

CAMPAIGN FINANCE REFORM BEFORE 1971*

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“There are two things that are important in politics. The first is money, and I can’t remember what the second is.”

—Mark Hanna

INTRODUCTION

The story is told that Samuel Gompers, the president of the American Federation of Labor (AFL), once approached his friend, Senator Boies Penrose, the Republican boss of Pennsylvania, seeking support for legislation then pending in Congress to abolish child labor.² Penrose supposedly replied “But Sam, you know as damn well as I do that I can’t stand for a bill like that. Why those fellows this bill is aimed at—those mill owners—are good for two hundred thousand dollars a year to the party. You can’t afford to monkey with business that friendly.”³

“Money is the mother’s milk of politics,”⁴ and this is as true in the twenty-first century as it was in the nineteenth. Whether a presidential candidate trying to get his message to two-hundred and eighty million people spread out over six million square miles, or a soccer parent running for town supervisor in a metropolitan suburb, a candidate needs money to pay for billboards, posters, mailings, television and radio time, as well as the full-time workers who staff the campaigns. To ignore this truth is to avoid the central issue in campaign finance reform—money is the fuel of political campaigns.

I. THE EARLY YEARS

It has always cost money to run for office, although the amount of money spent, as well as the type of expenditures made has changed considerably over the years. In colonial days and the early years of the Republic, campaign finance was not an issue, nor would it be seen as a problem for the better part of the nation’s first century.⁵ When George Washington first ran for a

² JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING’S INFLUENCE ON POLITICAL POWER IN AMERICA* 28 (2000).

³ *Id.*

⁴ Famous term stated by Jesse Marvin Unruh, Speaker of the California Assembly from 1961 to 1969.

⁵ BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM* 18 (2001) (stating that this was because most offices were either not elected or uncontested).

seat in the Virginia House of Burgesses in 1757, he appealed to a rather limited constituency.⁶ In the Mount Vernon area, there were just three hundred and ninety-one eligible voters, all of whom were white, male, and owned property.⁷ Washington personally knew most of them, and he ran not on a platform of issues but on one of character, reflecting the older British tradition of “standing for office.”⁸ He also “spent £39 to buy ‘treats’ for voters, including 160 gallons of rum and other strong beverages, or more than a quart per eligible voter.”⁹ The purchase of food and drink remained a staple in American politics well into the twentieth century, and in Washington’s time and later, the candidate usually bore the costs himself.¹⁰ This, of course, limited access to office to the affluent,¹¹ but that did not seem to bother anyone. While a few states passed laws attempting to limit food and drinks provided to voters, candidates largely ignored these restrictions.¹² The voters expected such treatment, and there is no evidence that in a time when all candidates set out buffets that people cast their votes on the basis of who had the best caterer.¹³ Thus, aside from these few ineffective laws, states left candidates alone in terms of how much they spent and how they spent it.¹⁴

In 1776, the year Americans declared their independence from Great Britain, of the approximately 2.5 million men, women and children, free and slave, only one in five adult white males met the property requirements needed to cast a ballot.¹⁵ Elections themselves remained fairly simple exercises—some rallies were held where food and drink would be served, some speeches given,

⁶ *Id.*

⁷ *Id.*

⁸ ROBERT K. GOIDEL, DONALD A. GROSS & TODD G. SHIELDS, *MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS* 16 (1999).

⁹ *Id.*

¹⁰ *Id.*

¹¹ SMITH, *supra* note 5, at 18.

¹² *Id.*

¹³ *Id.* They did expect the buffet, however, and in 1777 James Madison lost his race for re-election to the Virginia Legislature because he refused to provide liquor at his rallies. GEORGE THAYER, *WHO SHAKES THE MONEY TREE?: AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT* 28 (1973).

¹⁴ SMITH, *supra* note 5, at 18.

¹⁵ U.S. Census Bureau, *Facts for Features: The Fourth of July 2007* (Apr. 17, 2007), http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/010033.html. *But see* BIRNBAUM, *supra* note 2, at 25 (stating that there were four million U.S. citizens in 1776).

and perhaps some handbills distributed.¹⁶ There appears to have been no vote-buying or other fraud, and while this is not to say that it did not exist, it would have been very limited, since the elections involved a relatively small voter base.¹⁷ Moreover, not until Washington's second term in office did the first political parties appear, and they changed the face of American politics forever.¹⁸ Whether one supported the Federalist Party of Washington, Hamilton and Adams, or the Democratic-Republican Party of Jefferson and Madison, one now cast a ballot for issues as well as for the character of the candidate. In fact, as time went on, in some races the person running became less important than the party label he carried.

The existence of parties based on viewpoint changed the nature of politics. Both parties needed ways to get their message across to the people, not only during the actual election campaigns, but at other times too. Both the Federalist and Republican parties, as well as their successors, turned to newspapers as a means of broadcasting their beliefs, and since newspapers reflected the views of the owner-editor, this meant subsidizing him throughout the year.¹⁹ In 1791, Thomas Jefferson asked Philip Freneau to take up residence in Philadelphia, gave him a part-time job as clerk for foreign languages in the State Department, and made him the editor of the *National Gazette*.²⁰ The Federalists, with money provided by Alexander Hamilton, Rufus King and others, had already begun subsidizing a paper of their own, the *Gazette of the United States*.²¹ At both the national and state levels, whatever party held power could also provide friendly newspapers with lucrative contracts for government printing work.²² The newspaper owners responded with alacrity, extravagantly praising the candidates and positions of their benefactors, and vilifying with equal fervor those of their opponents.²³ Much of the campaigning before the Civil War relied on newspapers, and as late as 1850, a wealthy supporter

¹⁶ BIRNBAUM, *supra* note 2, at 25.

¹⁷ *Id.*

¹⁸ SMITH, *supra* note 5, at 18.

¹⁹ *Id.*

²⁰ DUMAS MALONE, *JEFFERSON AND THE RIGHTS OF MAN* 420-26 (1951); HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS & POLITICAL REFORM* 77 (4th ed. 1992).

²¹ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 77.

²² *Id.*

²³ *Id.*

who wanted to further the political ambitions of James Buchanan, gave \$10,000 to help start a newspaper to trumpet Buchanan's virtues.²⁴ "In 1860, Abraham Lincoln secretly bought a small German weekly in Illinois for \$400 and turned it over to an editor who agreed to report on the Republican party and to publish in both English and German."²⁵

John Quincy Adams, the sixth president of the United States believed as his father did, that "the presidency should be neither sought nor declined," and "[t]o pay money for securing it directly or indirectly . . . was 'incorrect in principle.'"²⁶ Aside from the possible exception of Washington's first election, this noble sentiment had never been true.²⁷ There had always been expenses, whether for food and drink, printed matter, or later for torchlight parades and "illuminations."²⁸ The first professional campaign managers—and the costs attendant to them—appeared on the scene around 1828, and within a decade the country witnessed the first documented case of outright vote-buying in the 1838 mayoral race in New York City.²⁹

The era of mass politicking began in earnest with Andrew Jackson and the organization of the Democratic Party—the successor to Jefferson's Democratic-Republicans—in the late 1820s.³⁰ Much of the credit goes to Jackson's lieutenant and successor, Martin Van Buren of New York, who organized the first popular mass campaign around the hero of the battle of New Orleans.³¹ By 1829, the electorate had expanded due to immigration into the United States as well as the removal of property and religious qualifications.³² Van Buren built upon the older base of newspapers with rallies, pamphlets and the appearance of the candidate himself at certain gatherings.³³ Van

²⁴ *Id.*

²⁵ *Id.* During the height of the electioneering contest between the Federalists and the Republicans, one disenchanted voter in Charleston, South Carolina, complained, "We are so beset and run down by federal republicans and their pamphlets that I begin to think for the first time that there is rottenness in the system they attempt to support, or why all this violent electioneering?" *Id.* at 78.

²⁶ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 77.

²⁷ *Id.*

²⁸ *Id.*

²⁹ BIRNBAUM, *supra* note 2, at 25.

³⁰ SMITH, *supra* note 5, at 19.

³¹ *Id.*

³² THAYER, *supra* note 13, at 28.

³³ SMITH, *supra* note 5, at 19.

Buren also oversaw the organization of the Democrats as a mass party, with organizations at the national, state, and local level.³⁴ Although the quadrennial campaign for the presidency remained the chief goal of the party, the faithful could now be called upon to support candidates in state and local elections, as well as for the House of Representatives. By the late 1830s, nearly every political office in the country involved a contest between the two chief parties, the Democrats and the Whigs.³⁵ By then congressional races “cost \$3,000 to \$4,000 (approximately \$60,000 in 2000 dollars), and the 1830 gubernatorial race in Kentucky was estimated to cost \$10,000 to \$15,000, or the equivalent of over \$200,000 in 2000 dollars.”³⁶

By 1840, parties used more than just newspapers and pamphlets to woo the voters: pictures, banners, buttons and other novelty items appeared. In the presidential campaign of that year, the Whig Party supporters of William Henry Harrison mounted “[c]onventions and mass meetings, parades and processions with banners and floats, long speeches on the log-cabin theme, log-cabin songbooks and log-cabin newspapers, Harrison pictures, Tippecanoe handkerchiefs and badges.”³⁷ None of this, of course, came cheaply.

Initially money for these races came from either the candidate’s pockets (if he had the resources) or from small contributions by the party faithful.³⁸ But as costs rose, party leaders began looking for donors who could make significant gifts to the cause.³⁹ Prominent New York Whigs such as Philip Hone and Thurlow Weed raised thousands of dollars from fellow merchants, bankers and well-heeled friends.⁴⁰ The Democrats also had their wealthy donors, such as the banker August

³⁴ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 9.

³⁵ SMITH, *supra* note 5, at 19.

³⁶ *Id.* For the politics of the era, see RICHARD P. MCCORMICK, THE SECOND AMERICAN PARTY SYSTEM: PARTY FORMATION IN THE JACKSONIAN ERA (1966).

³⁷ EUGENE H. ROSEBOOM, A HISTORY OF PRESIDENTIAL ELECTIONS 121 (1957) (describing when General Harrison, the hero of the army defeat of the Indians at the battle of Tippecanoe, would proudly claim that he had been born in a log cabin).

³⁸ SMITH, *supra* note 5, at 19.

³⁹ THAYER, *supra* note 13, at 28.

⁴⁰ SMITH, *supra* note 5, at 19. “Contributions often came in the form of cash packed in satchels or carpetbags, no questions asked. In 1839, Whig lobbyist Thurlow Weed raised \$8,000 from New York merchants, and the money was delivered in a bandana handkerchief. No one appeared to think it unusual.” THAYER, *supra* note 13, at 29.

Belmont.⁴¹ In a development that worried many people, banks and corporations began making donations to one party or the other in an effort to affect policy.⁴² Jackson, who understood a great deal about politics but little about banking and finance, declared himself an enemy of the Bank of the United States, the largest corporation in the country at the time, vowing to revoke its charter.⁴³ The president of the Bank, Nicholas Biddle, chose not to sit idly by, and between 1830 and 1832 spent \$42,000—an enormous sum in those days—on literature and advertisements in an effort to defeat Jackson in 1832.⁴⁴ Although Old Hickory won, and did in fact kill off the Bank, the campaign of that year saw what might well be called the first example of issue advocacy, the spending of money not for or against any particular candidate, but in favor of a policy.⁴⁵ By influencing how people felt on that issue, its sponsors hoped that the voters would then favor candidates supporting that view.

During the Civil War, corporations became an integral part of campaign financing, since government contracts provided so large a source of their income.⁴⁶ Abraham Lincoln predicted in 1864 that “[a]s a result of the war, corporations have become enthroned, and an era of corruption in high places will follow. The money power of the country will endeavor to prolong its rule by preying upon the prejudices of the people until all wealth is concentrated in a few hands and the Republic is destroyed.”⁴⁷

While there is certainly some hyperbole in Lincoln’s comment, he understood that with the growth of large government capable of rewarding its friends with great bounty, the businessmen of America would pour money into politics in order to ensure that they would get their share.⁴⁸ In the election of 1864, the Republicans spent over \$125,000 to get Lincoln re-elected.⁴⁹ That

⁴¹ SMITH, *supra* note 5, at 21.

⁴² THAYER, *supra* note 13, at 30-31 (describing the relationship between business and government as a “natural alliance”).

⁴³ SMITH, *supra* note 5, at 19.

⁴⁴ *Id.*

⁴⁵ *Id.* at 19-20. For more on Jackson and the Bank, see ROBERT V. REMINI, *ANDREW JACKSON AND THE BANK WAR* (1967).

⁴⁶ BIRNBAUM, *supra* note 2, at 25-26.

⁴⁷ *Id.* at 26. Lincoln’s letter was dated November 21, 1864. *Id.*

⁴⁸ *Id.*

⁴⁹ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 80 (providing a table which shows the amounts spent by the two major parties in each of the presidential campaigns from 1860 through 1988; such amounts, however, are not adjusted for inflation and thus do not provide a true comparison to today’s

amount doubled by 1872 when the GOP spent \$250,000 to reelect Ulysses S. Grant; four years later the two parties spent almost \$900,000 apiece in the bitterly contested race between Rutherford B. Hayes and Samuel J. Tilden.⁵⁰ Over the following decades, businessmen sought land grants to build railroads, tariffs to keep out foreign competition, a sound currency, and freedom from regulatory legislation. To achieve these goals, they freely supplied campaign funds, and in some instances fees and investment opportunities, to ensure friendly government.

Critics of the growing, and as they saw it, pernicious influence of businessmen in politics, pointed to the scandals of the Grant Administration, especially the Credit Mobilier, in which members of Congress lined their pockets with stock from a company building the trans-continental railway, and the Whiskey Ring, whose members skimmed off revenue from liquor taxes for the benefit of both parties.⁵¹ But while corruption captured the public attention, in fact party funds came not only from big corporations, but from assessments on officeholders and contractors.⁵² Andrew Jackson had famously said that “to the victor belongs the spoils,” by which he meant government offices should be in the hands of the party faithful. Typically the postmaster-general, from Jackson’s time through the administration of Harry Truman, handled the awarding of government jobs, and the office-holders showed their loyalty by returning a percentage—usually two percent of their salaries (or in the case of contractors, a percentage of their price) to the party.⁵³ This assessment system, first used in the 1830s by the Jacksonian Democrats, grew so that by 1878 approximately nine out of every ten dollars of the Republican Party’s congressional campaign committees’ income came from kickbacks from officeholders.⁵⁴ Not until a disgruntled office-seeker assassinated James A. Garfield in 1881 did Congress finally put an end to this

expenditures).

⁵⁰ *Id.*

⁵¹ BIRNBAUM, *supra* note 2, at 26-27.

⁵² SMITH, *supra* note 5, at 20.

⁵³ *Id.* Tammany Hall, the Democratic Party organization in New York City, which apparently invented this means of financing elections, taxed all city employees six percent of their salaries. THAYER, *supra* note 13, at 29. In post-Civil War America the practice was well-nigh universal, although the rates varied from state to state, and sometimes depended on the size of the salary. GOIDEL ET AL., *supra* note 8, at 20. In Louisiana, all state employees had to pay ten percent of their salary to the Democratic Party. *Id.*

⁵⁴ SMITH, *supra* note 5, at 20.

practice, and approved the Pendleton Act creating the civil service system.⁵⁵

The passage of the Pendleton Act and similar laws at the state level, while sometimes hailed as the first effort at campaign finance reform, actually sought to protect government employees from party officials.⁵⁶ But reliance upon the assessment system meant that no one donor had disproportionate influence within the party or upon elected officials because of the amount of money he gave. In essence, assessments ensured that parties would be free from big money by relying on a large group of small givers. The parties had never, of course, abandoned wealthy backers, but with their main source of revenue at both the federal and state levels now eliminated, both the Democrats and the Republicans had to look elsewhere to cover the costs of ever more expensive campaigns.⁵⁷

II. THE IMPACT OF INDUSTRIALIZATION ON CAMPAIGN FINANCING

The growing industrialization of the country, as well as economic expansion across the continent, made a closer relation between business and government inevitable. The building of the transcontinental railroad, for example, could not have taken place without federal government financing through a series of land grants. Sponsors of regional railroads and canals looked to state and local government for needed subsidies. The tariff schedules passed by Congress gave infant American industries protection from European competitors, although the protection continued long after the companies needed it. Wealthy men like August Belmont and his son, Augustus Belmont, Jr., Samuel Tilden, John Wannamaker, and Jay Gould continued to be important contributors to the two parties.⁵⁸ Gradually, however, the amount collected from corporations, primarily by Republicans but by Democrats as well, became the chief source of funding for political campaigns.⁵⁹ In the campaign of 1888, for example, the Philadelphia department store magnate John Wannamaker contributed \$50,000 to the presidential campaign of Republican

⁵⁵ *Id.*; ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883*, at 212 (1968).

