# THE DEMISE OF GRASSROOTS POLITICAL ACTIVITY UNDER THE PRESIDENTIAL ELECTION CAMPAIGN FUND ACT

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Presidential campaigns focus the attention of the entire nation on the election of a single public official. It is therefore important not to lose sight of the fact that these campaigns constitute a unique forum for more than just the narrow decision as to which individual will occupy the office for four years. The presidential campaigns also serve as multifaceted opportunities for consideration of a wide range of national issues. Campaigns for the presidency have traditionally drawn much of their verve and tenor from the fact that they are conducted not merely by a handful of insiders close to a candidate, but also by numerous grassroots and state-level organizers. At the heart of this process is the local organization network, which operates at the county, congressional district, city, and precinct levels. In considering the impact of the Presidential Election Campaign Fund Act[1] on grassroots political organizations in presidential elections, it is important first to briefly recall how presidential election campaigns were conducted before the Act went into effect.

My own experiences in this area were primarily in the presidential campaigns of 1968 and 1972. In those elections, the national campaign managers in Washington solicited and collected most of the contributions and in turn decided how that money would be expended. Expenses for media, candidate travel, printing, and other costs incurred by the national campaign were priority expenses. Any remaining money was allocated to field organization, with a specific amount budgeted for each state. That amount was then given to each state coordinator who went out to the field with the hope and promise that more money might be coming from Washington. Usually, however, there was no real expectation that more money would be available.

There are certain truisms about political campaigns that should be noted at this point. The first truism is that there is never enough money. For every dollar a campaign receives, there are ten urgent and competing demands for it. The second truism is that there is a constant battle for these limited dollars between the persons responsible for the various components of a campaign. The third truism is that there is probably no greater enmity than between the people in the national headquarters, who want whatever money there is to be spent for media and candidate travel, and the people in the campaign who believe it should be spent in the field for nuts and bolts

1. I.R.C. §§ 9001-9013 (1976 & Supp. IV 1980).

organizing. A fourth truism is that, if for no other reason than that the national campaign people are physically closer to the place where such decisions are made, most of the money gets allocated everywhere but to the field.

It should therefore be recognized that when state coordinators in the past went out into the field to put together the local organization, they went with the unspoken recognition that despite promises made to them, additional money for the field operations in the state would have to be raised locally. In retrospect, this proved to be a healthy phenomenon. A good state coordinator could divide the state into subregions, usually by congressional district, and send an organizer out with a list of supporters and a small bank draft, usually for a few hundred dollars. The congressional district organizer would then use that seed money and the list of supporters as the start of an organization that would feed itself by raising lots of smaller contributions—usually by passing the hat at rallies or by soliciting contributions as part of the general door-to-door canvassing effort. With a good field organizer, at least one storefront operation in each congressional district would be operating in a matter of weeks. In heavily populated areas, there were often as many as half a dozen storefronts operating in one district by the end of the campaign.

The enactment of the Presidential Election Campaign Fund Act drastically altered the manner in which campaigns are financed, and hence managed. Candidates for president accepting federal funds must now agree, as a condition to receiving this subsidy, not to accept any private contributions, including any private expenditures coordinated with the campaign.[2] A "private expenditure coordinated with the campaign" includes by definition an act as relatively innocuous as mailing a campaign brochure with a postage stamp paid for by volunteer, rather than by the campaign.

What this meant as a practical matter in 1976 and 1980 was that the principal campaign committee of each major party nominee was handed a check by the federal government as a subsidy. In 1980 such payments amounted to 29.4 million dollars. This subsidy was given after the convention, and constituted the sole source of funds for the campaign. With these funds, the campaign managers at the national level made their allocations to various campaign activities. After large sums had been deducted for media advertising, candidate travel, and other expenses of the national campaign, the remainder was then divided up among the fifty states for field organization. When the state coordinators in 1976 reached their states, however, they found themselves with their hands virtually tied behind their backs by the new federal election laws. Rather than being able to use the small sum allocated to the field as seed money to begin a vigorous and meaningful local campaign in which all who wished could participate, the coordinators

2. *See id.* § 9003(b)(2).

were flatly prohibited from permitting any private money to be contributed directly to the campaign or to be spent indirectly as an expenditure coordinated with the campaign.

About two years ago, I was counsel to the Republican National Committee in a suit brought by the RNC against the Federal Election Commission[3] challenging the constitutionality of the expenditure limits imposed on presidential candidates who accepted public financing. The essence of that litigation can be reduced to a single question: What are the rights of the participants in the political process to communicate with one another in the course of their activities? In the RNC suit, the Supreme Court let stand a decision of a three-judge court in the Southern District of New York which held that the restraints on grassroots activity on behalf of federally funded campaigns are not unconstitutional.[4] In light of the experience of this most recent presidential election, however, I believe it may be worthwhile to again raise the question in at least a public policy framework, if not a constitutional one, particularly since it is likely that extending public funding to other federal campaigns will remain under consideration.

