

The Incumbent Protection Act of 2002?
Politics Under the New Campaign Finance Law

Michael Johnston

The Occasional Papers of the School of Social Science are versions of talks given at the School's weekly Thursday Seminar. At these seminars, Members present work-in-progress and then take questions. There is often lively conversation and debate, some of which will be included with the papers. We have chosen papers we thought would be of interest to a broad audience. Our aim is to capture some part of the cross-disciplinary conversations that are the mark of the School's programs. While members are drawn from specific disciplines of the social sciences—anthropology, economics, sociology and political science—as well as history, philosophy, literature and law, the School encourages new approaches that arise from exposure to different forms of interpretation. The papers in this series differ widely in their topics, methods, and disciplines. Yet they concur in a broadly humanistic attempt to understand how—and under what conditions—the concepts that order experience in different cultures and societies are produced, and how they change.

Michael Johnston was a Member during 2002-03; the year's theme focused on corruption and its (increasingly absent) opposites: civic virtue, public responsibility, bureaucratic rationality. Johnston is the Charles A. Dana Professor and former department chair of the Department of Political Science at Colgate University. He most recently co-edited *Political Corruption: Concepts and Contexts* (2002). Professor Johnston was a founding co-editor of the journal *Corruption and Reform* until 1996 and has been a consultant to The World Bank, The Asia Foundation, the New York State Commission on Governmental Integrity, the US Agency for International Development, and several commercial firms. This paper is part of a new book project. Tentatively entitled *Syndromes of Corruption: Wealth, Power, and Development*, the project proposes new guidelines for the analysis of four major corruption syndromes defined by underlying developmental imbalances: distinguishing among them is essential not only to our improved understanding of the problems of corruption, but also democracy-building and security policies in developing regions. These challenges have become more urgent as globalization changes the role of nation-states, facilitates new connections between wealth and power, and obscures boundaries between the public and private domains.

For over 25 years, Professor Johnston has been teaching and doing research on American and comparative politics, with a specialization in the area of corruption and reform. The paper focuses on the McCain-Feingold-Cochrane campaign finance bill that was passed last year by Congress. Known as the Bipartisan Campaign Reform Act (BCRA), the bill is being challenged in court and could well lead to a major Supreme Court ruling on the rules of political finance. Professor Johnston will raise questions about the meaning, and value, of healthy electoral competition in a democracy, and about the sorts of policies that might help us establish and protect that sort of politics.

The Incumbent Protection Action of 2002? was presented at a Friends Forum. The Friends of the Institute are individuals who, through their support and involvement, become partners in the advancement of research and scholarship at the highest level, while providing an important link to the community.

The Incumbent Protection Act of 2002?: Politics Under the New Campaign Finance Law

After years of debate, both in and outside of government, over the fundamental integrity and fairness of America's system of financing federal election campaigns, Congress enacted, and President George W. Bush signed, the Bipartisan Campaign Reform Act (BCRA) in 2002. The legislation, formerly known as the McCain-Feingold bill after its two main sponsors, Senators John McCain of Arizona and Russell Feingold of Wisconsin, had been introduced in varying forms in every Congress since the mid-1990s. It is the most extensive revision of federal campaign finance law since the Federal Election Campaign Act of the mid-1970s, and was portrayed by its advocates as a reform response to a large, and at times shifting, set of concerns. Those issues included, at various points, "soft money"—unlimited donations made to political party organizations, as opposed to the limited "hard money" contributions given to registered campaign committees; the perceived power of Political Action Committees (PACs) and of others who make significant hard-money contributions; the proliferation of "issue ads" and their claimed effects upon the tone and competitiveness of politics; the rising costs of campaigns; and the difficulties challengers have in funding competitive campaigns.

"Reform" is a nice, wholesome word, but one that is often used to mask very different sorts of political agendas. Calling legislation a "reform" does not necessarily mean it will have beneficial results: If I were submitting legislation to Congress to triple the salaries of academicians, I would (of course) call it the "Higher Education Reform Act." "Bipartisan" has similarly pleasant connotations, but I am tempted to say that in the current polarized atmosphere in Congress there is precious little bipartisan agreement on any domestic policy issue.

There is one exception, however: Representatives and Senators from both parties want to be re-elected. In this discussion I will argue that under the guise of reform, they have enacted a law that makes it easier than ever for them to accomplish precisely that. Incumbent Members of Congress are not necessarily corrupt, nor are they bad people; indeed, a strong case can be made that their high rates of re-election—on which, more to come—stem from the fact that they are very effective at advocating the interests of their states and districts. But making re-election too easy—or, to put it another way, making it more difficult for challengers to organize and fund competitive campaigns—hardly makes for a healthy democracy.

I will argue that the problem with BCRA is fundamentally a political one. Campaign finance laws that were originally presented to the public as ways of making politics more open, and officials more accountable, work in several ways to protect incumbents and reduce political competition. Whether or not campaign contributions function as bribes—and there are good reasons to conclude that they do not—if our "reforms" impair the openness, credibility, and legitimacy of electoral politics, that too counts as a problem of corruption.

I. Financing Campaigns in the United States: Who Has the Upper Hand?

The current federal¹ system of campaign finance in the United States was intended to facilitate broad-based participation in campaigns while checking corruption through limits on contributions and spending, and by public disclosure of finance data. Taken on its own terms, the system has worked well. Contribution limits and disclosure are widely accepted and obeyed, although they have increasingly been *circumvented*, as we will see in the case of so-called “soft money”. The Federal Election Commission (FEC) administers the laws and disseminates information effectively, despite periodic assaults upon its budget by Congress, and its political independence has rarely been questioned. Campaign spending has grown in real terms: total congressional spending in constant 2000 dollars increased from \$647.9 million in 1981-82 to \$1.006 billion in 2000.² But the trend has not been continuous and, given the growing size of the electorate, can hardly be thought of as out of control: Congressional spending *per capita*, for example, only grew from \$3.81 for each person of voting age in 1981-82 to \$4.89, in constant dollars, in 2000. Add in presidential campaigns, and per capital spending for all federal races in the 1999-2000 election cycle increases to only \$8.22, or not quite enough to buy a decent pizza.³ Disclosure provisions have been effective: contribution and expenditure data are regularly reported and easily accessible (although we shall see that disclosure can squeeze the resources available to challengers). Overall, the current body of law does help check outright bribery and extortion. It falls short, however, in terms of fostering open and competitive electoral politics, and in terms of earning the trust of citizens. America’s influence-market corruption problem exacts its costs not so much in economic terms, but rather in terms of the openness and legitimacy of electoral politics.