⁵⁶ SMITH, *supra* note 5, at 20.

⁵⁷ *Id.* at 20-21 (stating that the parties began to rely increasingly on wealthy individuals instead).

⁵⁸ *Id.* at 21.

⁵⁹ *Id.*

Benjamin Harrison.⁶⁰ Moreover, forty percent of the party's national campaign expenditures (totaling \$1.35 million) came from manufacturing and corporate interests in Pennsylvania alone, collected by that state's party boss, Matthew Quay, who had just assumed the post of national party chairman.⁶¹

By the 1890s, campaign costs had risen across the entire political spectrum.⁶² The 1892 contest between Republican Benjamin Harrison and Democrat Grover Cleveland cost more than \$4 million, with the victorious Cleveland outspending his opponent by almost three to two.⁶³ That same year Carter Henry Harrison spent a half million dollars to become Mayor of Chicago, while "Hinky Dink" Kenna raised \$100,000 in his race for alderman.⁶⁴ Kenna lost, however, when someone stole his campaign funds.⁶⁵ No one, however, had a greater gift for getting corporations to give money to politics than Marcus Alonzo Hanna of Ohio.⁶⁶

Hanna had made his fortune in coal, iron and oil, and from the 1880s on had dabbled in Ohio Republican politics.⁶⁷ He retired from business completely in 1895 to devote himself to the election to the presidency of his good friend William McKinley.⁶⁸ He financed McKinley's primary campaign practically out of his own pocket with a donation of \$100,000,⁶⁹ and then, as national chairman of the Republican Party, turned to the greater task of raising money for the presidential campaign.⁷⁰ The Democrats and the Populists nominated William Jennings Bryan on a platform of silver currency and other "radical" ideas, all of which played directly into Hanna's plan.⁷¹

He contacted bankers and businessmen all over the country with a simple message—election of the radical Bryan would be bad for business, while the victory of McKinley would assure the

⁶⁰ *Id.*

⁶¹ ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW* xvii (1988).

⁶² SMITH, *supra* note 5, at 21.

⁶³ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 80.

⁶⁴ THAYER, *supra* note 13, at 40, 42.

⁶⁵ *Id.* at 42.

⁶⁶ SMITH, *supra* note 5, at 22.

⁶⁷ THAYER, *supra* note 13, at 48.

⁶⁸ *Id.* For more on the 1896 election, see PAUL W. GLAD, *MCKINLEY, BRYAN, AND THE PEOPLE* (Elephant Paperback ed., Ivan R. Dee, Inc. 1991) (1964).

⁶⁹ SMITH, *supra* note 5, at 22.

⁷⁰ MUTCH, *supra* note 61, at xvii.

⁷¹ SMITH, *supra* note 5, at 22.

continuation of the gold standard in currency and prosperity for big industries.⁷² He then went on to tell them how much they should give: banks were assessed one quarter of one percent of their capital, and other businesses were assigned flat amounts based on their ability to pay.⁷³ He reportedly raised \$3,350,000 for McKinley's campaign, twice the amount spent by Harrison in 1892.⁷⁴ No presidential hopeful had ever spent that much, and the sum would not be exceeded until the Harding campaign of 1920.⁷⁵ Unofficial estimates, however, put the amount at well over \$10 million.⁷⁶ Hanna collected \$250,000 from Standard Oil alone, an amount almost as large as Bryan's entire campaign fund, and a like amount from J.P. Morgan.⁷⁷ The Chicago meat-packing houses combined to give \$400,000.⁷⁸

Interestingly, Hanna made it quite clear to those whom he tapped that the only thing they could expect would be a pro-business attitude from a Republican administration.⁷⁹ He insulated McKinley from donors, and returned money from contributors who in any way implied that they expected special favors.⁸⁰ He even refunded money to corporations who, for one reason or another, sent in more than their assessed rate.⁸¹ Hanna had no difficulty raising money, because the nation's business community, including well-to-do Democrats, feared the consequences of a Bryan victory.⁸² The fact that the depression that had begun in 1893 lifted soon after McKinley took office—an event that had nothing to do with the Republican victory—helped to embed the idea in the minds of business leaders that the Republicans stood for prosperity and the interests of the banking and corporate community.⁸³ That idea, in large part, has

⁷² HAROLD U. FAULKNER, *POLITICS, REFORM AND EXPANSION, 1890-1900*, at 209 (1959) (discussing a letter written by William Allen White).

⁷³ *Id.*

⁷⁴ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 80. *But see* SMITH, *supra* note 5, at 22 (claiming that Hanna raised almost \$7 million, a sum that would not be reached again until 1936).

⁷⁵ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 80.

⁷⁶ FAULKNER, *supra* note 72, at 204.

⁷⁷ *Id.* at 203.

⁷⁸ *Id.* at 204. There is no modern biography of Hanna, and one must rely on the competent but outdated HERBERT CROLY, *MARCUS ALONZO HANNA: HIS LIFE AND WORK* (1912).

⁷⁹ SMITH, *supra* note 5, at 22.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ FAULKNER, *supra* note 72, at 209 (discussing a letter written by William

survived to this day.

Although Hanna passed from the scene not long after the death of McKinley in 1901, the banks and corporations he had cultivated in 1896 continued to provide the financial base for the Republican Party.⁸⁴ McKinley's successor, Theodore Roosevelt, shook the faith of many businessmen with attacks on corporate greed and his efforts to break up some of the larger monopolies.⁸⁵ Nonetheless, corporate support provided seventy-three percent of Roosevelt's 1904 campaign chest,⁸⁶ which amounted to a little over two million dollars.⁸⁷ In fact, four men alone—J.P. Morgan, John D. Archbold of Standard Oil, George Gould of the Missouri Pacific Railroad, and Chauncey Depew of the New York Central Railroad—either personally or through their companies provided one-fourth of Roosevelt's expenses.⁸⁸

The Democrats, although often outspent by the Republicans, also had corporate sponsors and deep pockets.⁸⁹ In 1896, the owners of silver mines in the western states contributed a hefty part of Bryan's campaign chest, and both parties relied upon wealthy donors.⁹⁰ In the 1904 election, for example, the Democratic candidate, Alton B. Parker, received more than \$700,000 from August Belmont, Jr., and Thomas Fortune Ryan.⁹¹ The Democratic vice-presidential candidate, Henry Davis, owned silver mines and made a large contribution.⁹² Although the parties continued to solicit money from small donors, the amount of money raised this way did little more than augment the crucial contributions of large givers.⁹³ As late as 1928, both parties relied on contributors of \$1,000 or more for seventy percent of their expenses; to put that figure in some perspective, that year a new car cost \$500.⁹⁴

Allen White).

⁸⁴ See MUTCH, *supra* note 61, at xvii.

⁸⁵ SMITH, *supra* note 5, at 22.

⁸⁶ *Id.* at 22-23.

⁸⁷ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80.

⁸⁸ MUTCH, *supra* note 61, at 3.

⁸⁹ This was not always the case, however. Cleveland outspent Harrison in 1892, and Wilson edged out Taft in 1912. ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80.

⁹⁰ FAULKNER, *supra* note 72, at 210; SMITH, *supra* note 5, at 22.

⁹¹ SMITH, *supra* note 5, at 23.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

III. THE BEGINNINGS OF REGULATING CAMPAIGN FINANCE

Around this time some states began, for the first time, to regulate campaign finance. In 1897, Nebraska, Missouri, Tennessee, and Florida banned corporate contributions.⁹⁵ All four states had voted for Bryan the year before, and the statutes were enacted in retaliation against the corporate sponsors of McKinley.⁹⁶ These laws, passed partly out of political pique and partly out of democratic idealism, foreshadowed a problem that we will return to again and again in this study. Corporations gave money to advance positions they believed would be of benefit to them, the same reason that individual donors made contributions. These donations constituted then, as now, a form of expression, of speech. Moreover, this speech, by a company or a person, involved political issues, and political speech has always been considered that form of expression most protected by the First Amendment to the Constitution. By 1897, the courts had already determined that a corporation had some of those rights accruing to “persons” mentioned in the Fourteenth Amendment.⁹⁷ If natural persons could make contributions to further their interests, then could corporate persons be denied their rights of expression? This basic issue—whether some expression can be silenced in the name of reform—will arise over and over again in the debate on campaign finance.

One should not think that only populists feared large concentrations of money and what they could do to corrupt the political process. In 1894, the conservative New York lawyer Elihu Root saw the need for more effective legislation, and urged the Constitutional Convention of the State of New York to prohibit political contributions by corporations:

The idea . . . is to prevent the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth, from using their corporate funds, directly or indirectly, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public.

It strikes . . . at a constantly growing evil . . . which has . . .

⁹⁵ MUTCH, *supra* note 61, at xvii.

⁹⁶ *Id.*

⁹⁷ *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (The opinion itself in *Santa Clara* does not specifically assert corporate personhood, however, it was established by Chief Justice Waite during oral argument).

done more to shake the confidence of the plain people of small means in our political institutions, than any other practice which has ever obtained since the foundation of our government. And I believe that the time has come when something ought to be done to put a check upon the giving of \$50,000 or \$100,000 by a great corporation toward political purposes, upon the understanding that a debt is created from a political party to it.⁹⁸

On the federal level, Congress did not act until a major scandal revealed the extent to which corporations had become involved in the political process.⁹⁹ In 1905, the big three life insurance companies, New York, Mutual, and Equitable Life, came under investigation by the State of New York.¹⁰⁰ The Armstrong Committee and its counsel, Charles Evans Hughes, relentlessly exposed how officers of the companies had abused their trust by using assets belonging to the policy-holders as their private piggy banks, which they raided for a variety of personal purposes.¹⁰¹ On September 15 of that year, Hughes called to the stand the treasurer of New York Life to explain a non-ledger check for \$48,702.50 issued at the order of the company's president, John A. McCall.¹⁰² The treasurer confessed that he knew nothing about it.¹⁰³ Hughes then called George W. Perkins, a partner of J.P. Morgan, a power in the Republican Party, and a vice-president of New York Life.¹⁰⁴ Perkins quite openly acknowledged that the check represented money paid to the Republican National Committee (RNC).¹⁰⁵ "He added that the company had paid similar amounts to the Republican presidential campaigns of 1896 and 1900, and defended the payments as 'an absolutely legitimate thing for us to do to protect the securities of these hundreds and thousands of people [policy-holders] everywhere.'"¹⁰⁶

Although everyone knew that corporations gave money to political campaigns, the investigation detailed how much had gone to the Republican Party, and suddenly the idea of corporate

⁹⁸ ELIHU ROOT, ADDRESSES ON GOVERNMENT AND CITIZENSHIP 143-44 (Robert Bacon & James Brown Scott eds., Books for Libraries Press 1969) (1916), *quoted in* United States v. Int'l Union United Auto., 352 U.S. 567, 571 (1957).

⁹⁹ SMITH, *supra* note 5, at 23.

¹⁰⁰ MUTCH, *supra* note 61, at 2.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ MUTCH, *supra* note 61, at 2.

contributions became scandalous and a menace to democracy.¹⁰⁷ “The New York *Tribune*, the nation’s leading Republican newspaper, reported [the following day] that Perkins’s testimony ‘caused a profound sensation as it furnished the first tangible evidence of connections between the insurance company and a political party.’”¹⁰⁸ In fact, the Committee knew about where the money had gone the night before, and efforts had been made to dissuade them from following up that line of investigation.¹⁰⁹ Perkins himself had taken Hughes aside during the lunch break before he took the stand, and told the counsel that he was fooling around with dynamite, saying “[t]hat \$48,000 was a contribution to President Roosevelt’s campaign fund. You want to think very carefully before you put that in evidence. You can’t tell what may come of it.”¹¹⁰

A week later, Roosevelt met with some of his leading advisors at his home at Sagamore Hill on Long Island.¹¹¹ Although the meeting had been planned before the Perkins testimony, there is little question that the Republican leaders discussed ways to control the damage.¹¹² Two of those present, Secretary of State Elihu Root and former ambassador Joseph H. Choate, had previously suggested prohibiting the use of corporate funds for political purposes.¹¹³ Although nothing had come of the earlier proposal, it now reappeared in December 1905 in Roosevelt’s annual message to Congress.¹¹⁴ After repeating an earlier call for greater publicity about campaign finance, he declared that “[a]ll contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders’ money for such purposes; and, moreover, a prohibition of this kind would be, as far as it

¹⁰⁷ SMITH, *supra* note 5, at 23.

¹⁰⁸ MUTCH, *supra* note 61, at 2.

¹⁰⁹ *Id.* at 2-3.

¹¹⁰ *Id.* at 3. Subsequent to the investigation, in a lawsuit to recover some of these funds to the policy-holders, McCall testified that he had asked Perkins to make the donation to the Republican Party out of his own pocket, promising that the company would then reimburse him. *People ex rel. Perkins v. Moss*, 187 N.Y. 410, 421 (1907). This way there would be no record of the company making a contribution to the GOP. For more on the investigation, see JOHN A. GARRATY, *RIGHT-HAND MAN: THE LIFE OF GEORGE W. PERKINS* 182 (Harper & Brothers 1960) (1957).

¹¹¹ MUTCH, *supra* note 61, at 3.

¹¹² *Id.*

¹¹³ *Id.* at 3-4.

¹¹⁴ *Id.* at 4.

went, an effective method of stopping the evils aimed at in corrupt practices acts.”¹¹⁵

In fact, a bill to that effect had been introduced into Congress five years earlier by one of the founders of the Republican Party, Senator William E. Chandler of New Hampshire.¹¹⁶ In a single page he proposed two provisions—no federally chartered corporations and no corporations engaged in interstate commerce could contribute to any election campaign at any level, state, national, or local, and all corporations, no matter their size, could not contribute to congressional campaigns.¹¹⁷ At the time, no one paid any attention to the Chandler bill, but the revelations of the Armstrong Committee and Roosevelt’s message to Congress breathed new life into the measure.¹¹⁸ Chandler by then had retired from the Senate, but he did try to get another Republican senator to sponsor it.¹¹⁹ When that endeavor failed, he turned to Senator Benjamin R. Tillman, the populist and racist Democrat from South Carolina.¹²⁰ The one-time radical Republican from the North and the unreconstructed Confederate had become friends nearly a decade earlier, when Tillman had backed Chandler in a battle over the cost of armor plating for navy vessels.¹²¹

It took Tillman the better part of two years to move the bill through Congress.¹²² He managed to get the Senate to pass it without debate in June 1906, a result many attributed to fear that the GOP would be branded as a party of corporate corruption in the upcoming mid-term election.¹²³ The bill then went to the House of Representatives, where it died when the House adjourned without bringing it to the floor.¹²⁴ The Republicans kept control of Congress and decided that they could afford to appease public opinion.¹²⁵ The House passed the bill in its original form, but the Senate Elections Committee weakened it, because the chairman, Joseph Foraker of Ohio, did not believe

¹¹⁵ 40 CONG. REC. S96 (daily ed. Dec. 5, 1905) (statement of Pres. Roosevelt).

