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CAMPAIGN FINANCE: A CHALLENGER'S PERSPECTIVE ON FUNDING AND REFORM

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My mission today is to describe life in the so-called trenches of campaign finance from the perspective of a candidate. In so doing, I am mindful that the greatest errors recorded in military history were those made by generals who expertly prepared to fight and win the previous war while losing the one they were in. Although a large part of the campaign finance landscape remains unchanged from 1992 and 1994 when I ran for office, there have been some significant changes. As we navigate this particular subject, my hope is that my comments from the past will be relevant to the present.

I ran for Congress as the Democratic nominee for New York's 19th Congressional District in 1992, and I ran again in the Democratic Primary in 1994. The district itself has much in common with suburban districts throughout the country. It is geographically large, running on the eastern side of the Hudson River from White Plains in the middle of Westchester County, north to Poughkeepsie in Dutchess County. It also includes four towns in Orange County on the western side of the Hudson River. It is ideologically diffuse, with the Westchester portion mildly favoring moderate Democrats while the remaining counties vote Republican. This region's media markets are many, with full coverage requiring purchases in Dutchess County, Northern Westchester and New York City. The result of all these factors is that a race here, as in many large suburbs throughout the country, is expensive. To be credible, a candidate must spend between $500,000 and $750,000. To win, a challenger would have to spend substantially in excess of $1 million.

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When I ran for Congress in 1992, I raised and spent approximately $130,000. My opponent was a twelve term incumbent[1] who spent approximately $600,000, or four times my amount.[2] Of the money I raised, approximately $10,000 came from PACs,[3] and the remaining $125,000 came from individual contributors. In addition, $15,000 was donated by the Democratic Congressional Campaign Committee. My recollection is that our average individual contribution was approximately $250. Substantially more than half the individual donations were from individuals who lived in the district. Although I have not seen the figures lately, I believe my opponent raised slightly more than one-third of his funds from PACs. Later, when I ran in a primary in 1994, I was able to raise only $40,000, of which all but $2,000 came from individual contributions. During both campaigns, I spent more than half my time trying to raise money. In the end, I lost both races.

My sense is that my experience in 1992 is comparable to that of congressional challengers in 1996. The data I have seen from the most recent electoral cycle indicate that House of Representative incumbents had a four-to-one financial advantage over challengers,[4] and that PACs contributed more than six times the amount of money to incumbents compared to challengers.[5] Those disparities in financial resources also made a difference. The re-election rate

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[1] The late Hamilton Fish, Jr. was a fourth generation congressman who served for thirteen consecutive terms over twenty-six years. *See* Genaro C. Armas, *Ex-Congressman Remembered as a Champion of Cooperation*, TIMES UNION (Albany, NY), July 28, 1996, at D7.

[2] In 1992, Hamilton Fish, Jr. spent $617,832 while the author spent only $132,279. MICHAEL BARONE AND GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 955 (1996).

[3] 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).

[4] *See 95% of Incumbents Win Re-Election In '96*, 1996 Federal Document Clearing House, Nov. 7, 1996, *available in* LEXIS, Nexis Library, CURNWS File (on file with *Journal of Law and Policy*).

[5] *See id.*

for incumbents in 1996 was 95%,[6] the highest since the 98% rate recorded in 1988. Moreover, as the financial gap between challengers and incumbents went down, the incumbent re-election rate also went down. In financially uncompetitive races, where incumbents had more than twice the resources of challengers, the re-election rate was 98%.[7] In financially competitive races, where challengers had at least half the resources of incumbents, the re-election rate was 76%.[8]

From my observation, there also appears to have been one major development in 1996 which differentiates that cycle from its 1992 predecessor. In swing races in 1996, substantial amounts of money were spent by ostensibly independent groups.[9] For example, in the 21st Congressional District race in Pennsylvania, independent groups spent at least $1.4 million to influence the race.[10] This amount was only slightly less than the $1.6 million spent by the two candidates themselves.[11] The so-called independent groups spending this money included the campaign committees of the two major parties, the AFL-CIO, the United States Chamber of Commerce,[12] and a myriad of industry association groups such as the American Hospital Association.[13]

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[6] *See id.*

[7] *See id.*

[8] *See id.* According to one report, nine out of ten candidates who outspent their opponents won their races. *See* John Solomon, *For Candidates Trying to Score with Voters, Money Talks*, NEWS TRIB. (Tacoma, Wash.), Nov. 10, 1996, at A6.