A Continuing Debate

Concern over the role of money in American politics predates the republic. Campaigns for the Virginia House of Burgesses by such luminaries as George Washington featured widespread distribution of food and spirits⁴—a process some saw as vote-buying. The role of the Bank of the United States in underwriting Henry Clay’s 1832 presidential campaign gave President Andrew Jackson—seen by Bank directors as hostile to its charter renewal—an issue he used effectively in winning re-election.⁵ The first federal law on political finance, enacted in 1867, “prohibited Federal officers from soliciting Navy Yard workers for contributions.”⁶ The late nineteenth and early twentieth centuries were the heyday of organized machine politics in many large cities and in some states as well. Their campaigns featured widespread vote-buying and paid “floaters” who voted many times. Such campaigns, the machine’s network of block captains, and the spoils at the top that were the point of the whole game, were financed in part by kickbacks and bribes from business interests sometimes paid willingly, and sometimes not. The most notorious intrusion of private money into national politics came in the 1896 presidential election, when financier Mark Hanna and his friends raised an unprecedented \$3.5 million (about \$71.5 million in 2001 dollars) on behalf of William McKinley.⁷ This led to the first serious proposal for total public funding of federal elections, advanced by Theodore Roosevelt in 1905, an idea that never became law but which appears in every new round of reform proposals to this day. The 1907 Tillman Act did not provide for public funding, but did bar contributions by corporations and national banks, a prohibition that remains in force today. In 1910 House campaigns were required by

law to disclose financial information—a requirement extended to the Senate in 1911.⁸

After the scandals of the Harding administration, Congress enacted the Federal Corrupt Practices Act of 1925. In theory, this law imposed strict spending limits upon House and Senate campaigns; in fact, they were so strict that there was little chance they would ever be obeyed. These limits applied only to individual campaign committees operating in two or more states, and no limit was set upon the number of committees a candidate could have. Provisions for disclosure and public access to information were weak, and candidates could exempt themselves by claiming they had no knowledge of expenditures on their behalf. The final indication of the law's impotence was that it did not apply to primary election campaigns at all—a major drawback in places where winning the dominant party's nomination was tantamount to election.⁹ Despite its obvious weaknesses—or perhaps because of them: no candidate was ever prosecuted under its provisions, and no less a political operator than Lyndon Johnson termed it “more loophole than law”¹⁰—the 1925 Act remained the legal basis for federal campaign finance for nearly half a century.

The next rounds of reform followed slowly, and were on partially aimed at campaign financing. The Hatch Act of 1939 (amended in 1940, and again in 1993) extended federal regulations to primary elections and revised Congressional contribution and expenditure limits. But its best-known and most important provisions regulated political participation by federal employees, many state and local officials and even some private citizens employed in federally-funded programs.¹¹ The Taft-Hartley Act of 1947, while aimed primarily at weakening labor unions, also made it illegal for both unions and corporations to make federal campaign expenditures in their own names. In 1966, the public-funding idea surfaced again in the form of legislation providing for public funding of presidential general election campaigns through payments to political parties.¹² This law was repealed a year later, but some of its major provisions—notably, a check-off box on the individual federal income tax return inviting taxpayers to earmark a portion of their taxes for the presidential election fund—were later implemented. Finally, in 1970, Congress enacted legislation that limited spending for television time; this bill was vetoed by President Nixon on freedom-of-speech grounds.

The Rules of Play

Like the 1925 legislation, the current rules of federal campaign finance law have been heavily influenced by scandal—first by the Watergate affair of 1972-74, which led to the resignation of Richard Nixon, and then in the 1990s by a widespread sense that spending and contributions were out of control. Like the earlier legislation, the current laws would have done little to prevent the scandals that shaped them. The story of the new reforms actually begins before Watergate: the Revenue Act of 1971¹³ reinstated the \$1.00 income tax check-off, creating a presidential election campaign fund available to campaign committees rather than to the parties themselves. The check-off, envisioned as a way for citizens to influence the funding of campaigns and to weaken the perceived dependence of candidates upon large contributions, was implemented in 1973; the first funds were distributed in 1976. The Act also limited campaign spending by presidential nominees who accepted public funding to the amount of the public grant—still the only spending limitation in the federal campaign finance system—and barred them from accepting private donations. At about the same time, Congress enacted the Federal Election Campaign Act (FECA) of 1971.¹⁴ It repealed the 1975 law, mandated extensive disclosure of campaign contributions and expenditures in all federal elections, both primary and general, and placed limits upon the use of

candidates' own personal funds. FECA also established the PACs as we know them today—ironically, they were intended as a vehicle for citizen participation and influence.¹⁵ The new legislation had only a minimal effect on the 1972 elections but its potential effect was still evident. President Nixon timed his signing of the bills to create an eighteen-day interregnum, early in the campaign, during which the 1925 law no longer applied but FECA had not yet taken effect. The result was a fund-raising free-for-all, chiefly by the Republican campaign, that at times amounted to a shakedown of corporate contributors.¹⁶

Watergate led to widespread demands for a general cleanup of politics and, in 1974, to comprehensive amendments extending the 1971 legislation. Revelations of dirty tricks and lawbreaking funded by leftover campaign funds helped to fuel a widespread sense that there was too much money in politics, and that both sources and uses should be disclosed and regulated. In this view, the political process was basically sound but threatened by the clout of large contributors. The state of political competition, the ease of entry for new groups and ideas, levels of public trust and participation, the role of political parties, accountability, and the decisiveness of election results were not extensively debated. Neither was the question of whether there really was too much money in the system rather than too little, too unequally distributed, to allow healthy competition.

