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CAMPAIGN FINANCE: LIFE AS A POLITICAL CONSULTANT

*David Keene**

Although being a political consultant is not nearly as exciting as Dick Morris¹ would have us believe, over the years it has proven very interesting. Therefore, when Joel Gora called and asked me to come here today, I agreed because we have both been involved in campaign reform policy discussions for many, many years. I do not wish to recount with you my perspectives “from the trenches,” but instead, wish to discuss my personal biases.

I was executive assistant to Senator Jim Buckley² in the 1970s when we won an amendment allowing expedited review of the 1974 Campaign Finance Act and, subsequently, took the issue to the Supreme Court with the assistance of some of the people here. What I feel we accomplished at the Supreme Court was to force policymakers at that time, and even now, to realize that the First Amendment means something. The First Amendment does have meaning — even if Dick Gephardt³ does not let that meaning

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¹ Dick Morris is a former political consultant of President Clinton and acted as his chief election strategist during his 1996 re-election campaign. Robert B. Reich, *Locked in the Cabinet*, FLA. TIMES UNION, June 8, 1997, at 16. However, Morris is more commonly remembered for losing this position after a scandal arising from a prostitute’s admission that he permitted her to listen in on his conversations with Clinton. *Id.*

² James Lane Buckley served as United States Senator from New York from 1971-1977. Buckley is currently a United States Court of Appeals Judge for the District of Columbia Circuit. 1995 JUDICIAL STAFF DIRECTORY (Anna L. Brown ed., 3d ed. 1995).

³ Dick Gephardt is the current House Minority Leader. Gephardt, himself, recently decided to return over \$22,000 in campaign contributions from questionably valid sources. *Follow the Money Dems: Orienting Toward Gephardt, Gore, and Kennedy*, AM. POL. NETWORK, Mar. 19, 1997, at 6 (noting

stand in his way when he suggests that, faced with the choice of either reforming politics or honoring the First Amendment, the latter would have to be sacrificed.

What has happened over the years since *Buckley* is that, to some extent, campaigning has become a business, especially for the political consultants and “fulltimes” involved. When I was first involved in political consulting and campaign management, it was the last thing from a full-time business. There was not much money involved in it. A campaign would start up a few months before the election and would go out of business at the election’s conclusion. If the candidate won, obviously it was the result of his efforts and not yours, so he did not pay you. If he lost, he knew that you had somehow done it to him, so he did not pay you.

So, you went out to look for other ways to make a living and got involved in politics as sort of an avocational activity. That has since changed, probably leading me to get out of the business because it became too lucrative. Campaigning has become a full-time activity.⁴ Like any business or human activity, campaigns and politics have “grown up” and organized themselves around the “rules of the game.”

I remember years ago, sitting on a panel at Harvard with John Sears,⁵ Ronald Reagan’s former campaign manager. A number of us were talking both about the campaign laws and changing them.

that, “[o]f the \$22,000 returned, \$17,500 had been contributed to Gephardt’s PAC and \$4,500 to his congressional re-election campaign”).

⁴ Lyn Nofziger, who was one of President Reagan’s political advisors, recently stated, “There’s now a full-time profession of people who run campaigns. . . . In the early days campaigns were run by people who would do one [campaign] every two or four years and in the meantime practice some other profession. It wasn’t until the seventies that you started to see people make full-time careers out of campaigns.” David Wagner, *Campaign Professionals Replace Machines*, INSIGHT MAG., Mar. 10, 1997, at 10.

⁵ John Sears is “incontestably one of the nation’s keenest political strategists.” Robert Novak, *Outsider Must Learn How to Be Team Player*, CHICAGO SUN-TIMES, Aug. 22, 1996, at 29. Although Sears worked with Richard Nixon, he is best remembered for his contributions to the Reagan campaign of 1980. See *id.* Most recently, Sears has been associated with Colin Powell, the former chairman of the Joint Chiefs of Staff, and Jack Kemp, 1996 Republican Vice-Presidential Candidate. *Id.* at 29.

Eventually, someone asked for Sears' perspective, evoking the response, "damn it, just give us the rules and we'll play the game."⁶ This philosophy is true to the extent that business, or anybody else, plays the game according to the rules. Most businesses and players in the political game, with certain well-known and recent exceptions,⁷ try to play by the rules. Those rules determine the shape of the game and the board on which that game is being played, if you will.