[9] *See* Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record $2.7 Billion*, WASH. POST, Feb. 9, 1997, at A1 (discussing how national political parties and outside interest groups spent unprecedented sums to saturate the airwaves and tout their views—to the point that the actual candidates felt like bystanders).

[10] *See* Guy Gugliotta & Ira Chinoy, *Money Machine: The Fund-Raising Frenzy of Campaign '96; Outsiders Made Erie Ballot a National Battle*, WASH. POST, Feb. 10, 1997, at A1 (mentioning that Congressman Phil English did not know the source of some advertisements that supported his election).

[11] *See id.*

[12] *See id.*

[13] Other outside contributors to the race in Pennsylvania's 21st District included Public Citizen, the National Right to Life PAC, and Citizens for the

My own view is that any campaign finance reform legislation must meet two objectives. First, both challengers and candidates of modest personal means in general must have access to more money. Although one tragedy of the current system is that it constitutes, absent extraordinary events, an incumbent protection racket, the other tragedy is that it has effectively laid down substantial barriers to entry for those without independent resources. Both the extraordinary cost of campaigns, and the small increments within which money must be raised, make it impossible for those without access to large sums (either their own money or money from large numbers of PACs) to be competitive. Furthermore, since PACs habitually do not fund challengers, the source of needed money is increasingly personal wealth or its equivalent. I believe it was no accident that in the 1994 Democratic Primary, after running better than any Democrat against an entrenched incumbent only two years earlier, I finished third in a three way primary.[14] I was outspent approximately five to one by the winner, and more than fifteen to one by the second place finisher. The second place finisher was a millionaire,[15] and the winner, although not personally wealthy, was the son of the retiring congressman.[16]

The campaigns I ran in were well-received by political observers, editorialists and at least that portion of the public with whom I was able to communicate. In 1992, the typical comments included assessments that I was "no one's sacrificial lamb,"[17] that I "enunciated positions on issues with clarity and force,"[18] that while I was "inexperienced in politics, [my] initial venture

Republic Education Fund. *See id.*

[14] *See* James Feron, *The 1994 Campaign: Congress; In House Races, Incumbents Defeat Challengers Handily*, N.Y. TIMES, Sept. 14, 1994, at B5.

[15] Dennis Mehiel, a businessman from Westchester County, placed second in the race. *See id.*

[16] The 19th Congressional District's Democratic primary was won by Hamilton Fish III, who ran for election in an effort to replace his retiring father, Representative Hamilton Fish, Jr. *See id.*

[17] *Election Forecast: A Real Contest*, THE PUTNAM TRADER (Carmel, NY), June 18, 1992, at A18.

[18] *Id.*

suggest[ed] considerable talent for the profession,"[19] and that I was an "impressively knowledgeable lawyer."[20] Even those whose opposition was pointed and a bit personal admitted that I offered "cogent arguments to back carefully considered positions on the full agenda of national issues, including economic recovery, education, health care and military spending."[21] I offer these comments not to aggrandize myself or to claim that money and money alone kept me from winning. I do not know whether money made me lose; however, I do know that the absence of money made me less competitive than I otherwise would have been.