The 1974 amendments¹⁷ dealt mostly with the flow of funds. Contributions from individuals were limited to \$1,000 per campaign, and to \$25,000 annually; PAC contributions were capped at \$5,000 per campaign with no overall limit. Spending limits were also imposed upon candidates. A provision for matching the first \$250 of individual contributions to presidential candidates during the primary phase was added. The law also created a politically independent Federal Election Commission (FEC) to administer the new system. These amendments were quickly challenged in court, notably on First-Amendment grounds: critics saw contribution and spending limits as curbing political expression. In January 1976, the Supreme Court's ruling in *Buckley v. Valeo*¹⁸ largely upheld the 1971 law and 1974 amendments, but ruled some key elements unconstitutional. Limits on *contributions* were acceptable because of the government's interest in preventing corruption¹⁹; limited public funding and disclosure likewise passed Constitutional muster. But limits on *expenditures*, the Court held, "impose significantly more severe restrictions on protected freedoms of political expression and association than do (. . .) limitations on financial contributions."²⁰ Ceilings on campaign spending were thus abolished for candidates not receiving public funding; spending by those accepting subsidies could be limited so long as the law allowed the option of refusing public funds. Because no public funds were provided for Congressional races, spending ceilings would apply only to presidential candidates who accepted public funding.

Buckley was handed down just as the first post-Watergate presidential campaign was getting under way. The Court gave clear signals as to the changes needed, and Congress moved quickly: its 1976 FECA amendments, removing expenditure limits for candidates and addressing some separation-of-powers issues, were enacted in May and quickly signed into law. These amendments also restricted the procedures by which PACs could solicit contributions and treated all PACs established by a particular corporation or labor union as a single entity, thus preventing the previous practice of channeling funds through unlimited numbers of committees. Since 1976 the law has been revised on several occasions by both Congress and the Courts. In 1979, amendments²¹ were enacted to strengthen state and local political party activities, increase funding for presidential conventions, and make disclosure less complicated. Later changes banned honoraria for federal officials, repealed a loophole that allowed Members of Congress elected before 1980 to put leftover campaign funds to personal use, and increased the voluntary income-tax check-off to \$3.00 per tax payer.

Supreme Court decisions in the early 1980s ended the “legislative veto” provisions of the law, whereby the FEC could enact rules subject to Congressional rejection. Toward the end of the decade, new decisions cleared the way for the proliferation of “soft money”—about which we will say more below.

II. A New Era of Reform? The BCRA

The most important revisions of federal campaign finance law in nearly thirty years came on November 6, 2002, when BCRA took effect.²² That legislation was motivated in part by a widespread perception of a corruption crisis. So-called “soft money”—unlimited and only partially disclosed contributions to political parties, sometimes at the state level, ostensibly for get-out-the-vote and party-building activities—was of particular concern: some critics saw soft money as gutting FECA’s contribution limits. Other concerns had to do with ways in which political money was used: expenditures on “issue ads”—political advertisements by independent groups advocating positions but not mentioning specific candidates—were not only unlimited (and thus potentially another contribution loophole) but were also seen by some as debasing the tone of political campaigns. In 1996, the presidential race drew particular attention to the rapid growth of “soft money” and innovative stratagems for putting it to use.

The new law’s major provisions²³ include a total ban on soft money in federal campaigns, and limits restricting “electioneering communication” (in effect, most broadcast advertising) within 60 days of a general election, and 30 days of a primary, to hard-money expenditures only. This in effect bans “issue ads” during those critical periods. Limits on individual contributions to campaigns were raised from \$1,000 to \$2,000 per federal election campaign (one candidate running in one primary or general election is treated as a campaign). This is a welcome change, as inflation has reduced the value of the old \$1,000 maximum contribution to just \$316 in 1976 dollars, forcing candidates to fund ever-more-expensive campaigns with contributions worth less and less (although the new limits do not replace all value lost since the mid-1970s). Limits on individuals’ total contributions across a two-year election cycle were also raised, and both the total and the per-campaign limits were indexed for inflation. PAC contribution limits, by contrast, were neither raised nor indexed. Finally, a “Millionaire Opponent” provision was applied to House and Senate candidates whose opponents spend large amounts of their own money—spending that remains unlimited. Limits on individual contributions to those facing such opponents are raised, and limits on party-spending on behalf of those candidates are removed, as opponents’ expenditures from their personal funds exceed a series of thresholds.

It remains to be seen whether the ban on soft money will be effective: quite likely, private foundations or other such groups closely allied to, but legally separate from, the major parties and campaign committees will emerge to raise and spend funds. BCRA now faces constitutional challenges of its own, notably from a range of critics who see its limits on broadcast advertisements as a violation of the First Amendment. But even if these issues are resolved, a broader question remains: will the new legislation make for a better, and less corrupting, electoral process at the federal level?

III. Corruption—or, the Appearance of Corruption?

The United States has a significant corruption problem with the way it finances its federal election campaigns, but not necessarily the problem much of the public thinks it has.

Outright bribery of federal elected officials is uncommon. More cases occur at state and local levels, but this is in part a reflection of the fact that the U.S. fills over half a million public offices by elections—all but 537 of them at state and local levels. The corruption that does occur is political. Whether or not there is in fact a great deal of actual bribery, popular majorities believe the campaign finance process corrupts and keeps their elected officials in thrall to large contributors. This not to say that popular perceptions make an act or process corrupt in a definitional sense, but rather that there is a lack of consensus as to what constitutes abuse, and, by extension, as to what kinds of politics we want. Perceptions are critical if only because current laws place substantial anti-corruption responsibility upon the press, the public, and competing campaigns, who must interpret waves of information in political as well as legal terms.