We can talk about how campaigning and political consulting has changed as a result of advances in technology and communications, including the ability of candidates to use computers, target voter groups and utilize greater sophistication in polling. But, when you go back over the years, over the presidential and various campaign cycles, you find that many of these changes are a direct result of the environment created by the legislative and regulatory strictures placed upon political activity. The problems that we have today are not so much the problems of political activity. Instead, we are faced with the problems resulting from too much money, as some suggest, and the problems of politicians attempting to break the laws. These are problems that were created by the framework established by the Federal Election Campaigns Act⁸ in 1974, which is destined to soon be replaced.

The 1976 presidential campaign marked the first presidential cycle under the 1974 law. As a result, it was the first time funds were matched and it was the first use of global and state contribu-

⁶ In a recent editorial, John Sears expanded upon his view of politics saying "Politics is not a science [but] a strange form of art in which human beings, operating against the deadline of an election, are forced to be creative and, in these moments derived from necessity, sometimes show true genius when it is least expected." John P. Sears, *New True Believers, Dole's VP Choice Leaves Clinton Vulnerable*, PHOENIX GAZETTE, Aug. 20, 1996, at B5.

⁷ For example, Representative Barney Frank used "more than \$120,000 in campaign funds during the 1990 campaign to pay legal expenses associated with allegations about his relationship with a male prostitute." Michael Kranish, *Using Campaign Funds for Fees and Fines Isn't Uncommon*, BOSTON GLOBE, Apr. 18, 1997, at A22. Additionally, "[f]ormer Representative Nicholas Mavroules . . . used more than \$78,000 in campaign funds to pay legal fees relating to charges of racketeering, bribery and income-tax evasion." *Id.*

⁸ 2 U.S.C. §§ 431-455 (1997).

tion limits. I worked in the primaries for Ronald Reagan, but the problems we suffered were common to all the candidates. Our problems, in fact, were fewer than those of the other candidates because Reagan, at that time, was one of the few national figures who had a small donor fundraising base. Even so, fundraising became very difficult. As you know, under the Federal Election Campaigns Act contributions to candidates are limited to one thousand dollars from an individual and five thousand dollars from a Political Action Committee (PAC).⁹ As a practical matter, with very few ideological exceptions, PACs do not contribute monies to primaries. Consequently, the practical limit on contributions to primaries is a thousand dollars, that is, the limit for an individual.

In 1976, two problems were imposed by statutory regulation.¹⁰ First, a global limit was established, which in 1976 was in the area of \$13 million prior to the national conventions. Second, there were new state limits. When you added these two figures up, you came to a total permissible contributions of about \$30 million. Therefore, your first priority under the new law, if you were managing a campaign, was to stop a good deal of activity that had occurred previously. You had to sit down and make some very clear choices. There could be no more volunteer headquarters. One of the first programs that was sacrificed on the Republican side was outreach to minority groups because it makes no sense from a dollar and cents standpoint. So, when you look back upon the activities of the Republican Party during the campaigns immediately following the time when those laws came into effect, you see that most of the

⁹ See 2 U.S.C. § 441a(1)(A) (stating that no person shall make contributions to any candidate for federal office and his authorized political committees which, in the aggregate, exceed \$1,000); 2 U.S.C. § 441a(2)(A) (stating that no multicandidate political committee shall make contributions to any candidate and his authorized political committees in respect to any elections to federal office which, in the aggregate, exceed \$5,000).

PACs are political action committees defined as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(a) (1997).

¹⁰ See generally 2 U.S.C. § 441(b) (setting ceilings for presidential campaign contributions).

outreach programs vanished.¹¹ This was due to the reality that once you get into a campaign and you are operating with a limited budget, you have to decide where you are going to get your votes.

Therefore, when the new rules were implemented in 1976, the candidates all ran into very serious problems. With a \$1,000 limit, it was very difficult to raise \$13 million in the period of time that was allowed.¹² The contribution limit was \$1,000, but none of the laws had affected the calendar under which the candidates operated. For example, in 1960 we had only 16 presidential primaries,¹³ primarily set up to permit candidates to go out and demonstrate to the party bosses that they could, in fact, get actual people excited to vote for them. Thus, John Kennedy went to West Virginia to prove that somebody like him could attract votes from such a place. But, by 1984 most delegates were selected via primaries held around the country. The states with primaries began looking at each other and saying, "look at what New Hampshire gets out of this — it's a big industry for a little state like that. Maybe in addition to enhancing our influence in our party convention, we could also make money and increase local tourism and media attention if we move our primaries earlier."

