stricture,²⁹⁶ this decision still favors the incumbent who has certain advantages. The salaries of his staff are paid by the government, he receives free publicity inherent in his office, and he can deduct the cost of a report to his constituents during a campaign, even if it contains a "brief personal message."²⁹⁷

The federal government should try to emulate the state of Minnesota, which allows a candidate to deduct from his gross income all unreimbursed campaign expenditures up to statutory limits.²⁹⁸ Such a provision would give recognition to the concept that a politician does fulfill a worthy function and would tend to encourage poor, but worthy candidates to run for office.

2. Reasons for a Tax Incentive

A properly drafted tax incentive²⁹⁹ might be a sufficient

force courts to carve out exceptions from this exception to the general rule of taxing only net income. Compare *Shoyer v. United States*, 290 F.2d 817 (3d Cir. 1961) (deduction disallowed); Rev. Rul. 60-366, 1960-2 CUM. BULL. 63, with *Maness v. United States*, 237 F. Supp. 918 (D. Fla. 1965), *rev'd*, 35 U.S.L. WEEK 2218 (1966); *Davenport v. Campbell*, 238 F. Supp. 568 (N.D. Tex. 1964).

295. *Mays v. Bowers*, 201 F.2d 401 (4th Cir. 1953) (amortization of expenses over term of office disallowed). It is interesting to note that this court feared that allowing a tax deduction would subsidize rich candidates, whereas, the minority in *McDonald* feared that only rich candidates would run without this tax incentive.

296. "To draw a distinction between outlays for reelection and those for election—to allow the former and disallow the latter—is unsupported in reason." *McDonald v. Commissioner*, 323 U.S. 57, 63 (1944).

297. I.T. 4095, 1952-2 CUM. BULL. 90. The Treasury reasoned that "The mere fact . . . that it might be politically expedient for a Congressman to incur an otherwise deductible expense would not ordinarily convert that expense into a nondeductible campaign expense." *Id.*

298. MINN. STAT. ANN. § 290.09(2)(c) (Supp. 1965). Surprisingly enough, the number of candidates who claimed the tax deduction fell far below the number who ran for office. HEARD, THE COSTS OF DEMOCRACY 395 (Anchor ed. 1962).

299. See generally ALEXANDER, TAX INCENTIVES FOR POLITICAL CONTRIBUTIONS (1961); 1956 *Hearings* 1250. For the latest thinking on this problem see *Hearings Before the Senate Committee on Finance on S. 3496, Amendment No. 732, S. 2006, S. 2965 & S. 3014*, 89th Cong., 2d Sess. (1966).

Unfortunately, all tax incentive bills have proposed that the Secretary of the Treasury have responsibility for developing controls. Shifting decision making to an administrative agency in order to pass a bill is often advisable, but such is not the case here. Decisions which would determine the ultimate success or failure of a tax incentive plan are too important to be left to an administrative agency. Cf. S. 2965, S. 3014, S. 3435 § 401, 89th Cong., 2d Sess. (1966); H.R. 16203, 89th Cong., 2d Sess. (1966); S. 2006, 89th Cong., 1st Sess. § 1 (1965).

psychological incentive to the parties and the electorate to make mass solicitations and contributions a practical and significant way of raising funds, while increasing the percentage of the population involved in politics.³⁰⁰ It has worked for charities and could work for political parties.³⁰¹ Although both parties are in favor of a tax incentive for political contributions,³⁰² no tax incentive will achieve a significant impact upon the political system without an educational campaign,³⁰³ which should not be too difficult to mount,³⁰⁴ and reorganization of local party organizations in order to reach masses of people, which would be very difficult to accomplish.³⁰⁵

A tax incentive would also seem to be an appropriate way to subsidize the political process,³⁰⁶ thereby opening it up to less wealthy candidates. In addition, it "would be an official recognition that political contributions are of value to our society."³⁰⁷ Furthermore, by leaving subsidization to the people a tax incentive would eliminate most of the problems inherent in the old proposals for direct government subsidies to the parties or candidates.³⁰⁸ Indeed, a tax incentive plan could be designed to strengthen the national parties,³⁰⁹ although this focus might prevent its use when most needed—during primaries—and might negate some of the flexibility in use, which otherwise could be attained.³¹⁰