Opinion polls clearly show that citizens believe corruption growing out of campaign finance is widespread and important. A 1997 Gallup survey found that more respondents said elected officials in Washington are influenced by pressure from contributors (77%) than by the best interests of the country (19%), and that more said elections are “for sale to the candidate who can raise the most money” (59%) than “generally won on the basis of who is the best candidate” (37%).²⁴ In May, 2000, Fox News and Opinion Dynamics asked a sample of 900 registered voters whose “power and influence on Washington” was “too much,” “too little,” or “about right”; 83% said PACs have too much influence (second only to “big companies” at 84%), and 74% said the same of “political lobbyists.” By contrast, 15% said public opinion had “too much” influence, while 74% said “too little.”²⁵ A Harris survey in late April and early May of 2001 asked the same question of 1014 adults; PACs were seen as having too much power and influence by 83%, and 71% said the same of political lobbyists; 14% said public opinion had too much influence, and 73% said “too little.”²⁶

In a January, 2000, *Newsweek* survey of 753 adults, 58% said that “[G]ood people being discouraged from running for office by the high costs of campaigns” was a major problem for the country, while 57% said that “Political contributions having too much influence on elections and government policy” was a major problem; for both of those items, only 10% responded “[N]ot much of a problem.”²⁷ ABC News and the *Washington Post* surveyed 903 adults in March of 2001, asking whether “politicians do special favors for people and groups who give them campaign contributions”; 80% said “yes, often,” and 13% said “yes, sometimes.” Among those who gave either of those responses, 67% said such favors are “a big problem.” In that same group an interesting contrast emerged: 74% rated such favors “unethical,” but only 46% saw them as “illegal” (about the same as the 48% who said “legal”). It is not surprising that large majorities believe contributions are reciprocated with favors; of more concern is the fact that a significant share of the population apparently thinks the current system fails to prevent, or even permits, unethical behavior.²⁸

A Rogues’ Gallery

Should citizens be so concerned? A degree of skepticism is a healthy thing in a democracy. Bribery has a considerable history in American federal elections: for example, Senators were chosen by state legislatures until 1912, and reports of bribes paid by would-be Senators to state lawmakers were frequent. In 1912, Illinois Senator William Lorimer’s 1909 election was invalidated by the U.S. Senate on grounds of such bribery.²⁹ Some donors and candidates attempt to justify illicit deals as campaign contributions. Still other cases include outsized “honoraria” for speeches (now outlawed for Members of Congress), money given to politicians’ friends, family members, business associates, or even favored charities, and gifts

in kind such as vacations, flights on corporate jets, and skybox seats at sporting events. Private-sector employment following an official's departure from government can complete major, if delayed, *quid pro quo* deals. The Ethics in Government Act of 1978³⁰ restricts such employment in the executive branch (but not for former Representatives or Senators), and also prohibits those who leave the executive branch from lobbying their former institutions for a period of time. But many executive-branch offices are subdivided for purposes of the Ethics Act, and a person leaving a position in one part of the White House on a Friday, for example, can legally go to work the next Monday lobbying another segment.

Thus it can be difficult to draw clear boundaries around what is and is not a corrupt form of campaign finance. A short list of cases illustrating the problem, however, would include the following among others:

James Traficant (D-Ohio): Expelled from the House in 2002 for trading official services for donations and bribes, extorting salary kickbacks from employees, taking steps to conceal those kickbacks, filing false tax returns, and lying to a grand jury;³¹

The Keating Five: Five Senators—McCain and Deconcini (R and D, respectively, Arizona), Cranston (D-California), Riegle (D-Michigan), and Glenn (D-Ohio)—accused of illicit favors for Charles H. Keating Jr., owner of a failed California Savings and Loan, in 1987, including meetings involving Keating, the Senators, and key regulators handling the “bailout” process for Keating’s S&L;

Donald E. “Buz” Lukens (R-Ohio): Convicted, in 1996, of bribery and conspiracy while a Member of the House, Lukens had been voted out of office in 1990 in the aftermath of a sex scandal;

Jim Wright (D-Texas): Speaker of the House who resigned his Speakership and seat in 198X, following an investigation of book royalties he received and a job that had been offered to his wife by a private businessman; the investigation was spearheaded by future House Speaker Newt Gingrich (R-Georgia) who himself became the focus of ethics allegations in the mid-1990s;

ABSCAM: A 1978-80 “sting” operation in which the FBI rented a Philadelphia townhouse and videotaped members of the House and Senate accepting cash from agents of a fictitious “Arab sheik.” Four Representatives were convicted of accepting bribes, Rep. Michael “Ozzie” Myers (D-PA) was expelled from the House, and Senator Harrison Williams (D-NJ) was convicted and resigned his office. One other House member was convicted on lesser charges, and in 1982 judges overturned the conviction of Rep. Richard Kelly (R-FL) on grounds of entrapment.

Other Congressional figures have been involved in scandals in recent years. They include Rep. Albert Bustamante (D-TX), convicted in 1993 for racketeering and bribery, and Rep. Jay Kim (R-CA), who pleaded guilty in 1997 to receiving over \$230,000 in illegal campaign contributions. Rep. Nicholas Mavroules was sentenced to prison in 1993 for accepting gratuities, and tax fraud. Rep. Dan Rostenkowski, a powerful Illinois Democrat,

was indicted in 1994 for offenses including embezzlement of public and campaign funds. Rostenkowski eventually pleaded guilty on two counts and served over a year in prison. Corruption involving campaign contributions may be much more common at local levels; the system colloquially known as “Pay to Play” in states such as New Jersey, Connecticut, and New York trades local government contracts and purchases for contributions, or outright extortion payments, to local elected officials.