So, a rush occurred to make the primaries earlier. This movement created an even more serious problem for people trying to run campaigns. It is a situation which, similar to campaign laws, has an impact on the outcome. Changing the "rules of the game" inherently benefits certain candidates over others. As a result of the changing rules, the demand for money in campaigns began to increase geometrically. Unless you started the game with huge

¹¹ See, e.g., Morton Kondracke, *The G.O.P. Gets Its Act Together*, N.Y. TIMES, July 13, 1980, § 6 (Magazine), at 18. For example, during the 1980 Republican Presidential campaign of Ronald Reagan, the money previously spent on Republican minority outreach programs was instead spent on advertising directed at middle-income non-voters. *Id.*

¹² Although the 1976 campaign has been described as a "financially sedate affair" because the new regulations were yet untested, the candidates realized the "important link between investment and victory" and, therefore, sought loopholes to raise the funds crucial to their campaigns. Philip John Davies, *Paying for Presidential Elections: Some Honey, Plenty of Money*, CONTEMPORARY REV., Oct. 1, 1996, at 169.

¹³ THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 79 (1960).

amounts of money already in the bank, you would not be able to play through the end.

In 1980, I worked for George Bush. George Bush was able to stay in that race against Ronald Reagan through the summer, but not because he won the Iowa caucus.¹⁴ Instead, Bush competed because he won a sort of “make believe” operation in Maine the year before. The boost he received there allowed him to raise enough money to compete through the early summer, despite his loss in New Hampshire. When you look at presidential candidates for the next cycle of 2000, the right objective is the conclusion which Al Gore’s people reached: “we have to get all the money we can get, wherever we can get it, right now. If we don’t get it, we’re dead; if we do have it, everybody else is dead because you’ve got to have it before you start.”¹⁵

Under these laws, how would an insurgent campaign succeed? Unless there is a true ground swell that wants to topple the front runner, it becomes very, very difficult. Even if what the trouble-making candidate says and does resonates, it is very difficult for him to build on that because you can resonate as much as you want in the closet.

As most of us believe, money is, in fact, speech.¹⁶ You need to have some money if you are going to make any noise after you

¹⁴ The Iowa caucuses are no longer outcome determinative. Philip L. Stone, *Take Pride in Iowa Caucuses' Role in Election*, DES MOINES REG., May 3, 1991, at 15. In theory, an unknown candidate who is victorious in Iowa should be able to raise the money and attention needed to succeed in New Hampshire and beyond. However, now that primaries occur so early, a candidate cannot take advantage of an Iowa victory. *Id.*

¹⁵ Al Gore, who has come under great public scrutiny for the manner by which he raised funds, succeeded in using extensive networks of supporters to raise \$1.36 million for the 1996 Clinton / Gore re-election campaign. See Hilary Stout, *Gore Lays Strong Groundwork for the Future, Loyally Campaigning, Fighting GOP Budget*, WALL ST. J., Jan. 8, 1996, at A20.

¹⁶ In expressing how important money is to speech, one analyst has written, “Separating money from speech is neither analytically possible nor desirable. Whether in electoral campaigns, newspaper editorials, legislative lobbying or, indeed, any political activity, resources are critical to disseminating messages and information.” John Bolton, *Virtues of the Buckley Ruling*, WASH. TIMES, Mar. 25, 1997, at A15.

advance beyond the closet. This was evidenced during the 1996 cycle on the Republican side. The only exception to that need for money was demonstrated by a candidate, who was not a serious contender, but who was able to write significant personal checks.¹⁷ The efforts of Joel Gora, Ralph Winter and others allowed this candidate to spend some of his money to enrich people in the consulting class. Some critics contend that not all political money is speech. Realistically, however, despite the small amount used in consulting fees, most of it remains speech and ought to be protected by the First Amendment.

This brings me back to my main point—that everything that happens is shaped by campaign laws. When I started in political consulting, you did not spend much time with the counsel to the campaign. Counsel was not a primary concern. Certainly, it did not constitute an entire branch of the campaign with huge budgets and specialized software. The Dole campaign has just completed and is closing down. In order to successfully close down without getting everyone indicted, they will have to maintain a staff of accountants and lawyers for the next three years. This was not the case in the old days. We have created a business with a vested interest in the way things are done now, or maybe even making them more complicated. I am not sure that it has made politics or politicians more honest. I am not sure that it has made campaigns any better. In fact, I am sure that it has not; decisions that were once made on the basis of how to get support, how to get votes and how to communicate our message, are now made on the basis of how to maximize our advantage under this peculiar set of rules.