3. Tax Deduction

In the past most tax incentive proposals have not been based upon a tax deduction, although this form is most analogous to

300. See Peters, *supra* note 253, at 421.

301. See § I. E. 3 *supra*.

302. 1961 *Hearings* 191 (Bailey in favor of a tax credit), 209 (Miller, Chairman Republican National Committee, in favor of a tax deduction). See also S. 3435, 89th Cong., 2d Sess. § 401 (1966); H.R. 16203, 89th Cong., 2d Sess. § 401 (1966), which embody tax deductions.

303. The educational campaign should be a "conscious and studied effort to educate the public to its social responsibilities, an effort [which would be] facilitated and fortified by adoption of the techniques of business organization and of mass advertising." Peters, *Political Campaign Financing: Tax Incentive for Small Contributors*, 18 *LA. L. REV.* 414, 421 (1958). In effect, political parties should emulate techniques of charitable organizations.

304. The American Heritage Foundation and The Advertising Council have already begun, somewhat successfully, such a program.

305. See § I. E. 3 *supra*.

306. See 1961 *Hearings* 49-50 (Senator Hickey).

307. *Id.* at 163 (Senator Long).

308. *E.g.*, party devitalization, etc. See § IV. B. *infra*.

309. See ALEXANDER, *op. cit. supra* note 299, at 31-32.

310. See Peters, *supra* note 303, at 434.

present tax incentives,³¹¹ and has been adopted by those states which have tax incentives for political contributions.³¹² The primary reason advanced why a tax deduction would not be an appropriate solution is that it would not provide sufficient psychological incentive. A \$100 deduction is not likely to motivate a large contributor³¹³ or a small contributor, who probably uses the standard deduction.³¹⁴

However, incentive through tax deduction seems to have gained in popularity this year. President Johnson's proposal³¹⁵ embodies a tax deduction, and most of the tax incentive bills filed in the Senate this year include a tax deduction separate from and in addition to the standard deduction either as the primary incentive or as an alternative.³¹⁶ Part of the reason for this pop-

311. *E.g.*, the charitable deduction of INT. REV. CODE OF 1954, § 170.

312. CAL. REV. & TAX CODE § 17234 (Supp. 1965) (\$100 deduction for contribution in any primary or general election); HAWAII REV. LAWS ch. 121, §5(g) (Supp. 1965) (contributions up to \$100 deductible if made to party committee); MINN. STAT. ANN. § 290.21(3)(e) (Supp. 1965) (\$100 deduction plus certain increased sums for specified political officials); MO. ANN. STAT. § 143.160(e) (Supp. 1965) (contributions up to \$50 to a party deductible) (receipt from party committee must accompany tax return).

313. A mere \$100 deduction is not likely to motivate a \$5,000 giver, but since his tax rate is likely to be higher than that of a smaller giver, a greater percentage of it would have gone for taxes if the deduction had not been available.

314. In 1963 55.7% of individual taxpayers used the standard deduction, but they accounted for only 22.2% of the total amount of deductions. Internal Revenue Service, Statistics of Income 1963, 4. Thus, it is clear that most lower income taxpayers used the standard deduction.

This is the primary reason most of the new tax deduction proposals would grant a tax deduction for campaign contributions in addition to the standard deduction. *E.g.*, S. 3435, § 401(a) (President Johnson's Bill), H.R. 16203, § 401(a) (House Republican's Bill), 89th Cong., 2d Sess. (1966).