IV. Money, Access, and Influence

In the decentralized American system, localism and relatively weak political parties foster free-standing election campaigns by individual candidates. Given the cost of campaigns, and the sheer scope of the benefits at stake in policymaking and implementation, it is perhaps surprising there is not a great deal *more* bribery than there seems to be. But in practice, donors are not nearly as powerful, nor are candidates and elected officials as vulnerable, as is commonly thought. Money alone does not guarantee election, and winners—particularly those running as incumbents—typically have many other political assets. Even maximum donations fund only a small share of most campaigns. The average House incumbent spent \$814,507 during the two-year 2000 electoral cycle; challengers spent an average of \$369,823, and candidates for open seats averaged \$1,173,433. In the Senate, incumbents spent an average of \$4,611,604, challengers \$2,759,587, and candidates for open seats averaged over \$16.7 million (the last figure was skewed upwards by extremely expensive campaigns for open seats in New York and New Jersey).³² Measured against such totals, even the maximum hard-money individual donation (\$1,000, at the time of the 2000 race), or \$5,000 from a PAC, is an extremely small sum—and most individual and PAC donors contribute less than the maximum.

Moreover, most incumbents who run for re-election win easily. High rates of re-election success for incumbents may, as mentioned above, reflect their effectiveness at speaking for their states and districts, and at constituent service, but the advantages remain striking. Between 1980 and 2000, the share of House incumbents whose re-election bids were successful ranged between 90.5 and 98.8%, and the share winning with at least 60% of the vote ranged between 65.2 and 88.0%. In 2000, some 400 of the House’s 435 members ran for re-election; all but six won, and 324 of those Members (81.0%) won over 60% of the vote.³³ In the Senate, re-election rates are only somewhat lower: in 1980, the year of a Republican landslide large enough to oust an incumbent President, 64.0% of Senators running for re-election won, 40% taking six votes out of ten or more. Between 1982 and 2000 the percentage of incumbents winning their re-election campaigns ranged between 75.0 and 96.9%, with the share exceeding 60 percent of the vote ranging between 44.8 and 65.5%.³⁴ Nearly a quarter of House incumbents running in 2000 faced token opposition or none at all.³⁵ Incumbents’ spending is generally driven by how much challengers are able to raise, with incumbents easily outspending their opponents. Contributors (particularly PACs), knowing that challengers are unlikely to win, give them little money, creating a self-fulfilling prophecy: in 2000, 63% of all PAC Congressional donations went to House incumbents, and just 8% to their challengers; 14% went to Senate incumbents, while just 3% went to their challengers.³⁶

Incumbents thus know they can win with or without a given contributor, can match or outspend most challengers with relative ease (a task made easier by the new BCRA), and therefore owe that contributor nothing. Seasoned lobbyists and frequent individual contributors virtually never make *quid pro quo* offers, and scorn anyone who would. Indeed, one

study concluded that donors' "leverage" is so small, and incumbents' security so extensive, that contributions resemble protection payments made to placate the powerful, not legalized bribes that would give donors the upper hand.³⁷ Many individual donors are critical of the current system and of the donor-politician relationships it creates³⁸—not a result one would expect if donations were a way to buy favorable decisions and policy. The immediate corruption risk may in fact be extortion of donors, particularly by top legislative leaders whose power to rewrite bills late in the lawmaking process has grown significantly in recent years.

Scholars who have studied the connection between donations and legislators' behavior have found little clear evidence that contributions buy roll-call votes on legislation. This may seem counterintuitive in light of cases such as the "bankruptcy reform" enacted by Congress in 2001 following a campaign in which banking PACs made unusually large donations.³⁹ But to attribute the legislation *solely* to contributions is to ignore the wider political situation: a Republican administration with pro-business sentiments had just taken office and Republicans had retained their majorities in both houses; opposition to the bill was weak and scattered; banks and other wealthy, well-organized interests have always been powerful in the American political system, and would be under any system of campaign finance we might imagine, including full public funding. The bankers' ability to mobilize such large contributions is more likely a result of their power, not its cause.

Contributors have more clout at less visible levels—for example, as subcommittees mark up bills, and as politicians open up connections to other officials—particularly on small policy details about which neither the legislator nor constituents have strong sentiments. But opportunities to provide such services arise only from time to time. Attempts to assess the influence of contributions also runs into logical problems: many groups give to candidates and officials who are receptive to their interests to begin with, and refrain from giving to opponents. A representative from a dairy-farming district may receive money from dairy PACs, but has sound electoral reasons to support their interests anyway. Conversely, many well-connected interests are not so much seeking change as hoping to prevent or minimize it, and it is logically impossible to show that donations explain things that *did not* happen. Most politicians find fund-raising the most distasteful part of their jobs—not what we might expect if it were the path to easy riches, or if politicians were in thrall to donor interests.

Lobbyists, contributors and most candidates generally agree that while contributions do not buy legislative votes or lead representatives to repudiate their constituents, they do buy access: the opportunity to make a case on a given issue. Access is limited, and while it hardly guarantees favorable results, nothing can be accomplished on most issues without it. It is a valuable commodity (if not, no one would pay for it), and indeed distributed as between organized interests and ordinary citizens. This will be the case in virtually any representative system, but it does raise questions about the vitality of politics: a pervasive concern with fundraising (particularly as the purchasing power of permitted donations declines) can divert attention from the groups and issues, and from the constituency work, that should be top priorities. The focus of political life shifts from the grassroots to dealings with contributors. The cumulative effects of spending most of one's spare time in the company of wealthy people, and of their particular view of the world, and corresponding expectations among the wealthy that they have special claims, likewise do little for the quality of representative democracy. Popular perceptions that money dominates politics, even if not literally accurate, reduce the level of political trust and degrade relationships between representatives and citizens.

V. The Corruption Problem: Bribery or Bad Politics?

A look at the wide-open politics of the 19th Century⁴⁰ strongly suggests that explicit corruption between donors and candidates in the American system has gradually been receding for more than a century. That trend would seem to owe as much to the vitality and inclusiveness of political contention as to reform: in an open, competitive political system, leaders have reason to believe that corrupt behavior of their own, or in the administrative agencies they oversee, can cost them their seats. Thus it is striking that in a broadly democratic system that has escaped the worst ravages of corruption—certainly by comparison to many other countries—so many citizens believe bribery and venality are widespread.