¹¹⁶ MUTCH, *supra* note 61, at 4.

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.*

¹²¹ *Id.*; FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN 347-51 (1944).

¹²² MUTCH, *supra* note 61, at 5-8.

¹²³ *Id.* at 6.

¹²⁴ *Id.* at 7.

¹²⁵ *Id.*

that Congress had the power to regulate state-chartered corporations.¹²⁶ Chandler's original proposal rested primarily on congressional authority to regulate interstate commerce, and only secondarily on the power to regulate elections to the House, and he would have barred political contributions from all but the smallest corporation.¹²⁷

In the eyes of many, the final version of the Tillman Act¹²⁸ was but a pale shadow of the original proposal. It banned contributions only by federally chartered corporations, a group that represented only a small percentage of companies.¹²⁹ How effective it proved to be is not hard to determine. While it dried up actual cash, the companies soon found ways around it by donating other items, such as office space, typewriters, and even travel (many of the federally chartered companies were railroads).¹³⁰ Another method involved keeping company officers on the payroll even when they devoted all of their time to working for a candidate.¹³¹ Since enforcement proved non-existent, within a few years money from corporate coffers again flowed into campaigns.¹³² A half-century after the passage of the Tillman Act, one board chairman, Duncan Norton Taylor, told a reporter that "[a] lot of corporate presidents just reach in the till and get \$25,000 to contribute to political campaigns."¹³³ The first federal effort at campaign finance reform, in short, had little practical effect.

A second bill passed a few years later had a more lasting effect. In 1910, Congress passed the Publicity Act, sometimes called the Federal Corrupt Practices Act (FCPA), that Theodore Roosevelt had requested five years earlier.¹³⁴ The new law required the post-election disclosure in House races of each donor of more than \$100,¹³⁵ a sum equal to \$1,667 in 2000 dollars.¹³⁶ The following year, Congress passed amendments requiring disclosure also to be made "not more than fifteen days and not

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Tillman Act, ch. 420, 34 Stat. 864-65 (1907).

¹²⁹ *Id.*

¹³⁰ SMITH, *supra* note 5, at 24.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910) (amended 1911).

¹³⁵ *Id.* § 6, 36 Stat. at 823.

¹³⁶ SMITH, *supra* note 5, at 24.

more than ten days next before an election,” and extended the coverage to include Senate races.¹³⁷ Although at that time state legislators still chose senators, a great deal of politicking went on that in most ways resembled political campaigns. “The 1911 amendments also limited the amount that could be spent in Senate races to \$10,000, and in House races to \$5,000.”¹³⁸

Like the Tillman Act, the new law failed to do what its sponsors had hoped, to shine a bright light on campaign financing.¹³⁹ While it did set a precedent for making contributor lists public, the bill failed for four reasons.¹⁴⁰ First, Congress doubted its constitutional power to regulate state and local committees, so the disclosure rules applied only to party committees operating in two or more states, or, in other words, only to the national committees, which at that time played a minor role in congressional elections.¹⁴¹ Second, the law on its face seemed to apply only to candidates, and committees, nominally without the candidate’s knowledge or involvement, soon sprouted to assist in the campaigns and completely ignored the reporting rules.¹⁴² Third, a decade later the Supreme Court held that Congress had no power to regulate primaries,¹⁴³ and in practically the entire South, whoever won the Democratic primary faced only token opposition in the general election.¹⁴⁴ Finally, the bill had no enforcement provisions, and did not assign responsibility for monitoring and enforcement to any federal agency.¹⁴⁵ While the disclosure requirements would later be expanded and would become an important part of campaign finance reform, in the short term the Publicity Act and its amendments, like the Tillman Act before it, did little to curb abuses in campaign fund-raising.¹⁴⁶

IV. INTRODUCING THE FEDERAL CORRUPT PRACTICES ACT OF 1925

Truman Newberry had spent some \$100,000 in the Michigan

¹³⁷ Publicity of Political Contributions Act, ch. 33, 37 Stat. 25 (1911).

¹³⁸ SMITH, *supra* note 5, at 24.

¹³⁹ *Id.* at 25.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* The role of so-called “independent” committees would be another issue that would recur in the debate over campaign finance reform. *Id.* at 37-38.

¹⁴³ *Newberry v. United States*, 256 U.S. 232, 258 (1921).

¹⁴⁴ SMITH, *supra* note 5, at 24.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

primaries against Henry Ford before going on to win election to the U.S. Senate in 1918.¹⁴⁷ A federal court then indicted Newberry for excessive campaign expenditures not only in violation of the 1910 law, but also a Michigan statute that limited senatorial campaign expenses to \$3,750.¹⁴⁸ He appealed his conviction to the Supreme Court, which in 1921, by a 5-4 vote, struck down those parts of the 1910 law as they applied to Senate races.¹⁴⁹ The opinion by Justice McReynolds rested primarily on federalism grounds, since at the time the law had been passed state legislatures still chose senators.¹⁵⁰ But McReynolds opinion said nothing about the provisions regulating House races, and four members of the Court believed the law completely constitutional.¹⁵¹ According to one interpretation, now that the Seventeenth Amendment had been ratified providing for direct election of senators, Congress merely had to re-enact the 1911 amendments for the bill to meet constitutional requirements.¹⁵²

When members of the House sought Attorney-General Harry Daugherty's opinion, however, he informed them that in light of the *Newberry* decision, all the provisions of the bill had been invalidated, and neither candidates for the House or the Senate had to file reports on their campaign contributors or expenditures.¹⁵³ Although both Democrats and Republicans disagreed with this interpretation, they did nothing until the country once again reacted to a major political scandal, the Teapot Dome affair.¹⁵⁴

Technically, Teapot Dome had nothing to do with campaign contributions; instead, it involved simple old-fashioned bribery of public officials, especially Secretary of the Interior Albert B. Fall, who awarded oil leases on federal land in return for kickbacks from the oil companies.¹⁵⁵ Harding had not been the choice of the

¹⁴⁷ *Newberry*, 256 U.S. at 245.

¹⁴⁸ *Id.* at 244-45.

¹⁴⁹ *Id.* at 258.

¹⁵⁰ *Id.* at 249.

¹⁵¹ *Id.* at 275 (Justice Pitney joined by Justices Brandeis and Clarke, concurred in result, but stated that "there is no constitutional infirmity in the act of Congress," and Chief Justice White, dissenting, also believed the law constitutional).

¹⁵² *Id.* at 261 (White, C.J., dissenting).

¹⁵³ MUTCH, *supra* note 61, at 19.

¹⁵⁴ *Id.*

¹⁵⁵ SMITH, *supra* note 5, at 25-26. *See generally* BURL NOGGLE, TEAPOT DOME: OIL AND POLITICS IN THE 1920S 15-31 (1962) (discussing the controversial

big corporations, and the majority of his money in both the primaries and the campaign came from small contributors or wealthy friends.¹⁵⁶ But in the investigation it emerged that oilman Harry Sinclair had made large, albeit legal, contributions to the Republican Party in non-election years, thus escaping the provisions of the Publicity Act, which only required disclosure of money received in an election year.¹⁵⁷ During the debate over campaign finance regulation, Senator Joseph Robinson (D-Ark) declared: "We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions."¹⁵⁸ Moreover, Robinson declared, many people assumed that donors to winning campaigns "expect, and sometimes demand . . . consideration" as a token of gratitude.¹⁵⁹

Congress, after dithering about for more than a year, finally passed the FCPA of 1925, and President Coolidge promptly signed it into law.¹⁶⁰ The new measure closed the loophole Sinclair had exploited by requiring disclosures regardless of when the contribution was made.¹⁶¹ It raised the spending ceiling for Senate races to \$25,000, required disclosure of all receipts by candidates for either the House or the Senate, and by political committees acting in two or more states.¹⁶²

The bill had a number of flaws. It required reporting only those expenditures made with a candidate's "knowledge or consent;" most office-seekers interpreted this as applying only to personal outlays.¹⁶³ As a result, expenditures made by committees were not reported.¹⁶⁴ As political scientist Louise Overacker commented, evasion of the law only required that "the astute candidate . . . be discreetly ignorant of what his friends are doing."¹⁶⁵ Passed on the eve of the great expansion of radio in the 1920s, and the purchase of airtime for political

transfer of naval oil reserves from the Navy to Secretary Fall).

¹⁵⁶ SMITH, *supra* note 5, at 25-26.

¹⁵⁷ *Id.* at 26.

¹⁵⁸ 65 CONG. REC. S9, 507 (daily ed. May 26, 1924).

¹⁵⁹ *Id.*

¹⁶⁰ Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070.

¹⁶¹ SMITH, *supra* note 5, at 26.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ LOUISE OVERACKER, MONEY IN ELECTIONS 271 (Charles E. Merriam ed., 1932).

advertisements, the Act's spending limits were out-of-date before Coolidge even signed the bill.¹⁶⁶ As a result, nearly all payments for airtime went through committees, which routinely ignored both the limit and the reporting provisions.¹⁶⁷ National party committees, the only ones affected by the measure, evaded the provisions applying to them by routing funds through state or local groups.¹⁶⁸ The reports they did file tended to be vague and incomplete.¹⁶⁹ Other committees claimed the law did not apply to them, and House Clerk William Tyler Page, the officer designated in the law to receive the reports, could do little about it.¹⁷⁰ "It is not for me", he said in 1924, "to say whether an organization, politically active, comes within the purview of the law or not. That was for the officers of such associations [themselves] to determine."¹⁷¹ And, if any other sign were needed that Congress really did not intend this bill to be very effective, one merely had to note that it lacked any enforcement provisions.¹⁷² "[T]here would not be a single successful prosecution under the act in the forty-six years" it remained on the statute books.¹⁷³

In addition, Congress did not challenge the Supreme Court's ruling that it had no authority over primaries, even though many in the legislature believed that *Newberry* did not provide a clear precedent.¹⁷⁴ Even after the Supreme Court rejected this holding and held that Congress had authority over primaries in *United States v. Classic*,¹⁷⁵ Congress did not act.¹⁷⁶ A coalition of Republicans and southern Democrats opposed federal regulation of primaries, and while Congress attempted further regulation of elections in the two decades following World War II, it did not reassert the authority first claimed in 1911 until the Federal Election Campaign Act (FECA) of 1971.¹⁷⁷

¹⁶⁶ SMITH, *supra* note 5, at 26.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ MUTCH, *supra* note 61, at 25.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ SMITH, *supra* note 5, at 27.

¹⁷⁴ MUTCH, *supra* note 61, at 21.

¹⁷⁵ *United States v. Classic*, 313 U.S. 299, 317 (1941).

¹⁷⁶ MUTCH, *supra* note 61, at 21.

¹⁷⁷ *Id.*

V. RISING CAMPAIGN COSTS

Franklin Roosevelt once complained that when he took office, capitalism was like a drowning man.¹⁷⁸ He and the New Deal rescued the fellow, only to be reproved a few years later for failing to save his hat as well.¹⁷⁹ Certainly big business did not see Roosevelt and the Democrats as its friends in the 1930s and continued to direct most corporate contributions to the assistance of the Republican Party and its candidates.¹⁸⁰ In fact, in all four of his victorious presidential campaigns, Roosevelt found himself outspent by his Republican opponents.¹⁸¹ So the Democrats turned to some creative fund-raising and uncovered a new and potent ally in the labor unions that benefited so greatly from New Deal measures.¹⁸²

Since the law prohibited corporations from donating money to presidential campaigns, the Democrats produced a souvenir book for the 1936 national convention.¹⁸³ The book had pictures and articles about the Democratic candidates, interspersed with many pages of advertisements generously paid for by national corporations.¹⁸⁴ There was no law prohibiting a company from taking out an ad, even in a political publication.¹⁸⁵ The Democratic National Committee (DNC) sold the books to corporations and others; cheap editions sold at \$2.50 apiece, deluxe copies autographed by the President himself went for \$100.¹⁸⁶ The party raised \$250,000 that year as a result of the book, easily covering the cost of the convention.¹⁸⁷ The souvenir book became a staple of national and state conventions of both parties for the next thirty-five years.¹⁸⁸

The souvenir book may have defrayed the costs of the national

¹⁷⁸ GARRY WILLS, *NIXON AGONISTES: THE CRISIS OF THE SELF-MADE MAN* 551 (Cherokee Publ'g Co. 1990) (1970).

¹⁷⁹ *Id.*

¹⁸⁰ LOUISE OVERACKER, *PRESIDENTIAL CAMPAIGN FUNDS* 16 (1946). *See generally* MICHAEL J. WEBBER, *NEW DEAL FAT CATS: BUSINESS, LABOR, AND CAMPAIGN FINANCE IN THE 1936 PRESIDENTIAL ELECTION* (2000) (providing more on the financing of the 1936 presidential election).

¹⁸¹ ALEXANDER, *FINANCING POLITICS*, *supra* note 20, at 80.

¹⁸² SMITH, *supra* note 5, at 27-28.

¹⁸³ *Id.* at 27.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ SMITH, *supra* note 5, at 27.

convention, but it played a relatively small role in paying for increasingly expensive political campaigns.¹⁸⁹ In the bitterly fought 1928 election between Herbert Hoover and Alfred E. Smith, the RNC officially spent \$6,256,111, while its Democratic counterpart expended \$5,342,350.¹⁹⁰ While these numbers by themselves would have made the campaign the most expensive in American history to that time, the actual costs of the campaign, including amounts spent by state and local committees, probably exceeded \$20 million.¹⁹¹ Moreover, the donation patterns again showed party reliance on big givers.¹⁹² Over 90,000 people contributed to Smith's campaign, and 140,000 gave to Hoover.¹⁹³ One percent of the givers to both parties gave half of the total amount raised.¹⁹⁴ Small contributors, identified as those giving less than \$100, accounted for only one-eighth of the sums raised by the Democrats, and eight percent of the Republican war chest.¹⁹⁵

The 1928 campaign took place at the height of the decade's prosperity; four years later both parties spent far less—a total of \$5.1 million by the national committees¹⁹⁶—but they still relied on large givers, who in each case gave more than forty percent of the totals raised.¹⁹⁷ By 1936, though, the amount contributed by donors of \$5,000 or more had shrunk to 26% for the Democrats and 24.2% for the Republicans.¹⁹⁸ While the GOP continued to rely upon business contributions, the Democrats had successfully tapped into a new source not only of revenue, but also of campaign workers—the labor unions.¹⁹⁹

The Republicans had not been friends of labor unions, and conservative judges—usually Republicans—had consistently struck down laws that helped workers and issued injunctions

¹⁸⁹ See ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80 (illustrating how revenues from the souvenir books barely made a dent in the 1936 Democratic campaign costs, which is estimated at almost \$5.2 million).

¹⁹⁰ *Id.*

¹⁹¹ OVERACKER, MONEY IN ELECTIONS, *supra* note 165, at 74.

¹⁹² *Id.* at 140-41.

¹⁹³ OVERACKER, PRESIDENTIAL CAMPAIGNS FUNDS, *supra* note 180, at 13.

¹⁹⁴ OVERACKER, MONEY IN ELECTIONS, *supra* note 165, at 137-42 (discussing contributions at length).

¹⁹⁵ *Id.* at 143.

¹⁹⁶ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80.

¹⁹⁷ OVERACKER, PRESIDENTIAL CAMPAIGNS FUNDS, *supra* note 180, at 14 (Table D).