315. S. 3435, 89th Cong., 2d Sess. § 401(a) (1966), provided for a tax deduction of up to \$100.

316. Senator Smathers introduced S. 2006, 89th Cong., 1st Sess. (1965), which provided for an alternative tax credit of up to twenty dollars for a joint return or a tax deduction of up to \$500 for contributions to national party committees or designated state party committees. Senator Williams introduced two bills. The first, S. 2965, 89th Cong., 2d Sess. (1966), provided a tax credit of 70% of the amount contributed, deduction not to exceed twenty-five dollars plus a 100% tax deduction of the amount exceeding \$25 up to \$100. Under this bill, national party committees, designated state party committees, and all candidates for election or nomination at local, state and federal levels would be eligible. The second, an amendment to H.R. 13103, 89th Cong., 2d Sess. (1966), provided for a \$100 deduction if the recipient had complied with all provisions of federal, state, and local law at the time the deduction is claimed. These proposed deductions would be in addition to the

ularity seems to be that politicians have realized that the largest untapped source of funds are persons earning between \$10,000 and \$15,000 a year, who would be the easiest to solicit,³¹⁷ and who would most likely be motivated by a \$100 deduction.

Even if a tax deduction is not allowed for partisan political contributions, consideration should be given to changing section 162 of the Internal Revenue Code of 1954 specifically to allow a tax deduction for bipartisan activities.³¹⁸ Such an amendment would serve to eliminate possible inconsistencies under present regulations.³¹⁹

4. *Tax Credit*

In the past, most "reform" proposals have incorporated some form of a tax credit for political contributions.³²⁰ A credit of one half the total contributions to specified committees or candidates, up to a maximum of ten dollars a year, is the most common suggestion.³²¹ The purpose of such a tax credit "is to increase the base of financial contributions. . . . [and get] a large number of

standard deduction. See H.R. 16203, 89th Cong., 2d Sess. § 401(a) (1966) (House Republican proposal).

317. These people are usually college educated, have a high concept of civic duty, and belong to organizations whose mailing lists can be obtained. See CAMPBELL, *THE AMERICAN VOTER* (1960).

318. See PRESIDENT'S COMMISSION 12-13. The biggest problem with this suggestion is distinguishing between bipartisan and partisan activities.

319. Although Treas. Reg. § 1.162-20(c) (4) (1965) disallows any deduction for lobbying expenses incurred in persuading the public about legislative matters, the same regulations allow deduction of the cost of "institutional advertising." Treas. Reg. § 1.162-20(a) (2) (1965). As a practical matter, in most instances it is impossible to distinguish between the two. For example, one manufacturer requested a ruling on the deductibility of expenses incurred in connection with federal, state, and local elections for purposes of 1) advertising designed to encourage the public to register and vote and to contribute to the political party or candidate of their choice; 2) sponsoring a political debate among candidates for a particular political office; 3) granting employees time off with pay for registration and voting; 4) maintaining a payroll deduction plan for employees wishing to make political contributions. The Treasury found the expenses to be ordinary and necessary expenses of doing business and therefore deductible, since these activities were "politically impartial in character" and "reasonably related to the taxpayer's expected future public patronage." Rev. Rul. 156, 1962-2 CUM. BULL. 47, 50.

320. S. 2965, 89th Cong., 2d Sess. (1966); S. 2006, 89th Cong., 1st Sess. (1965); H.R. 7308, 88th Cong., 1st Sess. (1963); S. 604, 1555, 2426, H.R. 9255, 87th Cong., 1st Sess. (1961).

321. S. 2006, 89th Cong., 1st Sess. (1965). See also the recommendations in PRESIDENT'S COMMISSION 17.

people more interested in the campaign.³²² Only one half the contribution would be allowed as a credit on the theory that part of the burden of contributing should fall upon the contributor.