Perceptions that those who govern are out of touch, compromised by the forces of money and powerful interests, thus no longer able to govern effectively are common to many democracies,⁴¹ but some aspects of the American system may heighten those concerns. Political parties are fragmented and poorly organized; separation of powers and federalism lead to election results that are often less than decisive, and sweeping changes promised during campaigns rarely occur. Large-scale media-intensive campaigns—a must, in a system of weak parties, low levels of participation, and an increasingly suburban population—require major financial resources, yet do little to engage the electorate. It is a fundamental error to say that elections make no difference; still, American campaigns neither bring out the differences an election will make nor clearly link the votes people cast to the policies they get. Voters confront both a campaign process intended to raise their expectations and a constitutional system designed to discourage solid mandates. At the same time, the rules of political finance have themselves contributed to the malaise.

How well have the laws worked? As I noted at the outset, campaign spending is increasing. But that, by itself, does not mean that public policy is for sale. House spending tends to increase significantly in presidential-election years, and to decline slightly during off-year campaigns. Senate spending has remained fairly constant: if the two unusually expensive open-seat races in New York and New Jersey are factored out of the 2000 totals, successful candidates spent about the same amounts, adjusted for inflation, as in 1986.⁴² The number of registered PACs—often described as proliferating in dangerous ways—was about the same in 2000 (4,499) as in 1986 (4,596), and has actually decreased significantly in the corporate and labor categories. In the 1999-2000 election cycle, a full third of all registered PACs contributed only \$5,000 or less to federal election candidates, with 15.6% contributing nothing at all.⁴³

Indeed, rapid increases arguably have had less to do with systemic corruption than with incumbent insecurity: historically, changes in campaign rules or in the partisan balance of the electorate, or in any year the presence of a strong challenger. Competitive politics is expensive business:

The most important number you need to know to predict whether a race will be competitive is not the size of the incumbent's bankroll but the challenger's. Incumbents also spend more as the level of competition goes up. [House] Incumbents who lost in 2000 spent almost twice as much as did incumbents who won close races and four times as much as safe incumbents. Competitive House challengers in 2000 who won 40% of the vote or more spent almost six times as much as House challengers who lost by large margins.⁴⁴

Looked at that way, the view that there is too much money in politics may be off the mark. Given the greater ease with which incumbents raise money, efforts to control contributions likely work to their advantage.

The current system thus benefits House and Senate incumbents and inhibits change in the party system. All candidates are treated alike in terms of contribution limits, but incumbents have many other advantages, such as extensive name recognition from past campaigns and from their news-making potential while in office, and established networks for raising funds and running campaigns. Full-time staff members on the public payroll, both in Washington and in constituency offices, perform casework for constituents. Incumbents have access to free television and radio studios, free mailing privileges, and federally subsidized Internet sites. These advantages are part and product of representing constituents, and in no way are they corrupt. But they are worth hundreds of thousands of dollars, and mean an incumbent and a challenger spending exactly the same amounts of money are still running an unequal race.

The law does not compensate for such incumbent advantages; indeed, it is difficult to imagine Congress's ever passing legislation that did so. But the money process itself also works in their favor. Public funding, for example, or rules allowing one or two large individual "startup" contributions, could help challengers launch credible campaigns and raise private donations. Spending limits combined with public funding could limit incumbents' ability to outspend challengers. But neither applies to Congressional races. Disclosure has more subtle effects: under the pre-1970s system donors did give most of their contributions to incumbents, but many also gave at least small amounts to challengers who seemed to be promising. "Playing both sides of the street" ensured access after the election, no matter who won. Now, with contributions to challengers a matter of public record, many donors find it prudent to give to incumbents only. Incumbents have also learned to use the disclosure process to discourage potential challengers by raising and reporting large amounts of "early money." A would-be candidate who sees that the incumbent already has amassed several hundred thousand dollars may well stay out of the race.

The BCRA legislation of 2002 will only enhance incumbents' advantages. Whatever its other drawbacks, "soft money" could be used by party leadership to help their stronger first-time nominees—for example, by intensive get-out-the-vote activities in a state or district. The new law seeks to confine fundraising to the hard-money process in which incumbents do best. Similarly, "issue ads" were more likely to be used by those seeking change than by backers of incumbents; while their actual effectiveness is open to doubt, restricting broadcast advertisements to hard-money funding only in the period just before an election again makes life easier for incumbents. Perhaps the most incumbent-friendly part of BCRA is the "millionaire opponent" provision. Self-financing is essential to most challengers, particularly in the House where many are newcomers to congressional politics; in most years, House challengers raise between 15 and 25% of their campaign money from their own funds.⁴⁵ Even if they spent major amounts of their own money to win the first time, incumbents need make little use of their own funds for re-election; and now, when facing well-heeled challengers, their hard-money fundraising will be even easier. The actual effects of BCRA are conjectural at this point, not least because of pending legal challenges; still it is a very incumbent-friendly piece of legislation.

Incumbent advantage is less decisive at the presidential level, where the high profile of the office attracts politically established challengers and major donors, and where incumbents are limited to two terms. Here the law does not so much enshrine incumbents as prop up the present party system. A solid majority of Americans support the idea of forming new

parties (even though they do not agree about what the new parties should be). But new parties and independent candidates face a high threshold (5% of the total vote) to qualify for even a fraction of the public funding given to presidential candidates of the two established parties, and of course can claim such funds only after the election. Change in the party system is discouraged; had today's rules been in place in 1860, Abraham Lincoln might well have run as a Whig.

VI. Conclusion: Making Reform Credible

Thus, the American campaign finance system may do tolerably well at inhibiting bribery of elected officials, but does little to foster the sort of open political contention essential to controlling corruption in the long run, and to maintaining the commitment of citizens. Indeed, the post-Watergate system has probably reduced the responsiveness of the system. Moreover, the public was given little real preparation for the law's effects. Disclosure revealed streams of money that very likely had been flowing for a long time, but which seemed to embody a new trend. The FEC notes that "[I]n 1968, still under the old law, House and Senate candidates reported spending \$8.5 million, while in 1972, after the passage of the FECA, spending reported by Congressional candidates jumped to \$88.9 million."⁴⁶ That increase was more apparent than real, but it shows how disclosure might affect perceptions. A widespread, if diffuse, perception that national politics has been debased by the power of money may be the most significant legacy of our most sweeping reform effort in the 20th century.

