CAMPAIGNS, CONGRESS, AND COURTS

The Making of Federal Campaign Finance Law

ROBERT E. MUTCH

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Abbreviations Used in Citations

AO	Advisory Opinion (formal ruling by the FEC)
AOR	Advisory Opinion Request (request for a ruling)
Bellotti	*First National Bank of Boston* v. *Bellotti* 435 U.S. 765 (1978)
FNB br.	Brief for First National Bank
Mass. br.	Brief for Massachusetts
SC	Supreme Court opinion
Buckley CA 1975	*Buckley* v. *Valeo* 519 F.2d 821 (1975)
Buckley SC 1976	*Buckley* v. *Valeo* 424 U.S. 1 (1976)
Buckley br.	Brief for Sen. James Buckley et al.
CC br.	Brief for Common Cause et al.
KS br.	Amicus brief for Sens. Kennedy and Scott
oral arg.	Transcript of oral argument (in Supreme Court library)
US br.	Amicus brief for United States
CED	Committee for Economic Development
CH	Clerk of the House of Representatives
Ch. MSS	Sen. William E. Chandler papers, Library of Congress
CPR	*Campaign Practices Reports*
CQ ___Alm.	*Congressional Quarterly Almanac* (for particular years)
CQ Wk. Rpt.	*Congressional Quarterly Weekly Report*
CR	*Congressional Record*
DNC	Democratic National Committee
FCPA	Federal Corrupt Practices Act

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FEC v. *AFC* CA	*Federal Election Commission* v. *Americans for Change* 519 F.Supp. 189 (1980)
FEC v. *AFC* SC	*Federal Election Commission* v. *Americans for Change* 455 U.S. 129 (1982)
ACLU br.	Brief for American Civil Liberties Union
AEP br.	Brief for Americans for an Effective Presidency
AFC br.	Brief for Americans for Change
CC br.	Brief for Common Cause
CC rep. br.	Reply brief for Common Cause
FCM br.	Brief for Fund for a Conservative Majority
FECFG	Federal Election Campaign Financing Guide
FR	*Federal Register*
H. Rpt.	House Report
HACH	House Administration Committee hearings
HCCH	House Commerce Committee hearings
HECH	House Election Committee hearings (1906–1927)
HLCH	House Labor Committee hearings
HSCH	House Special Committee hearings
MUR	"Matter Under Review" (FEC term for investigation into possible FECA violations; records on file in FEC public records room)
Newberry	*U.S.* v. *Newberry* 256 U.S. 232 (1921)
Pl. arg.	Argument for Plaintiffs (Sen. Newberry et al.)
Pl. br.	Brief for Plaintiffs
Pl. rep. br.	Plaintiff's reply brief
US br.	United States brief
NPBO	National Publicity Bill Organization
NJ	*National Journal*
NYSL	New York State Legislature
NYT	New York *Times*
NY Trib	New York *Tribune*
OFE	Office of Federal Elections (in General Accounting Office, 1972–74)
P&L	*PACs & Lobbies*
PCCC	President's Commission on Campaign Costs (1961–62)
RNC	Republican National Committee
RSC	Republican Study Committee (research group in House Republican party)

SC	Supreme Court opinion
SFCH	Senate Finance Committee hearings
SPECH	Senate Privileges and Elections Committee hearings
SRCH	Senate Rules Committee hearings
SSCH	Senate Special or Select Committee hearings
S. Rpt.	Senate Report
SS	Secretary of the Senate
TCF	Twentieth Century Fund
TNR	*The New Republic*
WH	Washington *Herald*
WP	Washington *Post*
WS	Washington *Star*
WSJ	*Wall Street Journal*

Preface

This book began with my interest in a Supreme Court case, *First National Bank of Boston* v. *Bellotti* (1978), which is mentioned only briefly in these pages. That case, and later ones on the subject of corporate political spending, led me to look into the enactment of the first federal campaign finance law, the 1907 prohibition on corporation political contributions. Wondering how we had moved from that prohibition to the *Bellotti* decision, I searched for a history of campaign finance regulation only to find that none existed. Moreover, the most commonly cited reference for the few summaries of that history I had encountered was one my limited research had already revealed as inadequate and misleading: Justice Felix Frankfurter's long digression in *U.S.* v. *UAW* (1957) (which actually depends heavily on the Justice Department's 1947 brief in *U.S.* v. *CIO*). I then began to reconstruct that history, still intending to use it only as a context for examining changing perceptions of the political role of corporations. But this task eventually became so compelling in its own right that it became my main project, and has resulted in this book.