However, certain structural defects seriously impair the utility of a tax credit plan. Besides the estimated loss of \$30,000,000 a year in tax revenue,³²³ problems of controlling possible abuses would seriously limit use of a tax credit as a catalyst for mass solicitation. Ideally, the tax credit should be available for contributions solicited in a door to door canvass, but a simple receipt plan is too vulnerable to abuse. A recipient of a \$200 contribution could use the available credits to buy nine votes, by handing out evidence of a twenty dollar contribution to nine people who could then claim a ten dollar credit against their taxes. In effect, these receipts would be as good as cash, yet would cost their distributor nothing. Whether abuse would be widespread is doubtful, but even a small amount of manipulation would affect significant sums of money, and would seriously undermine the public's willingness to give. Maximum control would require a contributor to purchase a special three part stamp at the post office: one part retained by the post office, the second going to the party or candidate, and the third filed with the contributor's tax return for the tax credit.³²⁴ But such a plan would provide no incentive for mass contributions because only strongly motivated individuals would be likely to make the necessary effort to contribute. Perhaps the problem might be alleviated by selling these same three part stamps to individuals and to party solicitors who have properly executed authorizations from the parties.³²⁵ Although this would necessitate extra work for party or candidate, such a plan would be less susceptible to abuse and would preserve secrecy of the donee from the Internal Revenue Service.³²⁶

322. 1962 *Hearings* 37, 43; 1961 *Hearings* 163.

323. Letter from Ass't Sec. of Treas. Surrey to Sen. Long (Mo.), Feb. 28, 1961, quoted in 1961 *Hearings* 114.

324. See ALEXANDER, *op. cit. supra* note 299, at 44-45, for further elaboration.

325. Cf. PRESIDENT'S COMMISSION 15.

326. It may seem anomalous to require the parties to publicize the contributions they receive, and at the same time to insist upon a contributor's right to secrecy; but there is a vast difference between the two. Although the Internal Revenue Service could theoretically check party records to see to whom a taxpayer made his contribution, it is unlikely to be done. The Internal Revenue Service should not be influenced by a taxpayer's party affiliation, as might happen if the information were apparent on the face of the tax return.

5. *Eligibility*

Determining who should be eligible to receive contributions covered by a tax incentive raises a series of dilemmas:

- To help candidates for election is to risk hurting candidates for nomination;
- To help federal candidates alone is to risk hurting nonfederal candidates;
- To help candidates is to hurt the parties;
- To help parties without assurance that they will help the candidates is to risk leaving candidates to rely upon large contributors;
- To help parties with assurance of candidate allocation raises allocation problems;
- To stress candidate and party committees hurts permanent nonparty committees.

Although a suggestion has been made to divide such eligibility into three parts—local, congressional, and national³²⁷—it should probably be limited to national parties and federal candidates.³²⁸ There are simply too many local offices, and, besides federal candidates are usually in the most need of money. Candidates for nomination or election to federal offices who have qualified to be placed on the ballot should be eligible, since they are most in danger of becoming obligated to moneyed interests, and because such candidates are most likely to encourage contributions from independent voters. Only those committees whose support such candidates have publicly authorized should be eligible because “placing the responsibility for accreditation directly and openly upon the candidate should make it difficult for undesirable fringe groups of either the left or the right to qualify.”³²⁹ And such restricted eligibility obviates problems of bureaucratic determination of who supported whom. The national parties³³⁰ should be able to designate one national committee and one committee in each state which would qualify to

327. 1961 *Hearings* (Bailey).

328. As a practical matter, the tax benefit could not be confined to federal candidates because national party committees could transfer part of their funds to ineligible candidates. But this is not an undesirable consequence; by transferring funds, national party committees could build party solidarity and responsibility.

329. Peters, *supra* note 303, at 433.

330. A definition of “national party” as one whose candidate for President is on at least ten state ballots has been suggested. PRESIDENT’S COMMISSION 16. This definition has been adopted by most bills introduced in the 89th Congress. *E.g.*, S. 3014, 89th Cong., 2d Sess. (1966); S. 2965, 89th Cong., 2d Sess. (1966); S. 2006, 89th Cong., 1st Sess. (1965).

receive such contributions.³³¹ This would tend to prevent splintering of the national parties, encourage greater party responsibility, and create a constituency for the national parties which is now lacking.

Any tax incentive should be operated on an annual basis.³³² An attempt might be made to shorten campaigns by reducing the time of eligibility to give and to receive contributions which qualify for a tax incentive. Such a plan, however, would not be worth the administrative difficulties which would be placed upon the parties and candidates, since mass solicitation would be effective only near the time of election when voter interest is present. Instead, candidates should be eligible beyond the end of election years, for a period sufficient to pay debts incurred in the immediately preceding campaigns, while the national parties should always be eligible.