Those concerns carry over to the public's outlook on further reform. While many see political money as a serious corruption issue, the public is equivocal at best about the chances of fixing the system. The CBS News poll in March, 2000, found that 11% of registered voters believed only "minor changes" were needed to improve "the way political campaigns are funded in the United States," while 43% backed "fundamental changes" and 42% said that "we need to completely rebuild it."⁴⁷ Yet in most polls, campaign finance reform as a major issue ranks low on the public's list of priorities: in May, 2000, for example, only 1% of a national sample in a Fox News/Opinion Dynamics survey named campaign finance reform as one of "the two most important issues for the federal government to address."⁴⁸ Does this contradict the notion that citizens are dismayed by the ways political money is raised and spent, or does it reflect a lack of confidence that elites will attack the issue in any fundamental way? One answer can be found in a pair of Gallup polls. In 1997, 59% said that even if major reforms are enacted, "special interests will always find a way to maintain their power in Washington," while 36% said that "major changes to the laws governing campaign finance could succeed in reducing the power of special interests". When the question was repeated in October, 2000, the percentage saying major changes could succeed had fallen to 28%, while those saying special interests will maintain their power had risen to 64%.⁴⁹

There is an old way to think about corruption that may be helpful here. It focuses not on specific people or actions, but on the capacity of a state to elicit the loyalty and trust of its citizens.⁵⁰ Corruption in this view is not a characteristic of a deed, but rather a collective state of being: Thucydides argued that when the leaders of Athens gave in to the impulse to invade the island of Melos, all Athenians—not just those who made the decision—fell into a state of corruption and of lost virtue. This idea is captured, imperfectly to be sure, in a basic dilemma of reform: it is not enough to prevent specific misconduct, one has to build a free society without allowing politics to become a mere extension of markets. A political

system that falls into that trap has little claim upon the trust of citizens; it also loses its ability to aggregate private preferences into legitimate, genuinely public policies that will be accepted and obeyed.

Much of the current discontent with American politics recalls this classical conception of corruption. The core problem is not bribery or extortion as such, but rather the widespread perception that the whole system, and the opportunities and guarantees supposedly provided to law-abiding citizens, have been corrupted in profound ways. This kind of discontent cannot be addressed through BCRA-style controls: the real challenge is to encourage and protect good politics.

It is not sufficient to free politics from the taint of corruption; good politics is a valuable process in its own right, one that depends upon a balance between vitality and order, openness and decisiveness. It must be open to a wide range of influences without becoming just another market. It enables people to have a say in decisions that affect their lives, adds to the vitality of citizenship and civil society, and enhances the political capacities of both individual people and the state. Good politics also involves several paradoxes: it is open and driven by real competition among genuine alternatives, yet yields results that are decisive and stay within the bounds of a broad consensus. It engages self-interest, yet takes place within accepted rules. It mobilizes broad segments of society—not just elite factions—yet does not confer total power (or permanent defeat) upon anyone. Winners receive real, yet bounded and temporary, governing power, and are held accountable for its use. Rules are thrashed out, often in the midst of controversy, that all can abide by out of self-interest rather than goodness. It may be that such considerations are too complicated to survive public debates over reform, or perhaps those who write the laws have too strong a stake in the current system. Either way, we have arrived at a campaign finance system that may check most specific offenses but is ineffective at winning the public's trust, and at sustaining the vitality of open, democratic political life.

ENDNOTES

- 1 In addition to the federal system discussed here, each state and many large cities have campaign finance laws of their own.
- 2 Spending figures from Federal Election Commission, "FEC Reports on Congressional Financial Activity for 2000" (May 15, 2001), < <http://www.fec.gov/press/051501congfinact/051501congfinact.html>> ; inflation corrections derived from the Inflation Calculator at < <http://www.westegg.com/inflation/infl.cgi>> .
- 3 Voting-age population figure for 1982 from Federal Election Commission, "National Voter Turnout in Federal Elections: 1960-1996", < <http://www.fec.gov/pages/htmlto5.htm>> ; for 2000 from Federal Election Commission, "Voter Registration and Turnout 2000", < <http://www.fec.gov/pages/2000turnout/reg&to00.htm>> ; Presidential spending in 1999-2000 from Federal Election Commission, < <http://herndon1.sdrdc.com/>> . Pizza prices may vary.
- 4 George Thayer, *Who Shakes the Money Tree? American Campaign Financing Practices from 1789 to the Present* (New York: Simon and Schuster, 1973); Gil Troy, "Money and Politics: The Oldest Connection", *The Wilson Quarterly* (Summer, 1997).
- 5 CQ, *Money Politics*, p 3; Federal Election Commission, *Twenty Year Report*, < <http://www.fec.gov/pages/20year1.htm>> , Chap. 1, p. 1.
- 6 *Ibid.*, Chapter 1, p. 5 at note 1.
- 7 *Ibid.*, Ch. 1, p. 1.
- 8 *Ibid.*
- 9 Michael Johnston, *Political Corruption and Public Policy in America* (Monterey, CA: Brooks-Cole, 1982), Ch. 6.
- 10 Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (New York: Viking Press, 1976), p. 186.
- 11 For a comprehensive discussion of the Hatch Act, see U. S. Office of Special Counsel, *Political Activity ("Hatch Act")*, < <http://www.access.gpo.gov/osc/>> .
- 12 Federal Election Commission, *Public Funding of Presidential Elections*, < <http://www.fec.gov/pages/pubfund.htm>> .
- 13 Public Law 92-178; 26 USC 9001 *et seq.*