Now you have all read stories of candidates going to New Hampshire and staying at Days Inns in Vermont; of everybody calculating how much of the media market expense could be laid off on another state so that they could get the maximum advantage in the state that they're running in. These are decisions that are not made for political reasons. They are made because of the campaign finance regime under which political campaigns are necessarily run.

¹⁷ Steve Forbes used his own personal fortune to support his candidacy for the Republican presidential nomination. See Editorial, *The Rich Candidate Problem*, WASH. POST, Jan. 19, 1996, at A26.

There are a whole long series of these kinds of rules and regulations that have done very little to enhance the integrity of campaigns but have forced them into different channels.

Why do we have PACs today? PACs were set up because of the perceived corruption of and public backlash to the Nixon scandals.¹⁸ Congress, or at least the Republicans and conservative Democrats in Congress, realized that they were shutting down things without touching labor. This has always been a sore point as it would give labor a tremendous advantage. Congress said that if we are going to have all this disclosure and all these filings then it all should apply to labor. Labor responded by saying, "well that's a bad idea, why don't we create PACs and let business have their PACs too?" This was the reason PACs were established.

In my view, PACs are not evil, they allow people to aggregate money. They allow candidates to make more sophisticated political decisions. But they were not created for any of these lofty government policy reasons. They were created simply so that somebody could avoid regulation. PACs were a response to the closing down of the historic access that people who wanted to contribute to politics had and the subsequent problems politicians had in raising money. Campaign finance laws created a situation in which the loopholes became the most important part of the law and soft money¹⁹ was the only way to communicate. The soft money explosion is largely due to an increasing need for communications.

Without laws permitting soft money, money would neither be raised nor spent as it is today. A contributor would much rather give money to candidate X than give it to a third party to do something on behalf of candidate X. Nor does a contributor, who wants to communicate and influence a candidate, want to give money to some state party in the hope that maybe the candidate will eventually learn of and appreciate the contribution. But the fact

¹⁸ The rapid growth of PACs in the mid 1970s is linked to the 1974 amendments to the Federal Election Campaigns Act (FECA) resulting from post-Watergate awareness of campaign abuses. Mitchell L. Graynor, Note, *Curbing Injurious PAC Support Through 2 U.S.C. § 441d*, 35 HASTINGS L.J. 869, 871 (1984).

¹⁹ See Anthony Corrado, *Giving, Spending and "Soft Money"*, 6 J.L. & POL'Y 45 (1997) (discussing the concept and development of "soft money").

of the matter is that these choices are dictated by campaign guidelines. People do not sit down and say, "I want to do this in the strangest and most indirect way that I can." These choices are dictated by the fact that, in order to operate within today's campaign guidelines, with the need for funds combined with limits on hard money, candidates need to find another method for financing campaigns. This is simply because the system does not work. In this system, you must do what you can.

The Republicans have had a historic advantage in this area because of their fundraising base. The Republican Party has been able to respond to new campaign finance regulations by concentrating more heavily on small donors. Just the other day, a major Republican donor said he did not like the direction in which the party was headed and urged "Team 100" people, donors that have given \$100,000, to get together and cut off their money unless the party redirected itself away from its alliance with social conservatives.

The GOP's small donor base made it impossible for big donors to dictate a new direction. It would hurt the party to lose the approximately 20% of the funds they get from big donors, but this segment of money is less significant for Republicans than for Democrats. This disparity developed because of the differences in the parties.

As some of you may know, in the sixties and seventies, the only real source of Democratic money was organized labor. Organized labor did not want the Democratic party to develop an independent fundraising base because it would diminish the importance of existing power centers in the party. Hence, the Democratic Party was 15 to 20 years behind the Republican Party in developing a small donor base. In order to succeed politically, the Republican Party wanted to free itself from its reliance on big donors and began to build up the technology to do so.