I wish to thank the people who assisted me in my research: Kent Cooper, Patricia Klein, Lucinda Munger, and Michelle Broussard, who patiently showed me how to get what I needed in the FEC public records room, Eugene Nabors and the rest of the staff at the Library of Congress' law library, FEC librarians Leta Holley and Ken Nero, Sharon Snyder and Fred Eiland in the FEC press office, and Martha Alito at *Congressional Quarterly*. Thanks are also due to Herb Alexander, Ann Bedlington, Thomas E. Harris, Mike Malbin, Dick Pious, John Murphy, Ted Burrows, and Pat Adamski, who read portions of this book in manuscript. I did not take all of their suggestions, and they cannot be held responsible for errors of fact or interpretation. Thanks also to Dorothy Thomas for typing, and to Jean Walen for typing and for keeping me in line stylistically.

Introduction

Who should pay for our politics? This question is behind the debate over how, or whether, to regulate election funding. Normally opinions on such abstract matters as the relationship between wealth and power remain well below the surface of public discussion. Campaign finance legislation, though, addresses as a matter of public policy a vital concern of political theory, the proper role of wealth in a democracy. The problem of money in elections is an old one, almost as old as elections themselves, but it is only in the last one hundred years that campaign funding became a policy issue. In earlier years, the question of who should pay election costs was rarely raised.

Politics in the eighteenth century was a gentleman's pursuit, and candidates paid their own campaign expenses. These were typically small: as gentlemen did not run, but rather "stood" for office, there were few campaigns in the modern sense. Candidates were supposed to attract support by virtue of their reputations, not by actually mingling with voters.[1] But often attempts were made to sway the electorate. Candidates in Northern cities might pay for the printing and distribution of campaign literature, and some also incurred other expenses on election day, when like Southern politicians, they were expected to treat voters to large quantities of food and strong drink. These elections were usually contests between factions of the upper classes which dominated public office. Merchants in the Northern towns and planters in the South took the leading positions in colonial, and later, state legislatures, and also sent the first representatives, senators, and presidents to the new national government. The planter gentry dominated Southern politics until the Civil War, but during that same period a new kind of politics appeared in the Northern states, and a new source of political money.

The early nineteenth century saw the rise of professional politicians, men without fortune who not only could not pay their own campaign expenses, but who depended for their livelihood on their salaries as elected officials. The professional politician appeared as part of another phenomenon, the modern political party and the spoils system that sustained it. At the federal level the practice of dismissing government employees after a presidential election and replacing them with supporters of the new chief executive began in earnest with Andrew Jackson's administration. Soon the parties called for financial support from those they had placed in government jobs by assessing officeholders a fixed percentage of their salaries.

The first known cases of assessments on government workers were those the Democratic party levied on U.S. customs employees in New York City during the 1830s. In 1838 a House investigating committee discovered "regular taxation of public officers . . . for the support of party elections" at the New York customs house (H. Rpt. 313 [25-3], 249). This discovery led to the first bill to regulate campaign financing: an 1839 Whig proposal in the Senate that no federal officer "shall pay or advance . . . any money toward the election of any public functionary, whether of the General or State Government" (*U.S. Senate Journal* Feb. 27, 1839, 289). The bill did not pass. Few politicians were willing to eliminate such a valuable source of party funds, and the system of assessments continued to grow. Louise Overacker (1932, 103) estimated that in the 1860s, 1870s, and early 1880s, the post–Civil War period when the Republicans exercised unbroken control of the White House, "the money collected by Republican congressional committees came largely from employees of the United States government." A Senate investigating committee reported that Republicans had levied a 2 percent assessment on government workers in 1876, and that the Republican congressional committee had raised about 90 percent of its money in 1878 from the same source (S. Rpt. 427 [46-2], 2-3; Whitridge 1890, 153).