- 14 Public Law 92-225; 2 USC 431 *et seq.*
- 15 While it was launched by labor union leaders in the 1940s, rather than created under the FECA rules, many observers regard the AFL-CIO's Committee on Political Education (COPE) as the first political action committee.
- 16 Anthony J. Lukas, *Nightmare*, p. 186.
- 17 Public Law 93-443.
- 18 424 US 1 (1976).
- 19 For an analysis of the Court's conception of corruption, see Thomas F. Burke, "The Concept of Corruption in Campaign Finance Law," Selection 34 (pp. 645-664) in Arnold J. Heidenheimer and Michael Johnston (eds.), *Political Corruption: Concepts and Contexts*, 3rd ed. (New Brunswick, NJ: Transaction Publishers, 2002).
- 20 424 US 1 (1976).
- 21 Public Law 96-187.
- 22 Public Law 107-155.
- 23 An excellent summary is available from The Campaign Finance Institute at < <http://www.cfinst.org/eguide/update/bcra.html>> .
- 24 Gallup Poll Archives, "Americans Not Holding Their Breath on Campaign Finance Reform." The results are based on telephone interviews with a randomly selected national sample of 872 adults, 18 years and older, conducted October 3-5, 1997. Estimated margin of error was K 3%. Results are reported at < http://www.gallup.com/POLL_ARCHIVES/971011.htm> .
- 25 Citizens' Research Foundation, < http://www.igs.berkeley.edu/research_programs/CRF/Basics/opinion.html> .
- 26 The Harris Poll, April 26-May 5, 2001; national sample of 1014 adults, with a margin of error of K 3%. The Polling Report, < <http://www.pollingreport.com/politics.htm>> .
- 27 Citizens' Research Foundation, < http://www.igs.berkeley.edu/research_programs/CRF/Basics/opinion.html> .
- 28 ABC News/*Washington Post* survey, March 22-25, 2001, national sample of 903 adults; margin of error K 3%. The Polling Report, < <http://www.pollingreport.com/politics.htm>> .
- 29 U.S. Senate Art & History, Historical Minutes 1878-1920, "Senator Ousted," < http://inaugural.senate.gov/artandhistory/history/minute/Senator_Ousted.htm> .
- 30 5 USC 107.

- 31 Traficant's particularly colorful story, and his unique personality, rhetorical style, and hair-cut, can be studied in considerable depth at < http://www.yourcongress.com/section.asp?section=Daily_Traficant> .
- 32 All expenditure figures compiled by The Campaign Finance Institute, George Washington University, < <http://www.cfinst.org/studies/vital/>> .
- 33 Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress 2001-2002* (Washington, DC: American Enterprise Institute, 2002). Tables and commentary available online at < <http://www.cfinst.org/studies/vital/3-3.htm>> .
- 34 Ornstein et al., *Ibid.*, < <http://www.cfinst.org/studies/vital/3-6.htm>> .
- 35 Ornstein et al., *Ibid.*, < <http://www.cfinst.org/studies/vital/>> .
- 36 Ornstein et al., *Ibid.*, < <http://www.cfinst.org/studies/vital/3-11.htm>> .
- 37 Gerald Keim, and Asghar Zardkoobi, "Looking for Leverage in PAC Markets: Corporate and Labor Contributions Considered," *Public Choice* 58, (1988), pp. 21-34.
- 38 John Green et al., "Individual Congressional Campaign Contributors: Wealthy, Conservative—and Reform-Minded" (Chicago: The Joyce Foundation, 1998).
- 39 For arguments characterizing this and other legislation as "paybacks" for contributions, see < <http://www.opensecrets.org/>> .
- 40 Mark Wahlgren Summers, *The Plundering Generation: Corruption and the Crisis of the Union, 1849-1861* (New York: Oxford University Press, 1987); Mark Wahlgren Summers, *The Era of Good Stealings* (New York: Oxford University Press, 1993); A.S. Eisenstadt, A. Hoogenboom, and H. L. Trefousse, *Before Watergate: Problems of Corruption in American History* (Brooklyn, N.Y.: Brooklyn College Press, 1978).
- 41 See Susan J. Pharr and Robert D. Putnam (eds.), *Disaffected Democracies: What's Troubling the Trilateral Countries?* (Princeton, NJ: Princeton University Press, 2000), esp. Ch. 8, 9.
- 42 Ornstein et al., *Vital Statistics on Congress 2001-2002*, < <http://www.cfinst.org/studies/vital/3-6.htm>> .
- 43 PAC data from Federal Election Commission, "PAC Activity Increases in 2000 Election Cycle" (May 31, 2001), < <http://www.fec.gov/press/053101pacfund/053101pacfund/tables/pachis00.htm> and [.../pacsp00.htm](http://www.fec.gov/press/053101pacfund/053101pacfund/tables/pacsp00.htm)> .
- 44 Ornstein et al., *Vital Statistics on Congress 2001-2002*, < <http://www.cfinst.org/studies/vital/3-6.htm>> .
- 45 Ornstein et al., *Ibid.*, < <http://www.cfinst.org/studies/vital/3-6.htm>> .

- 46 FEC, *Twenty Year Report* Ch. 1, p. 2.
- 47 CBS News Poll, March 19-21, 2000, national sample of 909 registered voters; margin of error K 3%. See The Polling Report, < <http://www.pollingreport.com/politics.htm> > .
- 48 Fox News/Opinion Dynamics Polls, May 10-11, 2000; survey of 900 registered voters. Citizens Research Foundation, University of California: < http://www.igs.berkeley.edu/research_programs/CRF/Basics/opinion.html > .
- 49 For 1997, see the Gallup Poll Archives, "Americans Not Holding Their Breath on Campaign Finance Reform": "The results are based on telephone interviews with a randomly selected national sample of 872 adults, 18 years and older, conducted October 3-5, 1997." Estimated margin of error was K 3%. Results are reported at < http://www.gallup.com/POLL_ARCHIVES/971011.htm > . For 2000, see CNN/USA Today/Gallup Poll, October 6-9, 2000, national sample of 1052 adults; margin of error K 3%.
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