The flip side of keeping qualified people out is that the system often invites unqualified people in. As an active participant in politics over the last twenty years, and a current Democratic state committeeman, I have been involved in numerous meetings with and conversations about potential candidates. Almost invariably, the first question asked to or about these people is not "what do they think?" or "where do they stand?" on a host of issues. Rather, it is "how much money can they put on the table?" Many who have a very good answer to this last question (which has to be a lot) have no answers or pretty poor answers to the other inquiries. This, however, should not be surprising. In a world where access to money is the preeminent qualification for running, the presence of money can and often does become the only qualification. The media act this way. Those who search for candidates act this way. And even competing candidates often act this way. For example, during my 1994 campaign, after I criticized one of my opponents on an issue, his retort was not to rebut my view, but rather to point out the negligible amount in my political bank account. It is no small wonder that political oratory and issue articulation are on the wane. We are not nominating orators or policy gurus (President Clinton aside). We are nominating bank accounts and fundraisers.

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[19] *See For Congressman*, THE PATENT TRADER (Bedford, NY), Oct. 29, 1992, at A20.

[20] Editorial, *For Congress From the Suburbs*, N.Y. TIMES, Oct. 29, 1992, at A26.

[21] *See Four For Congress: Re-Elect Incumbents*, THE REPORTER DISPATCH (White Plains, NY), Oct. 29, 1992, at 8A.

The second objective of campaign finance reform legislation must be to remedy the perceived or actual legislative corruption inherent in the current system. Although those in Congress insist that their votes are not for sale and that the contributions they receive do not determine legislative outcomes, the correlation between money and results is so high that at least a subtle but very effective form of bribery is at work. It is true that representatives respond primarily to voter preferences. When those preferences are apparent and strong, money does not force legislators to commit political suicide. Much of what is determined by Congress, however, is ignored by the public, and when this occurs, money does seem to matter. In my mind, two examples illustrate this point. Last year, when Congress, faced with substantial public pressure since it was an election year, increased the minimum wage,[22] it also larded the bill with over $21 billion in tax breaks to special interests which no one really noticed.[23] Each of those interests had contributed substantially to congressional campaigns. Similarly, in the 1980s, when the savings and loan crisis was only a $20 billion problem,[24] thrift lobbyists who had made substantial campaign contributions along the way successfully thwarted efforts to increase capital requirements in a way that might have stopped the crisis from mushrooming into a $500 billion problem in the 1990s.[25] Again, on a highly technical subject, the public was not looking.[26]

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[22] *See In Labor Day Bonus, U.S. Raises Minimum Wage,* N.Y. TIMES, Aug. 31, 1997, at 13A (noting that Congress approved a minimum wage increase in the Summer 1996).

[23] *See* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755.

[24] *See S&Ls Show Barely a Dent in Losses,* CHI. TRIB., Dec. 24, 1989, at 8.

[25] "Thrift lobbyists" are lobbyists for the thrift, or savings and loan, industry. The United States League of Savings Institutions lobbied heavily and successfully during much of the 1980's against any substantive statutory reforms. Edwin J. Gray, *Warnings Ignored, The Politics of the Crisis,* 2 STAN. L. & POL'Y REV. 138, 143 (1990).The League "always got what it wanted [because] . . . it was . . . a good contributor to the political campaigns of members of Congress." *Id.*

[26] *See id.* The public was unaware of the extent of the savings and loan crisis in part because of industry pressures and political contributions. *Id.* at 138.

The horizon of campaign finance reform today is occupied by two apparently fixed but contradictory stars. On the one hand, those on the right appear to favor a regime where there are no limits on contributions or expenditures, and where there are draconian penalties for non-disclosure. On the other hand, those in the center (which includes everyone else, the left having dissipated to the point of non-existence in Washington, D.C.) appear to favor a regime where candidates agree to voluntary expenditure limits in exchange for financial and other (principally free or reduced-cost media) assistance, and where the greatest excesses of the current system are curtailed. This last element of reform generally involves limits or outright bans on soft money.