The Supreme Court in *Buckley v. Valeo*[5] ruled unequivocally that expenditure limits are unconstitutional. The Court held that the state interests advanced by the supporters of the Federal Election Campaign Act[6] were insufficiently compelling to justify the intrusion upon fundamental first amendment rights. The Court in *Buckley* indicated in a footnote that notwithstanding this direct restraint on congressional powers, Congress may indirectly impose restraints, such as a condition on the receipt of public financing.[7]

The RNC suit was brought to challenge the implication of this footnote as being inconsistent with the unconstitutional condition doctrine and placing unconstitutional restraints on the first amendment rights of candidates and their supporters. During the evidence-taking phase of the case, we attempted to demonstrate that the complete ban on private contributions, including coordinated expenditures, was having a deleterious impact on presidential campaigns, particularly at the grassroots level. The testimony offered was, I believe, particularly compelling. For example, one witness, who had been the California state coordinator for the Democratic nominee in 1976, recounted that in prior campaigns, grassroots campaign organizations for the Democratic nominee often sprung up spontaneously in isolated areas, even before the state coordinator was able to contact local sup-

3. Republican Nat'l Comm. v. Federal Election Comm'n, 461 F. Supp. 570 (S.D.N.Y.), *certified questions answered,* 616 F.2d 1 (2d Cir.), *aff'd,* 445 U.S. 955 (1980); 487 F. Supp. 280 (S.D.N.Y.), *aff'd,* 445 U.S. 955 (1980).

4. Republican Nat'l Comm. v. Federal Election Comm'n, 445 U.S. 955 (1980), *aff'g* 487 F. Supp. 280 (S.D.N.Y. 1980).

5. 424 U.S. 1 (1976).

6. Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-456 (Supp. IV 1974) (amended 1976, 1980).

7. 424 U.S. at 57 n.65.

porters. The state coordinator testified that in previous years, local Democrats in the Salinas Valley had become accustomed to being ignored by the state coordinator in every presidential election year until late in the campaign, and therefore would routinely begin to organize their own local efforts. In late September of 1976, the local Democrats visited the state headquarters to inform the state coordinator of their progress. They told the coordinator, with some pride, that they had begun work immediately after the convention. One local businessman had donated a vacant storefront for the ten weeks of the campaign. Another person had painted a large sign which could be hung out front. Others had donated small amounts of money to begin running off leaflets and flyers which could be distributed in the community. The local supporters were preparing the grand opening of their office and had now come to the state coordinator because they wanted a representative of the campaign, preferably the presidential nominee himself, to speak at the kickoff. They also wanted to be included in future meetings in which campaign activities were planned so that the supporters could conduct their local campaign in conformance with the national and statewide strategy. The state coordinator testified that he was now compelled under the law to tell the supporters that no one from the campaign could legally attend the grand opening of their storefront headquarters. Moreover, their entire operation was illegal and would have to be closed down, if for no other reason than by virtue of that very meeting, since private expenditures in coordination with the presidential campaign violate federal law.

The lower court held, as a finding of fact, that grassroots activity had been curtailed by the Federal Election Campaign Act.[8] We were ultimately unsuccessful on the merits, however, since the court held that Congress has the power to impose expenditure limits as a condition of receiving public financing if presidential candidates have the alternative of turning down the federal subsidy.[9] The RNC suit was unsuccessful at least in part because the 1979 Amendments to the Federal Election Campaign Act relaxed the Act's strictures so as to permit local party organizations to raise and spend unlimited amounts for volunteer activity.[10] Despite the ruling in the RNC case, I have still not reconciled myself to the proposition that one citizen, even a presidential nominee, can make a choice which severely curtails the speech and association rights of all other citizens. While the 1979 Amendments are a clear improvement, I think it is useful in the aftermath of last week's results to again ask ourselves the question: What compelling public interest is being served by any of the restrictions on coordinated activity and the complete ban on private contributions? Is there any legitimate policy

8. 487 F. Supp. at 286.
9. *Id.*
10. Pub. L. No. 96-187, 93 Stat. 1339 (1980) (amending 2 U.S.C. §§ 431-456 (1976)).

reason why Congress should not continue the relaxation initiated in 1979 for local party organizations to include all other groups?

I spent considerable time during the 1980 presidential election working for one of the candidates, and spent the last two weeks in the field on behalf of the Democratic National Committee. It is sobering to experience first hand the prodigious efforts on the part of persons conducting campaigns to abide by the law and the continued chilling effects on the rights of individual participants to work on behalf of the candidate of their choice. I recited lists of persons with whom my co-workers could have no contact once they were in the field out of a concern that persons or organizations making private expenditures might be accused of doing so in coordination with an agent of the campaign. I respectfully suggest that persons who advocate the continuation of these restraints on coordinated activity spend a few days in a campaign field office and try to explain to political organizers why their friends and colleagues, who have been working vigorously on behalf of their candidate, may not attend meetings or be informed of a planned appearance by the candidate.

I must confess that I have a deep bias in favor of local organizational activity. In 1968 and 1972, it provided a crucial vehicle for communicating strongly held views. Volunteer activity in presidential campaigns is particularly important since it frequently leads to involvement in other campaigns. Without local organizational activity, campaigns will continue on their current path of becoming little more than part of the one-dimensional world of television, viewed dispassionately by those who are as alienated from the political process as they are from network programming.

I find totally unpersuasive the argument that the death of grassroots politics is the fault, not of the election laws, but of decisions made by cynical campaign media experts that thirty-second spots are more effective than direct citizen participation. That is not the issue. The issue is that if there is to be a Federal Election Campaign Act, it must be structured in a way to encourage and reinforce citizen involvement at every level.

The consequence of the complete ban on private contributions in federally funded presidential campaigns and the ban on coordinated expenditures has been the imposition of severe restraints on mainstream political organizations while simultaneously permitting the virtually unfettered flow of money to extreme fringe groups. I suggest that those who are concerned about the disintegration of the body politic into single issue groups should consider carefully the extent to which this process is accelerated by unnecessary restraints on mainstream political activity.

# PART THREE

## Regulatory Structure and Procedure