B. GOVERNMENT SUBSIDY

Direct federal subsidization was proposed as long ago as 1907 by President Roosevelt³³³ and as recently as 1961 by President Kennedy.³³⁴ Indeed, just recently John Kenneth Galbraith has suggested adoption of direct government subsidies, even at the state level, where problems of control are much greater.³³⁵ The alleged purpose of such a subsidy is to combat the effects of high costs upon campaigns by lessening influence of large contributors, making the parties more willing to nominate those financially unable to run, and helping to inform voters by publicizing issues and candidates.

Serious problems, however, stand in the way of adopting a subsidy. In the past, most subsidy proposals would have granted fixed sums to the parties on condition that they reformed certain campaign practices.³³⁶ The most important objection to such

331. See PRESIDENT'S COMMISSION 15.

332. ALEXANDER, *op. cit. supra* note 299, at 34.

333. 42 CONG. REC. 78 (1907).

334. See N.Y. Times, May 6, 1961, p. 14, col. 4.

335. For the provisions of this highly detailed and imaginative proposal, see Boston Globe, August 18, 1966, pp. 1, 8. While there is little chance of passing such a proposal, and the Massachusetts Supreme Court might well hold it unconstitutional, note 338 *infra*, it indicates the trend of academic and political thinking.

336. *E.g.*, S. 227, 87th Cong., 1st Sess. (1961), which would have given \$1,000,000 for radio and television expenses to a political party whose candidate for President received ten per cent of the popular vote. Minor parties whose Presidential candidates received more than one per cent of the popular vote would have received \$100,000. The bill contained a proviso that the parties streamline their conventions and

a fixed subsidy was fear of government interference with the present political system. Under the first and fourteenth amendments an individual has an equal right to express his views and to influence others. The state may not upset that equality, which it might do by granting a fixed subsidy to the parties, thereby distorting their power.

The first amendment's guarantee of free political action seems to make the distribution of power within a party a matter inappropriate for state regulation, absent a very compelling governmental interest. The dominant party should not easily be allowed to interfere through official channels with the organization of its opponents. Existing measures regulating party activities are justified either as curbs on corruption or as special situations in which the regulated activity has in fact a quasi-public function. The mere existence of a legitimate public purpose does not justify the extensive interference threatened by [direct government subsidies].³³⁷

Massachusetts, for example, seems to have adopted this reasoning, although the court clothed it in the "public purpose" doctrine.³³⁸ Nor is this the sole problem. Other major objections to a fixed governmental subsidy have been neatly summarized:

It is certain to raise problems of Federal control over the parties and over the mass media of communications. Federal subsidization would also tend to entrench existing parties and party leaders in positions of prominence. One of the best indications of the support for a given political organization is its ability to raise funds. If people are not interested enough to contribute, why should the Federal Government pick up the tab?³³⁹

A new form of subsidy which obviates many objections to government subsidies has been proposed by Senator Long of Louisiana.³⁴⁰ This bill³⁴¹ as originally drafted would have pro-

shorten campaigning time. However, even its sponsor admitted that the bill would not discourage or significantly lessen the importance of the large contributor. 1961 *Hearings* 46.

337. Note, 78 HARV. L. REV. 1260, 1262 (1965).

338. Massachusetts has held that the government cannot subsidize political parties because such activity does not fall within the "public purpose doctrine." Opinion of the Justices, 347 Mass. 797, 197 N.E.2d 691 (1964). Supposedly only public officials can spend public funds, although the same justices permitted state support for a failing public transportation company. Opinion of the Justices, 337 Mass. 800, 152 N.E.2d 90 (1958).

339. 1961 *Hearings* 33.