As a grossly underfunded challenger, I have to say that either set of reforms would have improved my own campaigns' financial balance sheets and presumably would have allowed me to run more competitive campaigns. Despite appearances to the contrary, a regime without limits on contributions or expenditures materially improves the political chances of those with modest means. My own story aside, a very close friend of mine from law school, Tom Foley, recently ran in a primary for Auditor General in Pennsylvania.[27] Although he had no money of his own, he was able to raise more than $250,000 in a state with no limits on contributions and came within a point of winning. So challengers and the not-so-well-heeled will do better even if Trent Lott and Mitch McConnell have their way.[28]

As a matter of public policy, however, I am not sure that a regime without limits meets the second objective of campaign finance reform. The Supreme Court in *Buckley v. Valeo*[29] emphasized that contributions carry the inherent potential for corruption

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[27] *See* Mario Cattabiani, . . . *As Will Auditor General Hopeful; Bob Casey Jr. Leading Democratic Race in Bid to Meet NYCE in November*, THE MORNING CALL (Allentown, PA), Apr. 24, 1996, at A1.

[28] Katharine Q. Seelye, *Army of Strange Bedfellows Battles Spending Limits*, N.Y. TIMES, Mar. 15, 1997, at 10 (discussing how Senator Mitch McConnell (R-Ky.) and Senator Trent Lott (R-Miss.) are longtime antagonists of limits on campaign spending and defend unlimited campaign spending as "the American Way").

[29] 424 U.S. 1 (1976).

and for that reason upheld limits on contributions.[30] As I have already noted, the real world of legislating indicates that the Court's assumption is valid in subtle but nevertheless pernicious ways, and the recent phenomenon of enormous independent expenditures can only make the problem worse. Prior to 1996, congressional representatives had the advantage of worrying, or pretending not to worry, about their own contributors. Today, they face the real possibility of having their races turn into referenda on special interests not even connected to their congressional districts.

The premise of those who would return to a limitless world is that disclosure can cure all evils, and certainly it can go a long way. One important reform worth making is instant computer reporting of all contributions on the Internet. With a substantially beefed-up Federal Election Commission, this might create real-time enforcement as well as relevant public outrage. On the whole, however, a limitless world with full disclosure works only if the public is paying attention all the time. The fact of the matter is that in a representative democracy, as opposed to a pure democracy, that does not happen.

It should also be noted that disclosure only works if what is disclosed actually flags the problem. If, for example, we are worried about the national security implications of foreign powers engaging in economic or other forms of espionage through contributions to domestic candidates and parties, the disclosure laws would have to extend to off-shore entities before they could be effective. A foreign power intent on getting its hooks into an American party or candidate will not be foolish enough to write a check directly to that party or candidate. The money will be laundered through a number of offshore entities and then through domestic subsidiaries of foreign corporations before it reaches the candidate or party. Therefore, for all practical purposes, disclosure will not solve the problem. Instead, a ban on the contribution would.

I am not unmindful of the criticisms leveled at expenditure limits. They can be rigged to benefit incumbents, and absent substantial oversight, almost certainly will be. The solution here,

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[30] *Id.* at 58.

however, is to write a bill with high enough limits, and with formulae that adjust limits to offset the advantages of those who opt out, and even perhaps to offset the advantages enjoyed by incumbents. The other criticism is that the rewards offered to entice candidates to participate in voluntary limits on expenditures themselves constitute "food stamps for politicians."[31] Use of this metaphor is a brilliant tactic embraced by the political right to demonize politics much as it already has demonized welfare, and so far it appears to be working. On the merits, however, this criticism is bunk. Politicians already are being subsidized. The only difference between a publicly funded system that either matches funds or provides in-kind benefits and the *status quo* is that under a publicly funded system the subsidy will be paid by taxpayers, not corporate or association donors. Democracy costs money. We can pay for it now by distributing resources to make the electoral process real and vital, or we can refuse to do so and be left with a system that empowers special interests, rewards the rich, and excludes almost everyone else.

[31] Filip Palda, *By the Money, For the Money . . . Magic Bullets Won't Cure U.S. Politics*, N.Y. NEWSDAY, Apr. 16, 1997, at A32 (criticizing campaign subsidies that entitle Democratic and Republican presidential candidates to $61.8 million if they agree to limit campaign expenditures to that amount and stating that this subsidy has been deemed "food stamps" for politicians).