¹⁹⁸ *Id.*

¹⁹⁹ SMITH, *supra* note 5, at 28.

preventing strikes or pickets.²⁰⁰ With the New Deal, labor for the first time found an administration in Washington sympathetic to its goals. The National Industrial Recovery Act of 1933 guaranteed laborers' right to bargain collectively, required industrial codes to adopt fair labor standards of minimum wages and maximum hours, and appropriated \$3.3 billion to put unemployed workers on the payrolls of federal projects.²⁰¹ After the Supreme Court invalidated the Act, Congress passed the Wagner Labor Relations Act of 1935, reaffirming laborers' rights to organize and bargain collectively, and established the powerful National Labor Relations Board to enforce this policy.²⁰² The 1935 Social Security Act created a fund to provide supplemental benefits to older Americans,²⁰³ and in 1938 Congress passed the Fair Labor Standards Act, establishing maximum hours, minimum wages, and safety conditions for workers employed in interstate commerce.²⁰⁴ Overseeing all these developments were prominent Democrats like Harold Ickes and Frances Perkins whom organized labor recognized as friends.

Years earlier, Samuel Gompers had established the political policy for the AFL: it would reward its friends and punish its enemies, but it would neither take overt political stands nor endorse particular parties or candidates.²⁰⁵ All of that changed in the 1930s as both the more conservative AFL as well as the newer and more liberal unions in the Congress of Industrial Organization (CIO) rushed to reward Roosevelt and the Democrats not only with their votes but also with dollars.²⁰⁶ CIO president, John L. Lewis, hand-delivered a check for \$250,000 to Roosevelt in 1936; Roosevelt rejected the check, though, "because he feared associating too closely with unions."²⁰⁷ The DNC had no problem accepting the money and in fact got an additional half-million dollars from labor unions for that election.²⁰⁸ Organized labor had contributed nothing to either party in 1928

²⁰⁰ CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880-1960*, at 65-66 (1985).

²⁰¹ National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933).

²⁰² Wagner-Connery Labor Relations Act, ch. 372, 49 Stat. 449 (1935).

²⁰³ Social Security Act of 1935, ch. 531, 49 Stat. 620.

²⁰⁴ Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060.

²⁰⁵ TOMLINS, *supra* note 200, at 57.

²⁰⁶ See BIRNBAUM, *supra* note 2, at 30-31.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 31.

or 1932, but roughly ten percent of all Democratic campaign funds came from unions in 1936 and sixteen percent in 1940.²⁰⁹

By the late 1930s, however, both Republicans and conservative southern Democrats suspected that Roosevelt was using New Deal programs—especially those benefiting labor—to build a powerful new political base for himself.²¹⁰ The various government employment projects such as the Public Works Administration, the Civilian Conservation Corps, the Tennessee Valley Authority, and the Works Progress Administration had put millions of men and women to work on the government payroll, but outside the civil service restrictions of the Pendleton Act.²¹¹ After Roosevelt failed to purge the Democratic Party of its more conservative members in the 1938 election, a coalition of Republicans and conservative Democrats united to push through the Hatch Act in 1939.²¹²

Named for its chief sponsor, Senator Carl Hatch of New Mexico, the measure extended the ban on political contributions and participation in campaigns beyond the civil service (covered under the Pendleton Act) to include all government employees.²¹³ While supposedly a reform measure, the bill had no other purpose than to strike at what its sponsors feared was Franklin Roosevelt's growing political power.²¹⁴ The following year, Congress amended the Hatch Act to ban donations by federal contractors or by employees of state agencies financed in whole or in part by federal funds.²¹⁵ The amendment also limited contributions to national committees to \$5,000,²¹⁶ and placed a spending limit on national committees of \$3 million per campaign.²¹⁷ The Hatch Act amendments proved as futile as previous measures. The \$5,000 limit on contributions only

²⁰⁹ OVERACKER, *PRESIDENTIAL CAMPAIGNS FUNDS*, *supra* note 180, at 14 (Table I); *see* THAYER, *supra* note 13, at 67-71 (discussing how the 1928 and 1932 campaigns left the Democrats in debt, but then labor unions began to contribute in 1936, contributing nearly \$500,000 in the 1936 election). In 1944, the percentage may have been even higher but because of intervening legislation (discussed below) the money from unions had to be listed as "unclassified." OVERACKER, *PRESIDENTIAL CAMPAIGN FUNDS*, *supra* note 180, at 14 (Table I).

²¹⁰ SMITH, *supra* note 5, at 27.

²¹¹ *Id.*

²¹² *Id.*; Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939).

²¹³ SMITH, *supra* note 5, at 27.

²¹⁴ *Id.*

²¹⁵ Hatch Political Activity Act. ch. 640, sec. 1, § 2, 54 Stat. 767 (1940).

²¹⁶ *Id.* sec. 4, § 13, 54 Stat. at 770.

²¹⁷ *Id.* sec. 6, § 20, 54 Stat. at 772.

meant that people wishing to give more than that amount would funnel their money into other committees, a practice that the Act did not cover.²¹⁸ Although neither national committee spent more than \$3 million until the election of 1952, the total expenses easily surpassed that limit.²¹⁹

Then in the midst of World War II, Republicans capitalized on the negative reactions to a bitter strike by John L. Lewis's United Mine Workers to push through the Smith-Connally Act, also known as the War Labor Disputes Act, over a presidential veto.²²⁰ Section 9 of the Act prohibited labor unions from contributing to political campaigns for the duration of the war.²²¹ The unions circumvented section 9 with a device that would come to play a key role in the debate over campaign finance reform a half-century later, the political action committee, or PAC.²²² Union members contributed to labor-organized PACs through automatic payroll check-offs, and then the PACs, supposedly independent entities, contributed that money to candidates.²²³ Lawyers for the CIO interpreted section 9 as prohibiting donations going directly to candidates, but not for expenditures made independently.²²⁴ The CIO, therefore, freely engaged in a whole variety of activities and supported particular Democratic candidates.²²⁵ Once again, an effort at supposed campaign finance reform—although in truth an attack on the political activities of labor unions—produced results opposite to those intended. In the 1944 presidential campaign, organized labor participated more fully than it had ever done before, and the

²¹⁸ SMITH, *supra* note 5, at 27.

²¹⁹ *Id.*

²²⁰ *Id.*; War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).

²²¹ War Labor Disputes Act, sec. 9, § 313, 57 Stat. at 167. Roosevelt did not veto the bill because of the campaign provisions, but because it limited the flexibility of executive action in wartime labor disputes. 89 CONG. REC. S796, 6487-88 (daily ed. June 25, 1943). During hearings on the bill, Lewis Hines, representing the AFL, asked why “if it has been good over the years for the employers to elect Representatives to Congress—and there are many Representatives in Congress elected by employers—why is it not good for organized labor and the trade-union movement to put forth a little effort and financial support, if necessary, to help elect their friends who have passed humanitarian legislation?” *To Regulate Labor Organizations: Hearing on H.R. 804 and H.R. 1483 Before the Subcomm. of the H. Comm. on Labor, 78th Cong.* 85 (1943).

²²² SMITH, *supra* note 5, at 28.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

CIO-PAC alone spent almost \$2 million in support of Democratic candidates.²²⁶

VI. UNION CONTRIBUTIONS

Well before the end of the war organized labor had become a major ally of the Democratic Party, and when the Republicans gained control of both houses of Congress in 1946, the first time in sixteen years, they wasted no time in going after the unions.²²⁷ The Taft-Hartley Act, passed over Harry Truman's veto, made permanent the Smith-Connally ban on union contributions.²²⁸ It also banned all union expenditures on political activity, including communications with union members that related to politics.²²⁹ As the House report accompanying the bill noted, the term "making any contribution" was to be interpreted broadly, to include not just direct contributions to candidates, but the indirect expenditure of funds to help candidates.²³⁰ Unions could not use money from their general treasury for political purposes, even, under section 304, to fund a newsletter to members in which the union endorsed a candidate.²³¹ Taft-Hartley not only attempted to regulate the use of money, but also for the first time overtly tried to limit political speech by a particular group.

The unions immediately challenged this latter section, and the CIO News published an editorial backing a Democratic candidate in Maryland.²³² The government brought suit, and eventually the case reached the Supreme Court.²³³ In a rather convoluted opinion, Justice Stanley Reed totally twisted the legislative history of the Act to hold that the ban did not apply to internal communications.²³⁴ None of the justices wanted to support a ban on unions communicating with their members, but only Justice Wiley Rutledge, joined by Justices Hugo Black, William O. Douglas, and Frank Murphy, believed that section 304 violated the First Amendment because it limited free speech.²³⁵

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, sec. 304, § 313, 61 Stat. 136, 159.

²²⁹ *Id.*

²³⁰ H.R. REP. NO. 79-2739, at 40 (1946).

²³¹ Labor Management Relations Act, 1947, § 304, 61 Stat. at 159.

²³² SMITH, *supra* note 5, at 28.

²³³ *Id.*; United States v. Cong. of Indus. Org., 335 U.S. 106 (1948).

²³⁴ *Id.* at 112-25.

²³⁵ *Id.* at 155 (Rutledge, J., concurring).

In 1957, the Justice Department indicted the United Automobile Workers for violating Taft-Hartley's ban on external communications, that is, sending political messages to the public at large.²³⁶ The union defended itself claiming that this ban, like that on internal communications, violated the First Amendment.²³⁷ The Warren Court, under attack because of its rulings on segregation and the free speech rights of communists, ducked the issue on procedural grounds, and sent the case back to a district court where a jury trial acquitted the union.²³⁸ The case marked the first time that any group had been indicted for speaking to the public about political issues, and in some ways foreshadowed the debate of the 1990s about "issue advocacy," and whether groups can spend money that helps a candidate through "education" of the public about particular issues.²³⁹

Despite this victory, unions for the most part did cease direct communications with the public, because they really had no need to do so.²⁴⁰ Workers, at that time still heavily Democratic, continued to send money to the union PACs through payroll check-offs, and the PACs not only made contributions to candidates but also financed messages to the public.²⁴¹ Moreover, internal communications, through union newspapers and newsletters, reached millions of members urging them to support particular candidates, usually Democratic.²⁴² Truman's surprise victory over Thomas Dewey in the 1948 election is often credited to the support he received from labor unions angry at the Republicans and grateful to Truman for his effort to block Taft-Hartley through a veto.²⁴³ Truman benefited not only from the money unions spent in his behalf, but also from the tens of thousands of union members who worked on campaigns, staffed phone banks, registered voters and helped out the Democrats in myriad ways.²⁴⁴

Ironically, very few corporations at this time set up PACs to evade the restrictions placed on them by the Corrupt Practices

²³⁶ United States v. Int'l Union United Auto., 352 U.S. 567 (1957).

²³⁷ *Id.* at 568.

²³⁸ *Id.* at 592-93; SMITH, *supra* note 5, at 29.

²³⁹ SMITH, *supra* note 5, at 29.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ TOMLINS, *supra* note 200, at 283.

²⁴⁴ *Id.*

Act.²⁴⁵ Commentators believe that in part corporations doubted that they could legally use company funds to establish a PAC.²⁴⁶ Moreover, company officials felt no need to do so.²⁴⁷ As noted earlier, well after the passage of the Tillman Act, corporate executives made large contributions for which their companies reimbursed them, or just simply ignored the ban by reaching into the corporate till and sending in money to a campaign committee.²⁴⁸ The lack of enforcement of the Tillman Law made chances of indictment practically nil.²⁴⁹

VII. THE NATURE OF CAMPAIGNING

By the late 1950s, Americans financed their campaigns through a system that, according to Frank Sorauf, a political scientist at the University of Minnesota and long-time student of how Americans financed their politics, had several features that would in effect determine the course of future campaign finance reform.²⁵⁰ To begin with, campaigns at the national level, including congressional races, depended primarily upon large contributors, consisting of wealthy individuals, corporations (which funneled their money through their officers' supposedly "personal" donations), and labor unions.²⁵¹ In 1952, about two-thirds of all money spent on federal elections came from donations of \$500 or more (\$2,300 in current dollars).²⁵² In state and local politics, patronage and payments remained a significant source of funds,²⁵³ with large contributors often rewarded after a victorious campaign with plum appointments.²⁵⁴

Political parties also played an important role in campaigns as the intermediaries between contributors and candidates.²⁵⁵

²⁴⁵ *Id.*

²⁴⁶ SMITH, *supra* note 5, at 29-30.

²⁴⁷ *Id.* at 30.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 21-24 (1988).

²⁵¹ *Id.* at 21.

²⁵² *Id.*

²⁵³ *Id.* at 22. In 1973, while working on a civic project in Albany, New York, I happened to go through a wrong door at City Hall on payday, to find municipal employees lined up making their contributions to the Albany County Democratic Party. How widespread this practice may have been is difficult to say, but according to Sorauf it did not apply at the federal level, due in large measure to the Hatch Act.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 22-23.

While federal rules may have limited expenditures by the national committees, members of the Democratic and Republican National Committees knew and, directly or indirectly, helped guide other committees and PACs in spending money beyond what federal law allowed.²⁵⁶ Very often the solicitations for funds, an important part of raising money for campaigns, came from party officials.²⁵⁷

Finally, federal and state laws aimed at regulating campaign finance all added up to nothing more than an exercise in futility.²⁵⁸ While some of the more blatant and corrupt practices had been eliminated or at least marginalized, no mechanism existed to enforce the laws, nor, if truth be told, did government officials really want to do so.²⁵⁹ Both Democrats and Republicans wanted and needed money to run their campaigns.

All of this began to change in the 1960s, with the development of new campaign technologies unlinked to print media, and a concomitant change in the nature of political parties.²⁶⁰ Although there had been public opinion polls since the 1930s, and politicians had begun using them in the 1940s, John F. Kennedy's campaign in 1960 used polls in a way that had not been done before, essentially relying upon them to shape campaign strategy.²⁶¹ At the same time, radio and television became the new media, and the costs of buying airtime and producing sophisticated commercials drove up the expenses of campaigning far beyond what they had been.²⁶² In 1948, the DNC spent \$2.7 million on the Truman campaign.²⁶³ In the two races in which Dwight Eisenhower ran for President, the RNC spent \$6.6 million in 1952 and \$7.8 million in 1956.²⁶⁴ In 1960, the national Nixon campaign spent \$10.1 million, while the Democrats paid out \$9.8 million for Kennedy.²⁶⁵ When Nixon ran again in 1968, his campaign exceeded \$25.4 million, and four years later the Nixon re-election campaign spent \$61 million.²⁶⁶

²⁵⁶ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 23.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 23-24.

²⁵⁹ *Id.* at 23.

²⁶⁰ *Id.* at 25.

²⁶¹ GOIDEL ET AL., *supra* note 8, at 25.

²⁶² *Id.*

²⁶³ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

While not all of this money went to radio and television, much of the increase can be attributed to the costs associated with these media.²⁶⁷ Later, new technologies, such as direct mailing and the use of computers for a variety of purposes would add to the skyrocketing costs.²⁶⁸

Related to this development, the nature of political parties and their relationships to candidates and campaigns changed.²⁶⁹ Through the 1940s and into the 1950s, there had been close ties between the candidate and party leaders.²⁷⁰ Originally, the parties had existed for the sole purpose of getting their candidates elected, and candidates in turn recognized their obligations to party officials and workers for their own success in attaining office. Franklin Roosevelt and Harry Truman worked hand-in-glove with the national Democratic leadership, not only during campaign years but between elections as well.²⁷¹ One often voted Democratic or Republican regardless of the candidate, because voters understood that the candidates shared and represented the basic values of the party.

The new technologies, however, placed greater emphasis on candidates than on their parties. In print advertising one could spell out party platforms and positions. Television and radio demanded sound bytes, and the former also required candidates who could project to the viewers. Many people credit John F. Kennedy's photogenic appearance in his first debate with Richard Nixon as the single most important factor that led to his eking out victory in 1960.²⁷² Suddenly candidates had to have sex appeal and be able to use the new media. Throughout the nineteenth century it is likely that no more than a few thousand people at a time actually saw or heard the candidates. William Jennings Bryan's barnstorming candidacy in the 1896 election changed the model to some degree, but even with all the campaigning that a Woodrow Wilson or a Herbert Hoover or a Franklin Roosevelt did, no more than two or three percent of the electorate—if that much—actually saw the man.²⁷³

²⁶⁷ *Id.* at 83.

