

## PANEL DISCUSSION: PROPOSED REMEDIES FOR PERCEIVED DEFECTS IN THE ELECTION LAW SCHEME

DEAN NORMAN REDLICH, MODERATOR

OPENING REMARKS OF DEAN REDLICH: The subject of this panel discussion concerns the question of remedies and the possibility of eliminating some of the defects in the general election law scheme, including problems with the primary system and ballot access.

I ask that the panelists accept for the moment that we are going to have a law regulating campaign finances. I would like to rule out, at least initially, a proposal that we should repeal the law. There are lots of remedies other than that. I think that we should operate under the assumption that campaign finance laws are a permanent phenomenon, despite individual predilections of the panelists as to whether the whole system should be abolished.

I would like the panel to focus on the issue that seems to have surfaced throughout much of the day. That is, the problem of the independent coordinated expenditure. Some of the speakers have pointed out that under *Buckley v. Valeo*,\* an individual's contributions, but not expenditures, are limited. In addition, the receipt of public funding for presidential campaigns may be conditioned on the limitation of the campaign's expenditures, and the law must treat independent expenditures coordinated with the campaign as a contribution for purposes of the one thousand dollar limit to ensure the integrity of the regulatory scheme. The system allegedly inhibits grassroots activity and prevents individual groups from organizing and working with the candidate. Is this the inevitable price that we have to pay if we are going to accept the triad established by the present law of campaign financing: the limit on contributions, unlimited expenditures, and limits on spending when the presidential candidate receives public financing?

THOMAS SCHWARZ: I would like to comment on your hypothetical facts, which have a lot of factors intertwined, perhaps not always in the right order. Independent expenditures are a function of the very complicated, convoluted mechanism that we have to limit contributions. Without a contribution limitation, we would not be debating the question of whether we should deal with independent expenditures, and if so, how they are to be treated. Experience with this law shows that it was a mistake to limit contributions. It is still true that sunlight is the best disinfectant, that disclosure would have been adequate. When we limit contributions, we make the law so complicated that it takes lawyers to figure it out. This

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\* 424 U.S. 1 (1976).

interferes with the ability of individuals to exercise their first amendment rights. I would suggest that we remove the contribution limitation, and perhaps retain some overall limitations on expenditures in connection with political activities, but without regard to specific contribution levels for each candidate. The fact that we have these panels and the Public Law Institute's annual seminar to explain what is happening in election laws so that people can exercise their rights suggests to me that things have gotten too complicated.

DAVID IFSHIN: I do not really disagree with what Tom [Schwarz] said, although I'm reconciled to the existence of contribution limits. If you rethink the law, the point of departure ought to be: with each of these restrictions, what evil are you really trying to cure? That's the only real test under strict scrutiny; what compelling governmental interest is there? In the case of the contribution limits, the Supreme Court said that the compelling governmental interest is the elimination of corruption and the appearance of corruption. Now if that's the case, a one thousand-dollar contribution limit is awfully low in the case of a presidential campaign. It would be very difficult to buy much influence in any party, even the Libertarian Party, for a thousand dollars. The real question ought to be: where do we set contribution limits? The contribution limit should be set in the area where corruption really is a problem. Eliminating contribution limits entirely doesn't meet the concerns which I addressed this morning. In the case of the presidential election, the real problem can be addressed more directly. I would simply characterize the subsidy, the 29.4 million dollars given to the campaigns, as a replacement for the twenty million dollars which was given by a handful of people in prior elections. Eliminating the large amount of private money, which is Fred Wertheimer's concern, and providing the government subsidy removes the threat of buying and selling influence. The campaigns should then be allowed to raise and expend as much as they can in smaller contributions, such as a thousand dollars or less. I fail to see what evil or danger there is in permitting this. What's wrong with allowing a lot of "speech"? I think that speech is good, unless you can find some evil purpose for which it's being used. I don't see that happening in this case. This is the most urgent problem to which we have to address ourselves.

DEAN REDLICH: Your solution would be to raise the contribution limit but allow coordinated expenditures and treat them as contributions, subject to the five thousand dollar limit or whatever you would want to raise it to.

DAVID IFSHIN: Not exactly. Acknowledging the problems of coordinated expenditures, the problems of organizations such as the National Conservative Political Action Committee (NCPAC), and the problem of trying to give a political pedigree to the people who are involved in independent committees, I would simply say that you can effectively take some of that pressure off. What the law has done is restrain the speech of the mainstream

and force private money out to the fringes, to the single issue groups. I would allow the principal campaign committees, now restricted to that 29.4 million dollars, to have this subsidy or a lower sum.

In addition, the campaign committees should be permitted to raise and expend as much private money as they want. That would allow the grass-roots organizations, not just the party organizations, to begin to fund themselves again in all levels of the campaign.

DEAN REDLICH: If Stewart Mott were to decide that he wanted to spend a half million dollars in support of a presidential candidate, and wanted to do it in a coordinated way, would your system permit that, or would that be subject to a five thousand-dollar limit?

DAVID IFSHIN: The specific remedy I proposed would not address the problem raised by the Stewart Motts. If they wanted to go out and spend money in a coordinated fashion, that would still be a coordinated expenditure subject to limits.

RONALD EASTMAN: I want to address this to Fred Wertheimer, because what I find so frequently on these panels is that those who have represented clients in the area and worked in the area for some time seem to develop a jaundiced view of the law as a whole. The question for Fred is really a troublesome one, and I don't have the answer. The ability to make coordinated independent expenditures has become so exploited that you can drive a fleet of Cadillacs through the loophole in the Act. What I want to ask Fred is, given that independent expenditures really seem to be sanctioned by the Constitution, what is your view of the contribution limitations, and how would you propose to deal with the problem? Common Cause is the basic architect and defender of the statute and I know they are usually thoughtful and serious.