340. See statements of Senator Long (La.) and the author in *Hearings Before the Senate Committee on Finance on S. 3496, Amend. No. 732, S. 2006, S. 2965 & S. 3014*, 89th Cong., 2d Sess. 8, 74 (1966). As reported out of Committee and approved by the Senate and House, the bill may combine many of the benefits of tax incentives as well as the simplicity of a subsidy. Each taxpayer when filing his tax form will indicate whether he wants one dollar of his tax payment to go into a

vided the national parties with a subsidy of one dollar for each vote received by its presidential candidate over 15,000,000 votes. The use of these funds, however, would be restricted to reimbursing presidential campaign expenditures. Of all bills thus far proposed, this one seems closest to achieving the desired goals of encouraging competent candidates to run and eliminating "corrupt" influences. It would greatly improve campaign planning because a presidential candidate would know that he could count on receiving at least a predictable minimum of campaign funds and thus would not continually have to change his plans as the flow of funds varied. It might even improve the quality of national party leaders by attracting more altruistic individuals, since party fund raising duties would not be as onerous, and patronage, as a motive for seeking party positions, would decline in importance. Controlling transfers of funds would also be much easier under this plan than under tax incentive plans, since the Comptroller would pay the party directly after the party certified the bill. Nor does this plan fall into the pitfalls faced by prior plans for direct subsidies. Since it does not condition the grant on acceptance of "reforms," it would allow the parties to react naturally, that is, it would permit them to reform themselves without artificial conditions which merely encourage evasion.³⁴² Similarly, since

fund to be used to support the candidates as provided in the bill. See H.R. 13103, 89th Cong., 2d Sess. §§ 301-305 (1966); S. REP. NO. 1707, H.R. REP. NO. 2327, 89th Cong., 2d Sess. (1966).

341. S. 3496, 89th Cong., 2d Sess. (1966). The Senate and the House of Representatives passed this bill as this article went to press in a modified form as an amendment to H.R. 13103, 89th Cong., 2d Sess. §§ 301-305 (1966). Several changes were made by the Conference Committee: If a political party receives over 15,000,000 votes in the preceding presidential election, it may receive one dollar multiplied by the total number of popular votes cast in such preceding presidential election for candidates of political parties whose candidates received 15,000,000 or more votes. If the political party receives over 5,000,000 votes but less than 15,000,000, it is entitled to one dollar per vote over 5,000,000. No payment, however, is to be made to parties whose candidate for President received less than 5,000,000 votes in the preceding election. Payments are not to be made until the total expenditures incurred to the date of payment have been certified by the party to the comptroller, and the party has complied with requests for information by the comptroller. See H.R. REP. NO. 2327 & S. REP. NO. 1707, 89th Cong., 2d Sess. (1966); note 340 *supra*.

342. For example, forcing the parties to shorten their campaigns, cf. S. 227, 87th Cong., 1st Sess. (1961), would only aid an incumbent President, who can make "non-political speeches" to fulfill his duty to inform the people. This is a significant problem, since it is almost impossible to make a distinction between political and non-political presidential utterances, particularly since a valid goal of a presidential

the subsidy would vary with the popular vote, the problem of the first amendment should be avoided because there would be no chance of governmental interference with political process.

However, there are certain weaknesses in the proposal which should be strengthened before the bill's enactment. It would probably be better to allow the parties to decide how their subsidies are to be used, rather than to limit their use solely to presidential campaign expenditures. This would be an additional defense against any attack based on the first amendment and would increase protection against "corrupt" influences. Although the Long bill would allow a Presidential candidate to refuse large, favor-seeking contributions, such a refusal would result in these sums of money gravitating toward congressional races. Further, control could be tightened by having the Comptroller pay the parties' bills directly, after party certification, rather than pay the money to the parties which have to redistribute the money among their creditors. Finally, since this proposal would not aid candidates for nomination, it should be combined with a proposal allowing candidates to deduct personal unreimbursed campaign expenses up to a fixed limit.

Although the normal first reaction to government subsidy of political parties is one of repulsion, reflection indicates that this may be the only way to begin real reforms. Government subsidy of political parties has worked well in Puerto Rico,³⁴³ and it might just be the device required to ease transition of the parties toward a more representative instrument of democracy.