²⁶⁸ GOIDEL ET AL., *supra* note 8, at 25 ("The continued growth in new campaign technologies would continue unabated.")

²⁶⁹ *Id.*

²⁷⁰ See SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 22-23.

²⁷¹ See THAYER, *supra* note 13, at 67, 75-76 (discussing FDR's and Truman's elections, including their relationships with the Democratic Party).

²⁷² HERBERT E. ALEXANDER, MONEY IN POLITICS 253 (1992).

²⁷³ ROBERT J. DINKIN, CAMPAIGNING IN AMERICA: A HISTORY OF ELECTION

In 1960, nobody who owned a television set could avoid images and advertisements for Kennedy or Nixon, and that pattern has only intensified. As a result, political parties, while still important, became to some extent secondary in the crucial matter of raising funds.²⁷⁴ Candidates and their own advisors now did the soliciting, and in 1972, Richard Nixon had so little use for the RNC that he established his own group, the Committee to Re-Elect the President, that operated wholly independently from the RNC.²⁷⁵

Few people welcomed this development. Fund-raising, which had been cyclical and tied to national races, now became constant.²⁷⁶ The results of an election had barely been certified before fund-raising began for the next one.²⁷⁷ The traditional start of the presidential campaign, Labor Day, disappeared as candidates began declaring their availability two or even three years earlier. While some candidates, such as Barry Goldwater (who in 1964 stood far to the right of the mainstream Republican Party) and George McGovern (who in 1972 stood far to the left of the mainstream Democratic Party) raised a relatively high percentage of their campaign funds from small contributors, the role of the big givers—either directly to the candidates or to the national party committees, PACs or other groups—became more and more important in funding campaigns.²⁷⁸

A number of commissions sought to establish guidelines for campaign reform during the 1950s and 1960s, including one that President Kennedy set up, that unsuccessfully called for matching federal funds in presidential races—but little actually happened.²⁷⁹ In 1966, Congress passed the Long Act, designed to lessen the influence of wealthy contributors in presidential races.²⁸⁰ The measure also called for public funding of political parties to pay for presidential campaigns, but ensuing acts of

PRACTICES 103-04, 114, 121, 149 (1989).

²⁷⁴ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 27-28.

²⁷⁵ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 196.

²⁷⁶ Peverill Squire, *Preemptive Fund-raising and Challenger Profile in Senate Elections*, 53 J. OF POL. 1150, 1150 (1991).

²⁷⁷ *Id.*

²⁷⁸ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 26-27.

²⁷⁹ Anthony Corrado, *Money and Politics: A History of Campaign Finance Law*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK 33 (Corrado et al. eds., 1997).

²⁸⁰ Presidential Campaign Finance Act of 1966, Pub. L. No. 89-809, § 302, 80 Stat. 1587. Although free-standing in its provisions, the Long Act was technically Title III of the Tax Code Revisions of 1966.

Congress permanently postponed implementation of that section.²⁸¹

Looking back, one needed only seven fingers to count the acts of Congress that tried to impose some order and reform on campaign finance practices—the Tillman Act (1907),²⁸² the Publicity Act (1910),²⁸³ the FCPA (1925),²⁸⁴ the Hatch Act (1939),²⁸⁵ the Smith-Connally Act (1943),²⁸⁶ the Taft-Hartley Act (1947),²⁸⁷ and the Long Act (1966).²⁸⁸ In addition, by 1959, forty-three states had some requirements for reporting campaign finance expenditures by candidates, their committees, or committees run by the parties, and thirty-one states had some limits on expenditures, although in most cases the limits applied only to the candidate or those expenditures made with his or her knowledge or consent.²⁸⁹ Only four states had limits on individual contributions, and these ranged from \$1,000 to \$5,000 a person, and could be easily by-passed through contributions to party committees.²⁹⁰

The effects of these laws, at both the federal and state levels, could be described as negligible at best.²⁹¹ As quickly as legislatures enacted new laws and restrictions, candidates and parties found means around them.²⁹² Not until 1971 did Congress pass the first serious attempt to reform campaign finance, and to understand what happened we need to look at legislative action and inaction after World War II.

VIII. FAILED EFFORTS IN TACKLING THE GROWING PROBLEM OF CAMPAIGN FINANCING

With the exception of the limitation on unions written into the

²⁸¹ Corrado, *supra* note 279, at 19-20.

²⁸² Tillman Act, ch. 420, 34 Stat. 864 (1907).

²⁸³ Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910).

²⁸⁴ Federal Corrupt Practices Act of 1925, Pub. L. No. 69-20, §§ 248-56, 44 Stat. 15.

²⁸⁵ Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939).

²⁸⁶ War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).

²⁸⁷ Labor Management Relations Act, 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159.

²⁸⁸ Presidential Election Campaign Fund Act of 1966, Pub. L. No. 89-809, § 302, 80 Stat. 1587.

²⁸⁹ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 32.

²⁹⁰ *Id.* at 31.

²⁹¹ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 183.

²⁹² *Id.*

Taft-Hartley measure, Congress did little in the years following World War II to deal with the growing problem of campaign finances.²⁹³ Some committees did hold hearings, and in 1948 and again in 1951, special House committees on campaign expenditures reported that the existing laws needed significant revision.²⁹⁴ The 1951 Committee stated flatly that it was “patently impossible for a candidate to conduct a Congressional or Senatorial campaign’ within existing limits, and that ‘present unrealistic limitations on campaign contributions and expenditures are an invitation to criminal violation.’”²⁹⁵ The report, however, produced no legislation, and it would be ten more years before another House committee showed any interest in the subject.²⁹⁶ The powerful Speaker of the House, Sam Rayburn of Texas, opposed any measure that would bring expenses for primary elections under scrutiny, and in those days, in Texas and most of the south, whoever won the Democratic primary, would coast to victory in the general election.²⁹⁷

Over on the Senate side of the Capitol, the Election Subcommittee of the Committee on Rules and Administration proposed in 1953 that the spending limit on national political committees be raised from \$3 million to \$10 million a year, a proposal that reflected the reality of increasing costs in running an election.²⁹⁸ The full Senate ignored the proposal, but in 1955 Senator Thomas Hennings of Missouri, the new chair of the Subcommittee, introduced a bill that required all political committees active in campaigns for federal office to file financial reports, even if they operated in only one state.²⁹⁹ In addition, the Hennings bill recommended raising the spending limits on congressional candidates and national committees; although the bill cleared the full Committee it never reached the Senate floor for a vote.³⁰⁰

Then in February 1956, Senator Francis Case (R-SD) announced that he was offered a \$2,500 campaign gift (later revealed to have come from the president of the Superior Oil Co.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* (quoting HOUSE SPECIAL COMM. TO INVESTIGATE CAMPAIGN EXPENDITURES, 81ST CONG., H.R. REP. NO. 3252, at 21-22 (1951)).

²⁹⁶ *Id.*

²⁹⁷ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 201.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

of California) if he would vote for a bill to benefit the natural gas industry.³⁰¹ Although both houses of Congress passed the measure, President Dwight Eisenhower found this effort at such overt bribery so discomfoting that he vetoed the bill.³⁰² The Case disclosure led to three separate congressional investigations, and suddenly the moribund drive to reform campaign finance appeared to gain new life.³⁰³ Lyndon Johnson (D-TX), the Senate majority leader, and William Knowland (R-CA), the minority leader, introduced a resolution that had eighty-three co-sponsors.³⁰⁴ To no one's surprise, the bill never left the Committee, since as some wags figured, with so many co-sponsors it might have passed if it ever actually came to the Senate floor.³⁰⁵ James Reston, a political reporter for the *New York Times*, wrote that Johnson and Knowland wanted "to block the investigation if possible, to limit it in any event, and to get it out of the control of the Senate Elections Subcommittee."³⁰⁶

But although they managed to block any reform, the two could not stop the Senate Privileges and Elections Subcommittee, chaired by Albert H. Gore of Tennessee. Although prevented from looking into the allegations raised by the Case disclosure, the Committee far surpassed previous efforts to examine and catalogue the financing of American political campaigns at the national level.³⁰⁷ It assembled a large research staff under the direction of Alexander Heard, perhaps the country's leading expert on campaign finance.³⁰⁸ The report included a long list of major donors arranged alphabetically and by family group—such as the DuPonts, Rockefellers, and Mellons—as well as the top corporate donors.³⁰⁹ Heard and other scholars, as well as some newspaper reporters, also tried to examine the documents filed with the clerks of the House and Senate by members of Congress reporting what they had spent in their election campaigns.³¹⁰ They found the materials to be of little value, varying greatly in

³⁰¹ MUTCH, *supra* note 61, at 26; ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 201-02.

³⁰² MUTCH, *supra* note 61, at 26.

³⁰³ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 201-02.

³⁰⁴ *Id.* at 202.

³⁰⁵ *Id.*

³⁰⁶ MUTCH, *supra* note 61, at 26-27.

³⁰⁷ *Id.* at 27.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 26.

format and detail, and practically inaccessible because of the uncooperative nature of the clerks' offices.³¹¹ Republicans screamed that the Committee had distorted its findings in order, according to Andrew F. Schoepel (R-KS), to support the "New Dealer" thesis that "the Republican Party was the party of big business and that the Democrats were the party concerned with labor and the so-called little man."³¹² Although normally the Gore Committee could have expected to see its report printed as a Senate document, which would have given it a relatively wide distribution, Schoepel prevailed on Senate leaders to withhold funds for printing; as a result the committee report appeared in a very limited edition as an unnumbered committee print, and received practically no notice by the press or the public.³¹³

In the meantime, Senator Hennings kept plugging away at his proposal, and after he became chairman of the full Rules and Administration Committee in 1957, he managed to get his bill reported out of committee, only to see the leadership forestall any floor debate.³¹⁴ Three years later, he finally managed to secure floor debate, and realized that for all the lip service paid to campaign finance reform, very few members of the Senate had any interest in changing things.³¹⁵ Hennings, in order to get his bill out of committee, had agreed to tone down some of the provisions, with the intention of adding back stronger measures during the floor debate.³¹⁶ With the help of Senators Kenneth Keating (R-NY) and Estes Kefauver (D-TN), Hennings did in fact strengthen the bill.³¹⁷ Candidates for federal office would have to report expenditures not only in the general elections but in the primaries as well; "state and local committees would be required to report if they spent \$2,500 or more" in a campaign for federal office; no individual could contribute more than an aggregate of \$10,000 to political campaigns in any one year; the "ceilings on expenditures" for House and Senate campaigns were raised significantly to reflect the actual costs of running for office; and "candidates for President and Vice President could spend up to [twenty cents] for each vote cast in any one of the three preceding

³¹¹ *Id.*

³¹² MUTCH, *supra* note 61, at 27.

³¹³ *Id.*

³¹⁴ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 202.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

Presidential elections.”³¹⁸ The strengthened Hennings bill passed the Senate by a comfortable margin of fifty nine to twenty two.³¹⁹ Sam Rayburn buried it in the House.³²⁰ Shortly after that, Hennings died, and no one in the Senate stepped up to take his place as a champion of reform.³²¹

The focus of reform then shifted to the White House. John F. Kennedy had been interested in campaign financing for a long time.³²² While in the Senate, “he [had been] a member of the Special Committee to Investigate Political Activities, Lobbying, and Campaign Contributions, one of the committees formed after the Case disclosure in 1956.”³²³ As a wealthy man, he knew the importance of money in politics, and had often heard accusations that his family fortune had bought public offices for him.³²⁴ But as the nominal leader of the Democratic Party, Kennedy also knew about the \$3.8 million deficit from the 1960 campaign that the party now had to cover.³²⁵ Kennedy named Alexander Heard, the same man who had staffed the Gore investigation, to chair a presidential commission on campaign costs in presidential elections.³²⁶

The Committee submitted its report the following year, and made some limited, albeit innovative, recommendations. The proposals offered by the Committee included:

- Individuals, businesses, labor unions, and private organizations should be encouraged to participate in and underwrite voluntary bipartisan political activities such as voter registration and fund-raising drives, and that expenses related to these activities be tax deductible.³²⁷
- Tax incentives should be tried for an experimental period, covering at least two presidential campaigns, allowing individual contributors to take a credit against their federal income taxes for a certain percentage of their donations, or to take a deduction of up to \$1,000 in any given tax year.³²⁸

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 202.

³²¹ *Id.* at 202-03.

³²² *Id.* at 203.

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 203-04; ALEXANDER, FINANCING POLITICS, *supra* note 20, at 27.

³²⁷ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 204.

³²⁸ *Id.* at 204-05.

- The unrealistic and unenforceable ceilings on individual contributions and on total expenditures by political committees should be abolished, and an effective system of public disclosure be put into place.³²⁹
- Congress should provide funds for the reasonable and necessary transition costs that a newly elected President would have in preparing to take over the office.³³⁰
- Section 315 of the Federal Communications Act should be temporarily suspended, as it had been in 1960, to permit broadcasters to make the airwaves available to the nominees of the major political parties on an equal basis (such as for debates) without having to do so for the candidates of the dozens of fringe parties.³³¹

The report, submitted in April 1962, received warm approval by the President at a news conference.³³² The chairmen of the Democratic and Republican National Committees endorsed it, as did former Presidents, Truman and Eisenhower, along with Richard Nixon, Adlai Stevenson, and Thomas E. Dewey—all the living presidential candidates of both major parties in the previous twenty-five years.³³³

Frank Sorauf dismisses the report as inconsequential, claiming Kennedy gave it only perfunctory support, and Congress brushed it aside without any serious consideration.³³⁴ Robert Mutch agrees that nothing happened in the remaining year and a half of the Kennedy administration, but points out that several of the proposals eventually became enacted into law or federal regulation.³³⁵ Herbert Alexander, on the other hand, considers the report a success.³³⁶ It represented “a model and comprehensive program for reforming” campaign finance, and while most of the proposals had been aired before, especially by liberal Democrats, he sees the real impact of the report in generating debate and getting things moving by providing a complete and detailed analysis of the problems facing the system.³³⁷ “The report,” he claims, “accomplished its purpose.”³³⁸

³²⁹ *Id.* at 205.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*

³³³ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 204.

³³⁴ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 34.

³³⁵ MUTCH, *supra* note 61, at 30-31.

³³⁶ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 205.

³³⁷ *Id.*

³³⁸ *Id.*

In fact, only one of the committee recommendations became effective during Kennedy's time.³³⁹ The Internal Revenue Service (IRS) authorized taxpayers to deduct expenditures in connection with federal, state, or local elections, if the money went to advertising designed to encourage voter registration, the sponsorship of debates among candidates, or giving employees paid time off to register and vote.³⁴⁰ The IRS ruling remained in effect for many years, and few people realized that the costs associated with joint appearances of candidates on radio or television, or "battle pages" in newspapers could be sponsored by corporations and counted as business expenses.³⁴¹

Very little else happened for the rest of the decade. President Lyndon Johnson, in his 1966 State of the Union message, announced that campaign finance reform would be a high priority of his administration.³⁴² He derided the laws then on the books as, "[t]oo narrow in their scope when passed, now they are obsolete. Too narrow in their purpose then, now they are inadequate. They are more loophole than law. They invite evasion and circumvention."³⁴³ He promised "to send Congress comprehensive legislation," but it took Johnson four months before he sent a bill up to the Capitol.³⁴⁴ The measure he recommended consisted primarily of proposals that reformers had been making for roughly two decades—primary elections would be brought under the law, contribution limits would be tightened, there would be greater disclosure and publicity of campaign finances, and all restrictions on expenditures would be repealed.³⁴⁵

The Republicans responded with a reform bill of their own, which embodied many of the President's proposals but also included the strengthening of disclosure requirements by establishing an independent Federal Election Commission

³³⁹ *Id.* at 207.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² MUTCH, *supra* note 61, at 30; Lyndon B. Johnson, Annual Message to the Congress on the State of the Union, Jan. 12, 1966, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=28015>.