The assassination in 1881 of President James A. Garfield by a man usually described as a disappointed office seeker, changed this situation. Suddenly the long-ignored ideas of civil service reformers took on political urgency, and the consequence was the Pendleton Act of 1883, which created a class of federal employees who had to win office by competitive examination. The act also prohibited solicitation of political contributions from this class of federal workers. Ways were found to evade this ban, but the new law did reduce, if it could not eliminate, party assessment of government salaries (see Civil Service Commission 1895, 22, 23; Ostrogorski 1970 II, 351-2). In so doing the act increased the importance of other funding sources; in that period the most significant of these were corporations.

Business money became dominant toward the end of the nineteenth century, but its importance had been growing for some time. Philadelphia financier Jay Cooke, Central Pacific Railroad president Collis P. Huntington, copper magnate William E. Dodge, and several other prominent businessmen contributed heavily to Ulysses S. Grant's 1868 presidential campaign (Oberholtzer 1968 II, 69-72). In 1888 Pennsylvania Republican boss Matthew Quay became his party's national chairman and raised about 40 percent of that year's presidential campaign fund from manufacturers and other businesses in his home state (Kehl 1981, 97-99). One historian of the late nineteenth-century Senate writes that corporation campaign contributions "became typical in post-Civil War America" and, in an era when the federal government was still small and U. S. senators were still elected by state legislatures, corporations gave to state parties perhaps even more than to national committees (Rothman 1969, 185, ch. 6). In 1894 the head of the sugar trust told a Senate investigating committee that his corporation regularly contributed to state and local parties, both Democratic and Republican, entering the transactions on the books as business expenses (S. Rpt. 606 [53-2], 350-53). In 1896 Mark Hanna assumed the Republican national chairmanship and immediately put corporate contributions to that party on a systematic basis by assessing banks and corporations: Banks, for example, were assessed at one-quarter of 1 percent of their capital (Croly 1912, 218-20). Hanna's biographer stated that the new chairman "introduced some semblance of business method into a system of campaign contributions which at its worst had fluctuated between the extremes of blackmail and bribery" (ibid., 425). These methods worked even more smoothly in 1900, and continued to work well even in 1904, after Hanna had left the field. But the rising importance of private business as a source of political money also produced the first concentrated attempts to regulate campaign funding.

In the eighteenth and early nineteenth centuries questions about the source of campaign funds and their potential for influencing the successful candidate's behavior in office seldom arose. It was later in the nineteenth century, when voters were choosing among non-upper class politicians, that the financing of elections became a public policy problem. The issue here is not corruption, which can be found in all political systems, but control. Eighteenth-century voters could not always be sure that their elected representatives were honest or intelligent, but they did know who was making policy. The concern among the electorates of the industrialized nineteenth century was that their elected representatives might not be the real policymakers, that government might still be controlled by those who provided campaign funds.[2] It was such concerns that, in the 1890s, led several states to enact disclosure laws to provide voters with information on the sources and uses of campaign contributions. In 1897 four states—Nebraska, Missouri, Tennessee, and Florida, all of which had given their electoral votes to William Jennings Bryan in 1896—prohibited corporation political contributions, in reaction against Mark Hanna's successful solicitation of corporate support for William McKinley (NE Laws ch. 19; MO Laws p. 1081; TN Laws ch. 18; FL Laws ch. 4538). Ten years later Congress passed a similar prohibition, the first federal campaign finance law. This book begins with that 1907 law.

Chapter 1 covers the years from 1904 to 1925. Most of the history of federal campaign finance regulation prior to 1971 concerns the enactments of these early years. The prohibition of corporation political contributions, the requirement that congressional candidates disclose the finances of their campaigns, and the first candidate spending limit were all passed from 1907 to 1911 in response to revelations that several corporations secretly financed Theodore Roosevelt's 1904 presidential campaign. Also important was the Supreme Court's 1921 decision in *U.S.* v. *Newberry,* the most important election law case until *Buckley* v. *Valeo* in 1976. Congress interpreted *Newberry* as invalidating its authority to regulate primary elections, either to impose spending limits on primary campaigns or to require primary candidates to file financial reports. Congress removed primaries from coverage by existing law in passing the Federal Corrupt Practices Act (FCPA) in 1925, and did not reassert its authority to regulate nominating procedures until the Federal Election Campaign Act (FECA) of 1971. In the passage of these early laws we first see the mixture of principle and partisanship that continues to characterize debate over this legislation.