V. CONCLUSIONS

It seems clear that although economic interests should have some influence upon our political system, they exercise too much influence today. Limitations upon the sources of contributions and the amounts that can be contributed are wise; limitations on the amount of money that a party or candidate can receive are not. The danger of money in politics is not too much money; rather, it is a disproportionate amount from large contributors. However, reforms which impose sanctions should play only a subsidiary role to reforms which structure politics to encourage politicians to respond to community, rather than special interests.

Effective publicity is the *sine qua non* of any effective re-

statement is gaining public support for his programs. See *Goldwater v. FCC*, 379 U.S. 893 (1964).

343. See WELLS, *GOVERNMENT FINANCING OF POLITICAL PARTIES IN PUERTO RICO* (1961).

form. All contributions of fifty dollars or more received by a party or candidate for nomination or election should be disclosed in frequent, uniform, easily accessible reports. All committees expecting to spend more than \$1,000 a year should be required to register and file reports. Establishment of a central repository and enforcement agency would help immeasurably. Publicity has an intrinsic cleansing effect and leaves the definition of "undue" or "corrupt" influence where it belongs—in the hands of the electorate.

If the influence of large contributors is to be curbed, adequate financing for the parties and candidates must be available from other sources. The passage of Senator Long's bill should alleviate the problem for the national parties and perhaps for some candidates, although the problem of adequate financing will still remain for most. Funds for these candidates should come from mass contributions or the national parties. Mass contributions might be encouraged by a publicity campaign to make political giving a respectable social function and by providing a tangible psychological incentive, such as a tax deduction, although the probability that Congress will pass another financial incentive is slim indeed. Alternatively, if the national parties were able to use the funds received under Senator Long's bill as they saw fit, many needy candidates might be helped. Available national party funds might also be increased by limiting the amount a person can contribute to candidates without imposing a ceiling on the amount a person can contribute to the national parties. Because of the Long subsidy, the national parties should no longer be at the mercy of large contributors, and the parties should be able to support needy candidates and encourage party unity with a minimum danger of undue influence. In any case, one essential reform should be carried out immediately. Candidates should be able to deduct personal, unreimbursed expenditures incurred in running for office. There seems to be no reason why this should not or could not be done, and it seems to be the only way to encourage competent candidates to run for nomination.

Although both the Administration and House Republicans agree on the basic reforms which need to be taken,³⁴⁴ passing

344. S. 3435 (President Johnson's Bill) and H.R. 16203 (House Republican Bill), 89th Cong., 2d Sess. (1966) are essentially identical. Most differences between the bills are more apparent than real. For example, although H.R. 16203, § 102 spells out the prohibition against union contributions and defines unions, it would do no more than S.

effective reforms will not be an easy task.³⁴⁵ However, if the public presses hard enough, and politicians cooperate by pressing the Dodd affair, some reform efforts could lead to Congressional action.

3435, which leaves the present prohibition against union contributions intact.

345. As this article went to press the House Subcommittee on Elections of the Committee on Administration favorably reported out H.R. 18162, 89th Cong., 2d Sess. (1966), which was supported by House Republicans. 112 CONG. REC. 24590 (daily ed. Oct. 6, 1966) Essentially it provides for the following: 1) reports covering conventions, primaries, and elections in one or more states would be required from candidates and from committees spending at least \$1,000 in one state; 2) debts and loans would have to be reported at regular intervals; 3) reports would be filed with the federal district courts and with an independent agency called the Federal Elections Commission which would have broad powers to audit reports, investigate, issue subpoenas and injunctions, act promptly on complaints, and encourage state election authorities to develop uniform procedures; 4) limitations on candidate and committee expenditures would be abolished; 5) although corporations could probably buy advertising in convention programs the cost would not be deductible; 6) corporations, labor unions, and trade associations with corporate funds or compulsory dues or assessments would be prohibited from financially supporting by direct or indirect contributions or expenditures any organization which participates in political activities, although affiliated organizations could operate so long as its funds were voluntarily contributed; 7) gifts of \$100 or more would be reported; 8) souvenirs costing less than twenty-five dollars could be sold, but advertising in political program books could not be sold; 9) contributions in another's name would be prohibited.