³⁴³ Lyndon B. Johnson, Letter to the President of the Senate and to the Speaker of the House Transmitting Proposed Election Reform Act of 1966, in 1 MESSAGES AND PAPERS OF THE PRESIDENTS: LYNDON BAINES JOHNSON: 1966, *available at* <http://www.presidency.ucsb.edu/ws/index.php?id=27617&st=election+reform+act&st1=>.

³⁴⁴ MUTCH, *supra* note 61, at 30.

³⁴⁵ *Id.*

(FEC).³⁴⁶ The Republicans also proposed drastically restricting the money spent by PACs sponsored by unions representing employees of federal contractors.³⁴⁷ The resulting deadlock led to the demise of both proposals, and the only surprise came when both houses of Congress accepted Senator Russell Long's amendment to a tax bill providing for public funding of presidential elections, using a voluntary check-off on one's income tax form.³⁴⁸ The proposal, although enacted, would not become operational for another decade.³⁴⁹ Despite more hearings and other proposals, Congress refused to act on campaign finance reform for the rest of the decade.³⁵⁰

IX. SKY-ROCKETING CAMPAIGN COSTS: THE GROWING USE OF TELEVISION IN CAMPAIGNS

It would be easy to dismiss congressional—and presidential—inaction by cynically noting that the system of campaign finance regulation in place, if it can be called a system, apparently worked.³⁵¹ Candidates could raise as much money as possible because they could rely on wealthy contributors, and the reporting requirements could best be described as meaningless.³⁵² “[I]n 1968 Mrs. John D. Rockefeller spent \$1.5 million on her stepson Nelson’s quest for the Republican [presidential] nomination,” while W. Clement Stone, a Chicago insurance magnate, gave the party \$2.8 million, most of it to Richard M. Nixon’s presidential campaign.³⁵³ When Richard Nixon became President in 1969, W. Pat Jennings, the Clerk of the House of Representatives, sent to the Justice Department a list of twenty Nixon fund-raising committees that had failed to file a single report for the campaign, and the names of 107 congressional candidates who had also violated the disclosure law.³⁵⁴ A year later the Justice Department announced that “none of the violators would be prosecuted . . . given the history of the act”

³⁴⁶ *Id.* at 30-31.

³⁴⁷ *Id.* at 31.

³⁴⁸ *Id.*

³⁴⁹ ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 210.

³⁵⁰ MUTCH, *supra* note 61, at 31.

³⁵¹ *Id.*

³⁵² SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 33.

³⁵³ *Id.* at 34.

³⁵⁴ MUTCH, *supra* note 61, at 28.

and its enforcement, it would be unfair to do so.³⁵⁵ However, the Department declared it would prosecute violators in the future.³⁵⁶

While there is undoubtedly some truth in that response, the fact is that campaigning had become more and more expensive, and many congressmen and senators had come to believe that they spent far too much time chasing after political contributions.³⁵⁷ The biggest campaign, that for the presidency, costs the most, and each four years the sums expended by both parties leapt upward.³⁵⁸ When Thomas Dewey had run against Harry Truman in 1948, their combined expenditures had been a little under \$5 million, or about the same amount that had been spent in the 1944 race between Dewey and Franklin Roosevelt.³⁵⁹ From then on one can see nothing but an upward spiral:

<u>Democrats</u>	<u>Republicans</u>	<u>Total</u>
1952 Stevenson (\$5.03m)	Eisenhower (\$6.61m)	\$11.64m
1956 Stevenson (\$5.11m)	Eisenhower (\$7.78m)	\$12.89m
1960 Kennedy (\$9.80m)	Nixon (\$10.13m)	\$19.93m
1964 Johnson (\$8.76m)	Goldwater (\$16.03m)	\$24.79m
1968 Humphrey (\$11.59m)	Nixon (\$25.40m)	\$36.99m ³⁶⁰

These numbers would be eclipsed by the \$91 million spent in the 1972 election, where Richard Nixon outspent George McGovern by a two to one margin.³⁶¹

While both parties tried to appeal to all income levels, during the 1960s, the Republicans actually had far more success attracting small, so-called “nickel-and-dime” givers. Republican fund drives in 1968 produced \$6.6 million in gifts, averaging \$15 from each of 450,000 individual contributors. While Barry

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 16.

³⁵⁸ *Id.* at 80.

³⁵⁹ *Id.* The 1944 campaign had probably been limited by wartime financial restrictions, since it had cost less than the campaigns in 1936 and 1940, which were themselves limited by scarce resources during the depression. SMITH, *supra* note 5, at 30. Nonetheless, one might have expected more money to be spent in 1948, but according to Bradley Smith, in inflation-adjusted dollars, the costs of the 1948 presidential election were the lowest since 1880. *Id.*

³⁶⁰ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 80. Even holding dollars constant, between 1952 and 1968 campaign costs rose two and half-times. *Id.*

³⁶¹ *Id.*

Goldwater in 1964 and George McGovern in 1972 raised large sums from a broad base of small donors, the GOP relied primarily on big givers, especially corporate donors, to finance their presidential campaigns.³⁶² In contrast, the Democrats, who began to rebuild their small donor base at the end of the decade, looked primarily to labor unions and their political arms for money.³⁶³ If one adds in the costs of primary campaigns, fought out in at least one party each year except 1956, the totals are significantly higher.

Nor did the costs of running for the House or Senate remain stable. According to a study by the Citizens' Research Foundation, the total cost of campaigning for all federal offices in presidential election years tripled between 1952 (the first year for which dependable figures are available) and 1972:

\$140 million
 \$155 million
 \$175 million
 \$200 million
 \$300 million
 \$425 million³⁶⁴

During this time, the cost of running for a seat in Congress—at least in California where fairly reliable data could be found—more than tripled for the House, and went up five-fold for the Senate:

	<u>House</u>	<u>Senate</u>
1958	\$1.0 m	\$1.3 m
1960	\$1.6 m	
1962	\$2.4 m	\$0.8 m
1964	\$2.4 m	\$3.2 m
1966	\$2.6 m	
1968	\$3.7 m	\$5.3 m
1970	\$3.6 m	\$6.7 m ³⁶⁵

³⁶² *Id.*

³⁶³ SMITH, *supra* note 5, at 30.

³⁶⁴ GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 166 (1980). Jacobson notes that the numbers for some of these years are "best guesses," given the poor reporting system in place. Even holding the dollar values constant the costs doubled in the twenty-year period.

³⁶⁵ *Id.* at 167. In constant dollars, the cost of a Senate race quadrupled. In 1960 and 1966 there were no elections for the Senate, and in 1962, a popular incumbent faced only nominal opposition, resulting in the low expenditures that

The big change in the 1960s, of course, involved the growing use of television in campaigns. In 1952, the government freeze on new stations ended, and in the following years television stations and, more importantly, household sets, proliferated. Television became an important—and expensive—part of campaigning.³⁶⁶ In 1952, the first year both parties used the new medium, they spent \$3.7 million purchasing time; twenty years later that number had tripled.³⁶⁷ Abraham Lincoln's entire campaign in 1860 had cost \$100,000; in 1960, it took that much to buy thirty minutes of air time.³⁶⁸

The problem did not abate; if anything, it worsened as the years passed. To give but one example, in 1988, former Florida Governor Reuben Askew sought the Democratic nomination for the U.S. Senate.³⁶⁹ One of his aides recalled a primary campaign rally in northern Florida:

A hunched-over, withered dirt farmer approached the governor with a \$100 check. 'I want you to have this,' said the man, trembling with awe. 'I've supported you for years, and I'm behind you now.' With a 30-second television spot in Tampa costing around \$6,000, the farmer's contribution paid for about a half-second of television. I didn't have the heart to tell him.³⁷⁰

Television may have been the single greatest factor in increasing overall campaign costs by fifty percent between 1964 and 1968. As Senator Edward Kennedy (D-Mass.) later testified, "like a colossus of the ancient world, television stands astride our political system, demanding tribute from every candidate for public office, incumbent or challenger. Its appetite is insatiable, its impact unique."³⁷¹ Senator Albert Gore (D-TN), defeated later

year. JOHN R. OWENS, TRENDS IN CAMPAIGN SPENDING IN CALIFORNIA, 1958-1970: TESTS OF FACTORS INFLUENCING COSTS 57 (CITIZENS RESEARCH FOUNDATION 1973). One can understand why it would cost more for a Senate race than for a House seat. House districts are fairly small and compact, while a senator represents—and must campaign in—the whole state. In geographically large states like California, New York, Texas or Pennsylvania, travel costs associated with a Senate race easily outstrip those involved in one House district, where the candidate can usually get around by car, or in some urban areas, by public transportation.

³⁶⁶ JACOBSON, *supra* note 364, at 10.

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 11.

³⁶⁹ *Id.* at 7.

³⁷⁰ *Id.* In May, Askew withdrew from the race, claiming that he had to spend too much time fund-raising and not enough time campaigning.

³⁷¹ *Id.* at 184.

in the 1974 election following a massive media blitz by his opponent, “warned that ‘in the days of slogans, labels, image making mass communications, monopolizing the time of the television that goes into the homes of the American people is a great danger to the democratic process.’”³⁷²

While some studies indicate that television ads are not very effective in House district races, their impact grows in statewide Senate races, and of course, in the nationwide presidential campaign. A survey taken of twenty-three senators and ninety-one representatives taken after the 1968 election found that nearly three-fourths of the Senate candidates had used television extensively, eighteen percent had used “some” television, and only nine percent had used none.³⁷³ By contrast, only a quarter of the House races had depended heavily on television, and nearly half had not used the medium at all.³⁷⁴ Politicians, and especially members of the Senate, began to look more favorably on spending and contribution restrictions as radio and television advertising became a bottomless pit soaking up millions of dollars.³⁷⁵

The ever-increasing costs of campaigning and the resulting reliance on corporate and union contributions raised fears that the end result would be corruption not only of individuals, but of the entire political system and the citizenry’s faith in it.³⁷⁶ Although there are plenty of stories about corporate donations leading to favorable legislation,³⁷⁷ many political analysts note that there are so many issues confronting congressmen it would

³⁷² JACOBSON, *supra* note 364, at 10 (quoting 91 CONG. REC. S3637, 11596 (1970)).

³⁷³ *Id.* at 168.

³⁷⁴ *Id.*

³⁷⁵ ROSS K. BAKER, *THE NEW FAT CATS: MEMBERS OF CONGRESS AS POLITICAL BENEFACTORS* 168 (1989).

³⁷⁶ JACOBSON, *supra* note 364, at 169.

³⁷⁷ The dairy industry’s pledge of \$2 million to Nixon’s re-election campaign in 1972, as well as smaller contributions to ranking members of the agriculture and finance committees supposedly helped to win an increase in price supports for milk worth more than \$10 million to milk producers. *Id.* at 168-69; see J. ANTHONY LUKAS, *NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS* 114-26 (1976). But there is a question whether this was a quid pro quo or merely support of people who already tended to favor such a policy. *Id.* at 124. There is also a potential negative response, such as when Senator James Abourezk (D-SD) noted that he would have liked to support certain pro-dairy amendments to a finance bill, “but because I have received contributions from dairy farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off.” *Id.* at 171-72.

be almost impossible for them to pay back every contributor by voting for each one's interests, especially since some of those interests probably conflict.³⁷⁸ Senators and representatives are keenly aware of what the main economic interests are in their home state or district, and realize that if they hope to keep their seats they have to vote in a way that will benefit their constituents.³⁷⁹ If a senator comes from a dairy state, she will not require a contribution from the dairy industry in order to support legislation favoring dairy farmers. While one may not agree with Charles Wilson's aphorism that "What's good for General Motors is good for the country," a congressman from Detroit is certainly aware that a healthy GM means jobs for his constituents and prosperity for his district.

But many people worried about the impression that money could corrupt the system. Senator Adlai E. Stevenson III (D-Ill), put it quite succinctly when he testified that "[e]ven if all of the dollars were honestly contributed and honestly spent, they would still have a corrupting influence on our politics. For the vast sums now required for political campaigns raise the unholy specter that politics in the future will be an enterprise for rich people only, for rich candidates, or at the very least candidates backed by rich contributors."³⁸⁰

The worry that the system might be corrupted, or even appear that way, did not provide sufficient impetus to move Congress to action in the 1960s.³⁸¹ Just as Sam Rayburn had buried earlier legislation to reform campaigns, so now Wayne Hays (D-Ohio), chair of the House Administration Committee and an unapologetic opponent of any change in the current campaign finance system, killed any bill that would endanger what he saw as a vested right—the ability of incumbents to secure more funds than their challengers.³⁸² Moreover, he had allies on his Committee, northern Democrats who did not want anything to get in the way of labor support for their party, and southern Democrats who wanted to keep the financing of party primaries

³⁷⁸ *Id.* at 171.

³⁷⁹ *Id.* at 171-72.

³⁸⁰ JACOBSON, *supra* note 364, at 173; *Federal Election Reform: Hearing Before the Subcomm. on Privileges and Elections and the Comm. on Rules and Administration United States S.*, 93d Cong. 185 (1973) (statement of Hon. Adlai T. Stevenson III and Hon. Charles McC. Mathias Jr., U.S. Senators from the states of Illinois and Maryland, respectively).

³⁸¹ JACOBSON, *supra* note 364, at 178.

³⁸² *Id.* at 179.

as veiled as possible.³⁸³ But pressure built, and if a reform package could get past the obstructionists like Hays, it stood a good chance of passage.³⁸⁴ Finally, Congress acted, not once but several times, in the 1970s.³⁸⁵

X. THE REFORM MOVEMENT OF THE 1970S

A variety of reform proposals had been batted around during the 1960s following the report of the presidential commission.³⁸⁶ Some emphasized full disclosure of contributions and expenses and a broadening of the parties' financial bases (by limiting contributions of big donors) to provide a fairer and more stable finance system.³⁸⁷ Other groups, such as the Citizens' Research Foundation, recognized the need for greater campaign resources, kept in check by stringent reporting requirements and the spotlight of publicity.³⁸⁸ Such publicity, they believed, would keep the candidates, the parties, and the system honest.³⁸⁹ A third approach, championed by public interest lobbies such as Common Cause, introduced a new idea—limit campaign resources by imposing ceilings on both campaign contributions and expenditures.³⁹⁰ The tight limits on individual contributions would be offset with public funds.³⁹¹ The ideas of this third group, while quite different from the traditional reforms that had been pushed since the end of World War II, nonetheless caught the attention of key members of Congress.³⁹² Aware of the escalating costs of campaigning and the ever more difficult and time-consuming task of raising funds, they found the idea of limitations on both income and expenditures very attractive.³⁹³

In 1970, both houses of Congress passed a relatively limited

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 179-81.

³⁸⁶ *Id.* at 175-76.

³⁸⁷ JACOBSON, *supra* note 364, at 181, 191. Disclosure requirements were the easiest proposals to win approval in Congress, requiring full reports of all contributions, the names of contributors and all campaign expenditures. Further, Common Cause pushed for the prohibition of all contributions except for small individual contributions.

³⁸⁸ *Id.* at 179-80.

³⁸⁹ *Id.* at 180.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 179-80.