Chapter 2 covers the period from the passage of the FCPA in 1925 to Watergate. The FCPA plugged a loophole in the disclosure requirement that had been uncovered during the Teapot Dome oil-leasing scandal. But examination of compliance with and enforcement of that requirement up to 1971 in the first section of this chapter reveals that the strengthened law worked little better than the old one. There was little legislative activity for most of the half century covered by this chapter. Congressional activity consisted mostly of select committee investigations into the funding of congressional and presidential campaigns, some of which resulted in useful reports. Congress did enact the first ceiling on individual campaign contributions and political committee spending, but did so as part of partisan and factional Democratic conflict over the New Deal. The loopholes in these limits were large enough to render them useless from the start. In 1966 Congress also enacted a public financing plan for presidential elections, then repealed most of it the following year, leaving only the one dollar income tax checkoff, which Democrats revived in 1971. The third and final section deals with the most important factors explaining passage of the 1974 FECA amendments: the drop in public trust in government in the late 1960s, the Watergate scandal, which exacerbated that decline, and the rise of Common Cause, an unusual liberal reform lobby that became the most effective pressure group for campaign finance reform.

Chapter 3 is on contribution and expenditure limits and the ideological debate over them in Congress and the courts. Since 1911 arguments for limits had been egalitarian, and there had been little ideological opposition to them. But in the 1970s conservative legal scholars offered a fully developed libertarian attack on limits as violations of first amendment guarantees of free speech. The first section of this chapter is about that argument. The remaining section concentrates on the development of the limits themselves. Particular attention is given to independent expenditures. Independent spending has been the subject of much debate, especially in presidential elections, and as of 1985 had been before the Supreme Court three times; the last subsection analyzes the arguments for and against independent spending from 1975 to 1985.

Chapter 4 is about the Federal Election Commission (FEC), focusing on the partisan, interest group, and institutional cross pressures within which it operates. The FEC probably would not have been created had it not been for Watergate, and it has been under attack from some quarters ever since. Although it was Republicans who wanted it, and Democrats who killed it in 1971, since its creation in 1974 the agency's critics have been mostly Republican and conservative. Congress, the House in particular, has chafed under the commission's regulation, but critics have accused the agency of being too easy on parties and incumbents, and too hard on challengers, defeated candidates, and small political committees. In recent years, reform-minded critics have suggested that it may be weakening the FECA itself.

Chapter 5, on public financing, begins by examining the politics of congressional passage in 1971 and 1973–74. Publicly funded elections had been a Democratic idea from the start, but that party's disunity on the issue combined with almost unanimous Republican opposition prevented Congress from doing much in the 1960s and in 1971. It was Watergate that made the present program politically possible by changing key Republican minds. The one dollar income tax checkoff used to accumulate the fund from which presidential candidates are paid remains a unique method of appropriating money for a government program; the middle section of Chapter 5 takes a close look at congressional and court debates over this device. The last section concerns the most troublesome part of this legislation, the funding of minor party and independent candidates, and deals largely with the FEC's handling of the Eugene McCarthy and John Anderson candidacies.

Chapter 6 is about the old battle between business and labor. Federal campaign finance law began in 1907 with an attempt to curb corporate involvement in electoral politics; during World War II, a few years after labor had begun to make campaign contributions, congressional Republicans and Southern Democrats brought unions under the 1907 prohibition. Labor responded to this move by inventing the political action committee, a device which has served it well to this day, despite challenges to its legality; those challenges will also be examined. Few corporations created PACs until 1974, when Congress limited individual contributions while setting higher ceilings on PAC gifts, and lifted restrictions on political giving by government contractors. The final section looks at changes in conservative thought and federal court decisions about the corporation's role in a democracy, from the turn-of-the-century belief that it had no legitimate role, to the current argument that corporations have the same First Amendment rights as citizens.

NOTES

1. For presidential candidates this tradition lasted almost to the end of the nineteenth century. M. I. Ostrogorski (1970 II, 342) wrote that those candidates were "debarred by custom from intervening personally in the election campaign . . . their greatness is supposed to prevent them from taking the field."