In the "old days" there were seminars discussing and articles written about how fundraising is corrupt and how making blatant appeals to people, who then send money through the mail, is crooked. Then, on television the other night, Dick Morris turned to

Pat Buchanan²⁰ and said, "by the way, you're the only one that raised money cleanly because you got it all in direct mail."²¹ It is amazing how things change, how your perspectives change. In fact, we talked in the seventies about the corrupting influences of big money, when that was the charge. It is still the charge today, and it can be corrupt. If a candidate makes a promise to somebody for \$1 million, but later decides it was a stupid promise and reverses field, he has upset that person. Clinton does this all the time because he apparently never listens to any of these contributors. However, if that same candidate sent out 10 million letters, received \$1 million in return and made a promise to the entire 10 million people, it would have great political consequences when he reverses field. So the question becomes, which impedes more upon the candidate's freedom of action? Those are things that you have to think about, as a practical matter, when you are out there deciding what you are going to do.

Now, I would like to take a step back and return to my focus. What I really want to do today is leave you with a sense that politics has changed as a result of campaign finance laws. I, for one, do not think it has changed for the better. In fact, I think it has changed for the worse. Today's political managers and consultants, unlike those of yesterday, spend much of their time designing a campaign, not around the issues, but around how they function within this increasingly restrictive regulatory framework. I think that this is the main consideration you have to address when you look at what is called reform.

I want to make a few more partisan, ideological remarks before I conclude. The 1974 Act, as I said, was not a response to evidence of corruption, but rather to a feeling and a perception that there was corruption. In fact, the Supreme Court allowed some interference with the First Amendment in order to keep the image of political activity clean. I think the 1974 laws were a harmful result

²⁰ Although Pat Buchanan is most popularly known for his position hosting CNN's political show "Cross Fire," he has also worked as an aide to President Reagan and, in fact, ran for the presidency himself in both 1992 and 1996. See Myron B. Pitts, *Pat Buchanan: On Race and the Republican Agenda*, USA WEEKEND, June 8, 1997, at 7.

²¹ *Crossfire* (CNN television broadcast, Mar. 3, 1997).

of Watergate. Maybe Richard Nixon's most lasting legacy in the political sphere is the campaign system under which we operate today. Ironically, Richard Nixon was a boy scout compared to what is going on now.

The public is saying that everything is rotten and has to be changed; which means politicians are going to have to change it. However, they are not going to change it for the good because, unfortunately, they are not going to think about it. They are going to do what, perhaps, ought to be done. They are not going to do what is politically wise. Frankly, we have an administration that defends everything it does as if it was staffed by Judge Kelly, the Republican Congressman caught in Abscam who said he did it because he was carrying on his own investigation.²² If you listen to the President, he is saying that we need tougher laws on crime because the laws we have were not tough enough to stop him.

The fact of the matter is that nothing that has happened, thus far, has proven that we need the sort of reform he has proposed. Everything that has occurred would have been avoided if politicians simply obeyed the existing laws, good or bad. In terms of legislation, I fear the political backlash to the Clinton administration's activities is going to dwarf the backlash to Watergate. Currently, the only thing that stands between political free speech and legislation that would, in fact, gut the First Amendment is one Senator from Kentucky who says it will never happen so long as he breathes.²³ Such is the unstable future of campaign reform and campaign finance.

²² Richard Kelly, a former Florida Republican Congressman, was the focus of a Federal Bureau of Investigations ABSCAM investigation. Before and during the trial relating to the ABSCAM charges, Kelly maintained that he took a \$25,000 payoff as part of his own secret investigation into what he perceived as suspicious characters who had infiltrated his office. Mary Thornton, *1 Abscam Conviction Overtured; FBI Manufactured "Crime" for Kelly, U.S. Judge Finds*, WASH. POST, May 15, 1982, at A1.

²³ The author refers to the McCain-Feingold legislation, which is strongly opposed by Senator Mitch McConnell. See Helen Dewar, *For Democrats, A Campaign for Finance Reform*, WASH. POST, Sept. 12, 1997, at A14. On October 7, 1997, the Senate voted against closing debate on the McCain-Feingold bill and postponed any immediate change to the current campaign finance system. See Editorial, *Thunder in the Senate*, N.Y. TIMES, Oct. 8, 1997, at A22.

So, you can sit up here and you can have all the round tables you want. You can discuss what would be wise, what would be best, what would impinge least on the First Amendment and what would be best for political activities. But, it all “boils down” to a response to what ever appears on the first page of the Washington Post—panicked politicians trying to save their own skins by creating an environment that will make it more difficult for future politicians to function effectively.