³⁹³ JACOBSON, *supra* note 364, at 179-80; FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES* 7 (1992).

campaign finance reform bill.³⁹⁴ Among other things, the measure would have suspended section 315 of the Communications Act (the equal time provision) for presidential and vice-presidential candidates, and required stations to sell air time to all legally qualified candidates at a price not to exceed “the lowest unit charge of the station for the same amount of time in the same time period.”³⁹⁵ Another feature limited the amount that candidates could spend for the use of broadcasting time to seven cents for each vote cast for all candidates for that office in the last election, or \$20,000, whichever was greater.³⁹⁶ This part applied to presidents and vice-presidents, senators and representatives on the national level, and governors and lieutenant governors at the state level.³⁹⁷ For primary campaigns, candidates (with the exception of those seeking the presidency) could spend no more than one-half of the limit for the general election.³⁹⁸ To enforce this provision, each candidate or a representative had to certify in writing to the station that buying the requested time would not exceed the legal limits.³⁹⁹ Stations could not sell time to candidates refusing to submit such affidavits.⁴⁰⁰

Despite the limited nature of the bill, President Richard M. Nixon vetoed it, on grounds that it did not go far enough.⁴⁰¹ He described the measure as “a good aim, gone amiss.”⁴⁰² “The problem with campaign spending [he declared,] is not radio and television; the problem is spending. This bill plugs only one hole in a sieve.”⁴⁰³ Nixon also disapproved of the fact that, as he saw it, the bill discriminated against broadcasters.⁴⁰⁴ Since the expenditure ceilings applied only to radio and television, the broadcast media would be at a disadvantage.⁴⁰⁵ Candidates could

³⁹⁴ S. 3637, 91st Cong. (1970). The bill in its entirety can be found in *Congressional Record*, 91st Cong., 2d Session (November 23, 1970), 119 CONG. REC. 38, 495-96 (1970).

³⁹⁵ 119 CONG. REC. 38, 495.

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 495-96.

³⁹⁹ *Id.* at 496.

⁴⁰⁰ *Id.*

⁴⁰¹ S. DOC. NO. 91-109, at 1 (available on microform at Cong. Info. Serv. No. S. 920-9).

⁴⁰² *Id.* at 3.

⁴⁰³ *Id.* at 1.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 1-2.

spend their quotas, and then spend as much as they wanted in other venues, such as newspapers, billboards and mailings.⁴⁰⁶ As a result, Nixon claimed, overall campaign spending would not be curtailed.⁴⁰⁷ The President voiced a number of other objections, and while one might discount them as self-serving since at the time his Re-election Committee had already begun amassing the biggest campaign finance war-chest hitherto seen in American politics,⁴⁰⁸ he made a number of valid points. The bill would favor incumbents, would discriminate against broadcasters, and the formula did not account for differing costs in different markets.⁴⁰⁹ Defenders of the bill believed that one step in the right direction was a good start, but Nixon effectively stated that if Congress really wanted to reform campaign finance, then it should do so wholeheartedly.⁴¹⁰

Shortly after the Nixon veto, Common Cause, a citizens lobby headed by former cabinet secretary John Gardner, filed a suit challenging the non-enforcement of the FCPA, the 1925 Act that still governed campaign expenses.⁴¹¹ The suit sought to enjoin the Republican and Democratic National Committees, as well as the Conservative Party of New York, from violating two sections of the FCPA.⁴¹² Common Cause alleged that the national committees had encouraged the formation of multiple local committees on behalf of individual candidates in order to get around the law's limit of \$5,000 on an individual contribution to a committee, and the expenditure by any one committee of more than \$3 million in one year.⁴¹³

The courts eventually dismissed the suit, but it served a useful purpose in focusing attention on the shortcomings of the FCPA, and showing how easily the major parties circumvented its restrictions.⁴¹⁴ Moreover, Common Cause may well have wanted to prod Congress to act quickly, aware that with the 1972 presidential campaign just around the corner, the potential for

⁴⁰⁶ *Id.* at 1-2.

⁴⁰⁷ S. DOC. NO. 91-109, at 2 (available on microform at Cong. Info. Serv. No. S. 920-9).

⁴⁰⁸ *Id.* at 1, 2, 3; DAVID W. ADAMANY & GEORGE E. AGREE, POLITICAL MONEY: A STRATEGY FOR CAMPAIGN FINANCING IN AMERICA 31 (1975).

⁴⁰⁹ S. DOC. NO. 91-109, at 1, 2, 3.

⁴¹⁰ *Id.* at 3; *see also, e.g.*, 119 CONG. REC. 38, 497 (statement of Sen. Pastore).

⁴¹¹ *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803, 806 (D.D.C. 1971).

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* at 807.

even greater abuse could not be ignored.

XI. THE FEDERAL ELECTION CAMPAIGN ACT OF 1971

To everyone's surprise, Congress did in fact completely overhaul federal campaign law by passing two measures, the Revenue Act of 1971 and the FECA of 1971.⁴¹⁵ The Revenue Act finally put into effect the Long Amendment of 1966 by creating a general fund for presidential and vice-presidential campaigns, and permitting taxpayers to check off a dollar of their taxes to underwrite the fund.⁴¹⁶ In order to get Nixon's approval, Congress agreed to delay implementation until the 1976 presidential election. FECA had two main goals—tightening reporting requirements and limiting expenditures for media advertising.⁴¹⁷ But it also looked at other aspects of modern campaign finance, and brought many of the provisions of the old 1925 law up to date. The law broadened the definitions of both “contributions” and “expenditures,” in order to include almost any donation and cost associated with a political campaign.⁴¹⁸ In a clear effort to reduce the advantage of wealthy candidates, the law imposed a ceiling on what candidates for federal offices could spend out of their own pockets or those of their immediate families—\$50,000 for president or vice president, \$35,000 for senators, and \$25,000 for representatives.⁴¹⁹

The FECA set up fairly specific rules for reporting contributions and expenditures, rules that made the law far more effective than its predecessor.⁴²⁰ On the contribution side, the names of all donors or lenders who gave \$100 or more had to be reported, and the names of all committee officials had to be listed.⁴²¹ The drafters of the measure had such great confidence in the reporting provisions that the bill repealed the largely unenforceable prior limits on contributions and expenditures.⁴²²

⁴¹⁵ Revenue Act of 1971, Pub. L. No. 92-178, § 801, 85 Stat. 562; Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972). Although Congress did not actually finish passage of the bill until 1972, it continues to be known as the Federal Election Campaign Act of 1971. It is codified at 2 U.S.C. §§ 431-455 (2000).

⁴¹⁶ Revenue Act of 1971 §§ 801, 802.

⁴¹⁷ ADAMANY & AGREE, *supra* note 408, at 7.

⁴¹⁸ *Id.* at 48-49.

⁴¹⁹ *Id.* at 48.

⁴²⁰ *Id.* at 48-49.

⁴²¹ *Id.*

⁴²² *Id.*

Only the old prohibition against direct contributions by corporations and labor unions remained intact.⁴²³

The media provisions to some extent addressed the problems Nixon pointed out in his veto of the earlier bill.⁴²⁴ Candidates now had limits on all media spending, both broadcast and print, with a maximum of \$50,000 for the smallest district up to \$1.4 million for the senatorial candidates in California.⁴²⁵ Of this amount, no more than sixty percent could go to radio and television.⁴²⁶ Recognizing that inflation could make these limits meaningless and therefore susceptible to evasion, the bill indexed the ceilings to adjust to changes in the cost of living index.⁴²⁷

Only time would have told if the FECA regulations would do what its sponsors hoped—shed the bright light of publicity on the abuses and excesses of campaign finance, restrict both large contributions as well as large expenditures, and provide a more level playing field for challengers and incumbents by having them both operate under the same rules. The bill, signed into law by President Nixon in January 1972, seemed to meet some of its goals in the 1972 election, and as Frank Sorauf noted, it “brought the fullest disclosure of campaign transactions in American history; and while it did not curb the growth of campaign spending generally, it did limit the use of media advertising.”⁴²⁸ Moreover, its provisions may have helped unravel one of the largest scandals in American history—Watergate.

XII. THE WATERGATE SCANDAL

The break-in at the DNC headquarters in the Watergate complex in Washington, D.C., by a group funded by the Committee to Re-elect the President, proved to have been the first step in a chain of events that eventually led to the resignation of Richard Nixon in August 1974. But Watergate is far more than a botched burglary. The stories uncovered by investigative journalists and in House and Senate hearings detailed an unparalleled abuse of executive power.⁴²⁹ For the

⁴²³ ADAMANY & AGREE, *supra* note 408, at 123.

⁴²⁴ *Id.* at 72.

⁴²⁵ Corrado, *supra* note 279, at 52.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 36.

⁴²⁹ For Watergate in general, see BOB WOODWARD & CARL BERNSTEIN, ALL

purposes of our story, however, Watergate stands for the worst-case scenario of a badly flawed campaign finance system that failed to forestall corruption or prevent out-and-out criminal activity. That in the end constitutional safeguards worked to save the political system and forced Nixon from power provided little comfort to those seeking to reform the system of financing elections.

Nixon had decided to by-pass the RNC as much as possible, in part because he and his top aides assumed that the Committee would play by the rules, rules that would prevent them from raising and spending the massive amounts of money they believed necessary to win in 1972.⁴³⁰ So they created an independent body, the Committee to Re-Elect the President, and the money flowed in.⁴³¹ Financier, Robert Vesco, who later fled the country after embezzling millions of dollars from his companies, delivered \$200,000 in cash in an attaché case.⁴³² Billionaire aviation manufacturer and movie producer Howard Hughes put \$100,000 into a safe deposit box belonging to Nixon's friend Bebe Rebozo.⁴³³ Clement Stone reported giving \$73,000, but later investigations showed that he had provided more than two million dollars secretly.⁴³⁴ At least thirteen corporations and their foreign subsidiaries made over \$780,000 in clearly illegal contributions.⁴³⁵ All told, the Committee received an estimated \$5 million in large individual and corporate donations, most of them illegal under the law.⁴³⁶ The Committee, in order to hide these donations, kept a great deal of it in cash on hand, allowing for payouts of \$250,000 to Herb Kalmbach, the President's lawyer, \$350,000 to Gordon Strachan, H.R. Haldeman's aide, and \$83,000 to G. Gordon Liddy, this last money going to finance the Watergate break-in.⁴³⁷

How did sophisticated and wealthy men become dupes of the Nixon Committee? After all, they had made donations, perhaps

THE PRESIDENT'S MEN 26 (1974) and STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON (1990). For the effect on political campaigning, see RALPH K. WINTER, JR., WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER (1974).

⁴³⁰ KUTLER, *supra* note 429, at 192.

⁴³¹ ALEXANDER, FINANCING POLITICS, *supra* note 20, at 73-81.

⁴³² BIRNBAUM, *supra* note 2, at 32-33.

⁴³³ SORAUF, MONEY IN AMERICAN ELECTIONS, *supra* note 250, at 187.

⁴³⁴ *Id.* at 33.

⁴³⁵ BIRNBAUM, *supra* note 2, at 33.

⁴³⁶ *Id.* at 32-33; ALEXANDER, FINANCING POLITICS, *supra* note 20, at 73-81.

⁴³⁷ KUTLER, *supra* note 429, at 355.

even large ones, before, but not since the days of the Tweed Ring in the late nineteenth century had there been stories of fat cats turning up at party headquarters with satchels stuffed with bills.⁴³⁸ In part, Nixon turned the primary fear of the reformers on its head. They had worried that big corporations, eager to get government to act for their advantage, would offer money and essentially “buy” legislators and their votes.⁴³⁹ Nixon did the opposite. His lieutenants went to corporations and told them that if they hoped to be treated well, they had better pony up.⁴⁴⁰ One story illustrates this practice perfectly.

A Nixon fund-raiser, Herbert Kalmbach, approached George Spater, the president and CEO of American Airlines, at a dinner in New York on October 21, 1971.⁴⁴¹ He asked Spater to make a contribution to the Nixon campaign of \$100,000, a sum well beyond anything that Spater had ever given, and because of existing law, one unavailable from the American Airlines treasury.⁴⁴² Spater said he might be able to come up with \$75,000, but Kalmbach wanted more, and Spater knew that Kalmbach represented Nixon.⁴⁴³ At that time the company had at least twenty matters pending before various federal agencies, including a proposed merger with Western Airlines that would require the President’s signature.⁴⁴⁴ Moreover, in his private law practice, Kalmbach represented United Airlines, American’s major competitor and an opponent of the merger.⁴⁴⁵

Figuring he had no choice, Spater first contributed \$20,000 out of his own pocket.⁴⁴⁶ Then he transferred \$100,000 of the airline’s money to the Swiss account of a Lebanese agent, André Tabourian, who regularly handled legitimate overseas transactions for American.⁴⁴⁷ For accounting purposes, Spater had the amount entered on the books as a special commission to Tabourian for the sale of used aircraft in the Middle East. Tabourian then transferred the money back to a separate account

⁴³⁸ *Id.*

⁴³⁹ LUKAS, *supra* note 377, at 117.

⁴⁴⁰ *Id.* at 112.

⁴⁴¹ *Id.* at 128.

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ LUKAS, *supra* note 377, at 128.

⁴⁴⁶ *Id.* at 129.

⁴⁴⁷ *Id.*

in New York, and soon after he came over himself.⁴⁴⁸ Tabourian withdrew the \$100,000 in cash, and handed it to an American Airlines official who put it into a safe.⁴⁴⁹ In March 1972, Spater took the laundered cash—now free of any traceable connection to the airline—put it into a large envelope and handed it over to the Nixon fund-raisers.⁴⁵⁰ These and other tales not only illustrated the greed and criminality of the Nixon campaign, but also illuminated the short-comings in existing law, even the major reforms enacted while people delivered bags of money to the Nixon Campaign Committee.⁴⁵¹

The disclosures of Watergate fed the demand for reform. The late 1960s had seen, as Seymour Martin Lipset and William Schneider noted from their study of public opinion polls, “a virtual explosion in antigovernment sentiment.”⁴⁵² While the Vietnam War may have been the “catalytic event” creating this mistrust, Watergate heightened popular distrust of both government and its leaders.⁴⁵³ The University of Michigan Center for Political Studies runs a biennial poll in which it asks if the respondent thinks that “quite a few of the people running the government are a little crooked,” and whether “the government is pretty much run by a few big interests.”⁴⁵⁴ In 1968, only about a quarter of the people answered yes to the first question, a number that shot up to nearly fifty percent by 1974.⁴⁵⁵ Thirty percent of the people thought big business ran the government in 1964; almost seventy percent responded affirmatively to that question in 1974.⁴⁵⁶ In the early 1960s, when serious discussion of public financing began, the American public rejected the idea by a seven-to-one margin; by the fall of 1973, a poll showed sixty-five percent of the people favored tax support for both

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* Lukas drew on the little-noticed part of the Senate Select Committee on Presidential Campaign Activities, chaired by Senator Sam Ervin (D-NC). After uncovering proof of wire-tapping and misuse of federal agencies, and the evidence that led to Nixon’s resignation, they also looked into some of the activities of the Committee to Re-Elect the President. LUKAS, *supra* note 377, at 129.

⁴⁵¹ MUTCH, *supra* note 61, at 42.

⁴⁵² *Id.* (citing SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 16 (1983)).

⁴⁵³ MUTCH, *supra* note 61, at 42.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 43.

⁴⁵⁶ *Id.*

presidential and congressional campaigns, while only twenty-four percent opposed it.⁴⁵⁷

Common Cause, a group dedicated to electoral and governmental reform attracted 100,000 members within six months of its founding; by the beginning of 1972 that number had increased to a quarter million.⁴⁵⁸ Common Cause and other citizen lobbies played an important role in campaign finance reform over the next three decades. When the FEC proved slow or unwilling to enforce the law, these groups stepped in and generated publicity as well as lawsuits.⁴⁵⁹ Common Cause filed its first lawsuit within months of its creation, challenging the efforts of both the Democratic and Republican National Committees to evade the 1971 FECA contribution and expenditure limits by setting up multiple committees.⁴⁶⁰ A key issue in the suit was whether or not the law gave non-governmental groups standing in the form of a "right of private enforcement."⁴⁶¹ Common Cause won a significant victory when the Federal District Court ruled that it had standing to bring class action suits on behalf of all voters.⁴⁶² The suit did more than just put the major political parties on notice that Common Cause intended to serve a watchdog function; it also gave the new group immediate legitimacy and a seat at the table in the discussion of future campaign reform measures.⁴⁶³ Common Cause next sued Richard Nixon's Campaign Committee to force it to disclose how much money it had raised before April 7, the date the law went into effect.⁴⁶⁴ When it became clear that the case would come to trial before Election Day, the Committee reluctantly released the names of more than 1,500 people who had given over \$5 million.⁴⁶⁵

As Robert Mutch notes, the Watergate hearings did for campaign finance reform in the 1970s what the Armstrong hearings had done for the 1907 and 1911 laws.⁴⁶⁶ Not only

⁴⁵⁷ ADAMANY & AGREE, *supra* note 408, at 5.