2. Max Weber (1958, 86) defined the difference between the two kinds of politicians as between those who lived "for" and those who lived "off" politics. The former was possible only for the rich. "Either politics can be conducted . . . by wealthy men . . . or political leadership is made accessible to propertyless men who must be rewarded. The professional politician who lives 'off' politics . . . receives either income from fees and perquisites for specific services—tips and bribes are only an irregular and formally illegal variant of this category of income—or a . . . salary or both."

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Chapter 1

The First Laws

CORPORATION CONTRIBUTIONS

New York Democratic newspapers tried to put some excitement into the 1904 presidential campaign by charging that Theodore Roosevelt's Republican candidacy was being financed by corporations that had been granted immunity from antitrust suits (New York *World* Oct. 1, 1904, 6; NYT Oct. 1, 1904, 8). Democrats had made such charges against William McKinley's 1896 and 1900 campaigns; the new wrinkle in 1904 was the implication of extortion and bribery, which appears to have been no more than speculation based on the fact that Republican national chairman George B. Cortelyou had assumed the party post after resigning as Secretary of Commerce and Labor, which position had made him one of the few officials with access to information on large businesses collected by that department. But Democratic candidate Alton B. Parker also repeated old charges that corporations had volunteered large sums so that Republicans could bribe voters in key states (NYT Oct. 25, 1904, 5).

Republicans hurled back charges of their own, insisting that the Democrats had their own ties to trusts (NY Trib Oct. 3, 1904, 8: WSJ Oct. 8; 1904, 1).WINTER 1854The President told Cortelyou to publicize Parker's large contributors, especially speculator Thomas Fortune Ryan and banker August Belmont, "to show that he is profiting by exactly what he denounces" (Roosevelt 1952, IV, 1,009). Roosevelt also cautioned Cortelyou to keep the charges of extortion "entirely distinct" from those of accepting corporation money, so as "not to permit ourselves in denying one to get drawn into a discussion of the other" (ibid., 1,101–2). This was a prudent move. Although corporate backing for Republican candidates was a well-known fact to the politically sophisticated, it was generally considered to be illegitimate and so was carefully concealed. In a speech toward the end of the 1904 campaign, Secretary of State Elihu Root pointedly distinguished between corporations and their officers, asserting that "Democratic corporation managers have contributed to the Democratic fund, Republicans to the Republican" (NYT Nov. 5, 1904, 8). In the end, this dispute did not affect the outcome. Roosevelt won easily, and the accusations died down, as such things tend to do. But they did not stay down. They returned with greater force the following year, during an investigation into the private business corruption that was the other great concern of the time.

The political power wielded by insurance companies in New York State, particularly by the "big three" of New York, Mutual, and Equitable Life, had been the subject of rumor and suspicion for decades before the appointment of a joint state legislative committee to investigate the industry in 1905. The inquiry had been prompted by reports of questionable financial practices by Equitable officers and by battles for control of that company. The legislature appointed a committee headed by state Senator William Armstrong, who convinced Charles Evans Hughes to serve as chief counsel (NYT June 21, 1905, 1). The Armstrong committee began public hearings on September 6, 1905, in the council chamber of New York City Hall. Although the first six days were devoted to the business practices of Mutual and New York Life, by the end of the seventh day the committee found itself deep in politics.

Chief counsel Hughes spent most of the morning of September 15 trying to unravel New York Life's tangled financial records, seeking the purposes of "non-ledger" accounts and the destinations of checks cashed through circuitous routes (NYSL I, 689–707). He expressed particular interest in a check for $48,702.50: although issued by order of president John A. McCall, the company treasurer knew nothing about it. Hughes then called to the stand George W. Perkins—a J. P. Morgan partner as well as New York Life vice-president. Perkins was well known in national political and business circles, so his appearance in the council chamber was well attended. Hughes inquired once more about the check, and Perkins replied that it was "money paid to . . . the Republican National Committee account of last year" (ibid., 701–2). 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 everywhere" (ibid., 752–53).

Perkins's revelation was front-page news across the country.[1] The New York *Tribune*, the nation's leading Republican newspaper, reported 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" (Sept. 16, 1905, 1). The committee members themselves were not surprised, however, as they had learned of the check's purpose the night before Perkins took the stand. According to the *Tribune*, the committee had been "warned of the result of pressing their inquiry in this direction," but had "insisted that they would perform their duty and give the fullest publicity to every item no