⁴⁵⁸ MUTCH, *supra* note 61, at 44.

⁴⁵⁹ *Id.* at 45, 46.

⁴⁶⁰ MUTCH, *supra* note 61, at 45; *Common Cause v. Democratic Nat'l Comm.*, 333 F. Supp. 803 (D.D.C. 1971).

⁴⁶¹ MUTCH, *supra* note 61, at 45.

⁴⁶² *Id.*; *Common Cause*, 333 F. Supp. at 808-09.

⁴⁶³ MUTCH, *supra* note 61, at 45-46.

⁴⁶⁴ *Id.* at 45.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 46.

Common Cause but other groups signed on to the issue.⁴⁶⁷ To take but one example, Sears-Roebuck heir Philip M. Stern, a liberal philanthropist and author, established the Center for Public Financing of Elections.⁴⁶⁸ The executive director, “Susan B. King, had been the Washington director of the National Committee for an Effective Congress, a liberal PAC,” and she proved extremely adept at building a coalition of church, labor and professional organizations all committed to campaign finance reform.⁴⁶⁹ King, Gardner, and other reformers, all veterans of politics, knew how to lobby and they knew how to get their side of the story into the media.⁴⁷⁰ On some days, as Mutch dryly notes, “[m]embers of Congress might well have felt that the morning newspapers, nightly television news, constituent mail, and pro-reform lobbyists all over the Capitol had created pressure for new legislation that was too great to resist.”⁴⁷¹

XIII. THE 1974 AMENDMENTS AND *BUCKLEY V. VALEO*

Of course, most of the crimes related to Watergate had little or nothing to do with campaign financing, as the break-in at Democratic headquarters, obstruction of justice, and use of the Internal Revenue System to try to punish “enemies” demonstrate.⁴⁷² Nixon had not been forced to resign because of violation of the 1971 FECA, nor did the trials and convictions of many of his associates deal with campaign finance. But as the facts of how Nixon had raised and used money became public, it fed a growing public outrage.⁴⁷³ John Gardner of Common Cause noted that many of the illegal activities committed by the administration and its hirelings had been financed by money paid to the Re-election Committee, and as such, Watergate “is a particularly malodorous chapter in the annals of campaign financing.”⁴⁷⁴ The public outcry grew so powerful that it enabled reformers in Congress to push through substantial changes to

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ MUTCH, *supra* note 61, at 46.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² GOIDEL ET AL., *supra* note 8, at 26.

⁴⁷³ STEVEN M. GILLON, *THAT’S NOT WHAT WE MEANT TO DO: REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA* 203 (2000).

⁴⁷⁴ *Id.*

FECA that in fact dwarfed the reforms of the 1971 Act.⁴⁷⁵ Although known as amendments, the 1974 measure addressed not only the perceived shortcomings of the 1971 FECA, but tackled just about every item on the reformers' agenda.⁴⁷⁶

To begin with, Congress finally created a mechanism to police the candidates and the parties in their adherence to the campaign finance laws.⁴⁷⁷ The FEC would be composed of six members, three Democrats and three Republicans, serving staggered six-year terms.⁴⁷⁸ The President, the Speaker of the House, and the president *pro tem* of the Senate would each appoint two members, one from each party, and all six members would be subject to confirmation not just by the Senate but by the House of Representatives.⁴⁷⁹ In addition, the Secretary of the Senate and the Clerk of the House would serve as *ex officio* members.⁴⁸⁰

The 1971 law set no limits on either contributions or expenditures, except for what wealthy candidates could give to their own campaigns.⁴⁸¹ The amendments set a \$1,000 contribution limit to any one candidate for each primary, run-off, or general election, with a maximum of \$25,000 to all candidates for federal office in any election cycle.⁴⁸² No contributor could give more than \$5,000 to any political organization or committee, but there were no limits on the aggregate amount a person could give through multiple committee donations.⁴⁸³ A private person could not expend more than \$1,000 on behalf of a single candidate.⁴⁸⁴ Contributions of over \$100 had to be paid by check or money order, a clear response to people carrying envelopes stuffed with money into the Nixon campaign headquarters.⁴⁸⁵ Foreign contributions were barred completely.⁴⁸⁶

⁴⁷⁵ *Id.* at 203-04.

⁴⁷⁶ *Id.* at 203-05.

⁴⁷⁷ *Id.* at 205.

⁴⁷⁸ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 310, 88 Stat. 1263 (codified as amended at 2 U.S.C. § 437c (2000)).

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

⁴⁸¹ GILLON, *supra* note 473, at 202-204.

⁴⁸² Federal Election Campaign Act Amendments of 1974 § 101; GOIDEL ET AL., *supra* note 8, at 26-27

⁴⁸³ Federal Election Campaign Act Amendments of 1974 § 101; GOIDEL ET AL., *supra* note 8, at 26-27.

⁴⁸⁴ Federal Election Campaign Act Amendments of 1974 § 101; GOIDEL ET AL., *supra* note 8, at 26.

⁴⁸⁵ Federal Election Campaign Act Amendments of 1974 § 309(2)(B).

⁴⁸⁶ *Id.* § 101.

On the expenditure side, candidates for President could not spend more than \$10 million in the primaries.⁴⁸⁷ In any specific state primary, he could not spend more than twice what a senatorial candidate would be allowed to spend.⁴⁸⁸ For the general elections, the law capped presidential expenditures at \$20 million.⁴⁸⁹ Candidates for the House had a \$70,000 limit in both the primary and general election, while people running for the Senate faced limits determined by the population of the state, but no more than \$100,000 in the primary and \$150,000 in the election.⁴⁹⁰

In an important step, the new law finally implemented public funding of at least part of the presidential campaign, through a voluntary check-off on a taxpayer's return.⁴⁹¹ A formula determined how much a candidate would get once he had raised a minimum of \$100,000 in amounts of at least \$5,000 in each of twenty states or more.⁴⁹² In addition, the law tightened the reporting requirements, and directed that periodic reports be delivered in a timely manner to the FEC.⁴⁹³ In other areas as well, the law attempted to strengthen the rules set out in 1971.

To call these changes simply "amendments" to the 1971 FECA is clearly erroneous. This law went well beyond the 1971 regulations, attempted to avoid the problems revealed by the Watergate scandals, and in many ways fulfilled the agenda that many reformers had been advocating for more than two decades.⁴⁹⁴ In some of its goals, the 1974 law was in fact a great advance over all previous measures. By extending public financing to all levels of the presidential campaign, it acknowledged the importance of both the primaries and the general election in choosing the nation's chief executive.⁴⁹⁵ But reformers could not get public funding for congressional campaigns, primarily because of the intransigence of Wayne Hays (D-OH), the powerful chair of the Ways and Means Committee, and other representatives from essentially one-party districts who did not care to see their challengers paid for by tax

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ GOIDEL ET AL., *supra* note 8, at 27.

⁴⁹² Federal Election Campaign Act Amendments of 1974 § 9033(A)(3).

⁴⁹³ GOIDEL ET AL., *supra* note 8, at 27.

⁴⁹⁴ *Id.* at 26.

⁴⁹⁵ *Id.* at 27.

dollars.⁴⁹⁶

The question of whether spending limits would increase the advantage enjoyed by incumbents played a major role in the debates in both houses of Congress.⁴⁹⁷ In the House, William E. Frenzel (R-MN) had noted in the 1971 debate that “when you establish a spending limitation you literally insure that incumbents are not going to be defeated because the only weapon the non-incumbent has . . . is [money to] get his name known.”⁴⁹⁸ By the time Congress debated the 1974 measures, it had before it figures from the 1972 elections, showing that challengers to incumbents only did well if they spent a great deal of money, usually more than would be allowed under the new limits.⁴⁹⁹ Several representatives and senators said plainly that they would never have been elected if the proposed spending limits had been in place when they first ran for office.⁵⁰⁰

Part of the problem in setting a viable limit arose from the different experiences of those involved.⁵⁰¹ Proposals for limiting the expenditures for House races ranged from \$30,000 to \$190,000.⁵⁰² Representative Frenzel thought that \$150,000 made sense, because “that is what it cost [him] to get elected the first time.”⁵⁰³ Wayne Hays and John Herman Dent (D-PA) thought that \$35,000 to \$40,000 would be enough, but both men ran in districts where they normally had weak opposition.⁵⁰⁴ In the end, the House set a limit of \$70,000 on the primary and an equal amount on the general election, with another twenty percent allowed to cover the costs of raising these funds.⁵⁰⁵ A single number, applying to all races, made sense for the House, since all districts are by law roughly equal in population.

Candidates for the Senate, however, faced a far different situation. Running in California or Texas meant covering more ground and persuading more voters than running in Rhode Island or New Hampshire. So the bill allowed senatorial

⁴⁹⁶ THAYER, *supra* note 13, at 288; ALEXANDER, MONEY IN POLITICS, *supra* note 272, at 227.

⁴⁹⁷ JACOBSON, *supra* note 364, at 186.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 187.

⁵⁰¹ *Id.* at 188.

⁵⁰² *Id.*

⁵⁰³ JACOBSON, *supra* note 364, at 188.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 185.

candidates to spend the larger of \$100,000 or eight cents per eligible voter in a primary, and then \$150,000 or twelve cents per voter in the general election.⁵⁰⁶

Those who predicted that the 1974 limits would favor incumbents were proven right, and one need not be cynical to assert that the drafters of those limits recognized that such would in fact be the consequence. To begin with, the regulations embodied in the bill made it that much more difficult to raise money, and would-be donors tended to give to incumbents, who had not only the name recognition but also the power of an office they already occupied.⁵⁰⁷ Various studies showed that incumbents on the average raised twice as much as challengers, and that challengers had a difficult time (unless they had personal wealth) getting the start-up money to run a campaign.⁵⁰⁸ The regulations on contributions also made it more difficult for both challengers as well as incumbents to raise money, with the result that much more time went into the effort to fund a campaign than in the actual campaigning itself.⁵⁰⁹ Sixty-one percent of Senate candidates and more than half of the House candidates—both incumbents and challengers—responded to a survey taken after the 1976 election that the new FECA rules made it more difficult to raise campaign funds.⁵¹⁰

Perhaps some reformers considered this good news, but even before the bill had gone into effect some politicians began warning that no bill, no matter how comprehensive, could free campaign finance from the influence of money.⁵¹¹ Senator Edward Kennedy (D-MA) asked “Who really owns America? Is it the people or is it a little group of big campaign contributors?”⁵¹² To Kennedy, Congress had failed to solve the energy crisis because of the campaign gifts of the oil industry.⁵¹³ National health insurance had been sabotaged by the American Medical Association and private insurers, while the National Rifle

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at 194.

⁵⁰⁸ *Id.* at 194, 196. A good example is Henry John Heinz, III, heir to the Heinz 57 food company, who put \$2.5 million of his personal fortune into winning his senate race in Pennsylvania in 1976. JACOBSON, *supra* note 364, at 196.

⁵⁰⁹ *Id.* at 194.

⁵¹⁰ *Id.*

⁵¹¹ GILLON, *supra* note 473, at 204.

⁵¹² *Id.*

⁵¹³ *Id.*

Association blocked meaningful gun control laws.⁵¹⁴ Failing to provide for public financing of Senate and House elections, Kennedy warned, guaranteed that the influence of powerful interests would continue.⁵¹⁵ As if in response, Senator Lowell Weicker (R-CT), one of the heroes of the Watergate investigation, urged the public not to place too great a faith in public financing, which, he declared, “is not magical Clorox guaranteed to end forever the dirty laundry of Watergate. It does not cut the cost of campaigns; it just shifts the cost.”⁵¹⁶ Senator Howard Baker (R-TN), another popular figure during Watergate, “worried about the constitutionality of a law that used taxpayers’ money to fund candidates they did not support.”⁵¹⁷ Public subsidies, he warned, could “abridge the individual’s First Amendment right of freedom of political expression.”⁵¹⁸

As it turned out, the 1974 FECA amendments did abridge the First Amendment, but not in quite the way that Senator Baker had worried about. The Supreme Court struck down significant portions of the law in *Buckley v. Valeo* (1976),⁵¹⁹ a decision that still shapes both the legislative as well as the judicial debate over campaign finance reform.

XIV. THE ROCKY ROAD AHEAD

Even after *Buckley*, the 1974 amendments still marked a significant improvement over the nearly useless scheme that had been in effect before 1971. As Anthony Corrado noted, “the new campaign finance system represented a major advancement over the patchwork of regulations it replaced. The disclosure and reporting requirements dramatically improved public access to financial information and regulators’ ability to enforce the law.”⁵²⁰

The new regulatory plan did include one very familiar element: a ban on corporate and union contributions and expenditures in federal elections.⁵²¹ The law now put a little bite into these

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* at 205.

⁵¹⁷ GILLON, *supra* note 473, at 205.

⁵¹⁸ *Id.*

⁵¹⁹ *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

⁵²⁰ Corrado, *supra* note 279, at 33.

⁵²¹ Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1267.

prohibitions by making it unlawful for anyone—a candidate or a committee member—to accept such contributions.⁵²² But the law did allow for a PAC, whose administrative and fundraising expenses could be paid for by a parent corporation or union, so long as the actual funds expended politically came from voluntary contributions.⁵²³ One wonders if the drafters of this provision realized that, far from reining in campaign finance abuses, PACs would be the proverbial camel’s nose in the tent.

The 1974 law also treated political party committees as a type of political entity that had to register with the FEC, and it subjected them to fairly specific limits on donations they could receive and expenditures they could make.⁵²⁴ But party committees, as part of the official political party structure at national, state, or local levels, did in fact receive special treatment as well.⁵²⁵ Individuals could contribute up to \$20,000 a year to national party committees and an additional \$5,000 to a state party committee.⁵²⁶ These committees could then transfer unlimited sums to other party committees without the transfer being treated as a contribution.⁵²⁷ A national party committee could also transfer \$17,500 during an election cycle to a senatorial candidate, and both national and state parties could make limited “coordinated” expenditures on behalf of their candidates for federal offices.⁵²⁸ These amounts varied by office (representative, senator, president) and by state population (more in New York and California than in Nevada and Mississippi), and were indexed to the rate of inflation.⁵²⁹

In what would prove the greatest flaw in the new plan, the law made no distinctions between various types of party accounts, some subject to federal law and others not.⁵³⁰ The statute makes no mention of “federal” or “non-federal” accounts, and this created the first problem that arose after the law went into effect

⁵²² *Id.*

⁵²³ *Id.*

⁵²⁴ *Id.* at 1276.

⁵²⁵ *Id.* at 1265.

⁵²⁶ Corrado, *supra* note 279, at 56.

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ Fed. Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, 1265.

⁵³⁰ The sole exception to contributions to party committees involved donations to building funds of national and state parties, which were exempt from all restrictions.

in 1976.⁵³¹ The limits set on coordinated party spending had a clearly harmful effect on traditional grassroots party activity, and this led Congress to amend the law in 1979 to correct this problem.⁵³² Neither did the 1974 law distinguish between what we now call “hard” and “soft” monies.⁵³³ The 1974 law and the 1979 revision created what would become the bane of reformers for the next two decades; the difficulty resulted, as we shall see, from the response of the FEC to concerns related to the federal system—how best to facilitate the work of party organizations that have roles in both federal and non-federal election campaigns. And, one might add, the internal inconsistencies in the Supreme Court’s decision in *Buckley* boded ill for the future.⁵³⁴

⁵³¹ Corrado, *supra* note 279, at 34.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).