FRED WERTHEIMER: Where does that line "usually thoughtful" apply in this area? This is a rough process. The effort to interrelate politics with the kind of rules and guidelines which exist in the campaign finance area is very difficult. The system is going to have rough edges, no matter what, unless you don't take any steps. It does cause frustrations. There aren't simple ways of solving everyone's needs. What we have come to repeatedly in this area is a series of balances. Ultimately, the Supreme Court in *Buckley* balanced the difference between contribution limits, which they found constitutional, and expenditure limits, which they found unconstitutional. They balanced the difference between contribution limits, which they found unconstitutional, and independent activity limits, which they found unconstitutional, and then came to the middle with the question of coordinated independent activity, which they found to be the equivalent of a contribution. Now the earlier point that was made by Tom Schwarz is correct. If you really want to avoid any questions about independent expenditures as an issue, then you would repeal contribution limits. It may be that a truck can

be driven through the loophole in the law of independent expenditures. It hasn't happened yet. Jan Baran's client [Americans for Change] announced that their independent expenditure committee planned to raise and spend between twenty and thirty million dollars in this presidential campaign to defeat President Carter. I don't know what the exact figure will be, but it will be in the low hundreds of thousands of dollars. Only if you have contribution limits do you face the question of "what is independence?"

It is essential to have contribution limits. They are the heart of the Act, along with public financing. Disclosure, in and of itself, is not a disinfectant. If it is, then disclosure requirements in the financing of congressional elections must have disinfected the Congress. That's not my view. The capacity of campaign contributions to have a detrimental as well as a positive effect on the process is a fundamental issue. Campaign contributions may have a very detrimental effect depending on the amounts involved.

DAVID IFSHIN: What Fred says gets to the heart of this problem. This whole debate comes down to a single question: what is the extent to which Congress has the constitutional power to regulate whatever speech component there is in the expenditure of money in connection with a federal election? I think that Common Cause's characterization of the independent expenditure exception as a loophole is unfair. It's not a loophole, it's an exercise of a constitutional right, protected by the Supreme Court in *Buckley* and again in the *Republican National Committee*\* cases. The question comes down to how much power will we place in the federal government to control speech? The question I would ask Fred, in light of the suit\*\* his organization brought against Jan Baran's client [Americans for Change] seeking to enforce the one thousand dollar limit against them, is: if your case is successful, could Congress regulate the right of Common Cause to accept money and to expend money under the same rationale—to slow the skyrocketing cost of lobbying? I personally find much more danger in lobbying in Washington than I do in Jan's organization. I know Common Cause is a lobbying organization in the public interest, but there are a lot of lobbying organizations that come a lot closer to bucking the process than do Stewart Mott's advertisements. I would just ask Fred, carrying this argument to the extreme, does Congress have the power to extend this system to his own organization, and why not?

FRED WERTHEIMER: Well, I leave you to answer that question. The Court's decision does recognize the need to define "independence" in the context of campaign finance laws. The Court decided that independent expenditures

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\* *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280 (S.D.N.Y.), *aff'd*, 445 U.S. 955 (1980).

\*\* *Common Cause v. Schmitt*, No. 80-1609 (D.D.C. Sept. 30, 1980); *FEC v. Americans for Change*, No. 80-1754 (D.D.C. Sept. 30, 1980).

cannot be constitutionally regulated and that coordinated expenditures are contributions. It therefore assumes that they are going to be reached in this area. My own feeling, in terms of the independent expenditure issue, is that something very interesting happened, at least in this 1980 presidential election. A change took place in 1979 allowing state and local political parties to have a much larger role in the presidential campaigns than they previously played. As a result, very substantial sums were spent by the parties, particularly by a party that was equipped to raise significant sums of money. The Republican Party's expenditures and impact on the 1980 election will probably be far more significant than were the independent expenditures. It seems to me that the impact of independent expenditures decreases if the candidates, if the parties, have a sufficient capacity to raise and spend money in the elections.

JAN BARAN: I would like to take this rare opportunity to agree with you, Fred. In terms of the effect of increased latitude for party participation, I think it is interesting that the parties were given this additional latitude to make unlimited expenditures for get-out-the-vote and registration drives. That is, in effect, an exemption from the expenditure limit. I think that there is a correlation between the expenditure limit and the amount of independent expenditure activity that's going on. First of all, I don't think that eliminating contribution limits will eliminate spontaneous independent political speech and activity, either by individuals or by organizations. I know that during our arguments before the three-judge court, Judge Wilkey referred to the election of 1880 between James G. Blaine and Grover Cleveland. Judge Wilkey thought that the first independent expenditure was made in that campaign when the Presbyterian minister got up and congratulated Blaine for being an opponent of rum, Romanism, and rebellion. That is, I think, an indication that historically, you can't really control what people wish to do spontaneously or independently of a campaign. Based on my personal observation, the fundraising activities of the independent ad hoc groups in the 1980 election were directly and negatively affected by the litigation to which they were subjected and by the increased ability of the parties to raise money outside of this expenditure limit. I would venture to say that they would have been even less successful in raising the money that's necessary to make this type of expenditure if the contributor had been able to make that limited contribution directly to the Reagan campaign or the Carter campaign. In that way, I depart from some of the other suggestions that it is the contribution limit which, in effect, curbs this type of organized, sophisticated activity. I think, to a large degree, this constraint is directly related to the expenditure limit.

THOMAS SCHWARZ: We have, to some extent, substituted one evil for another. Although large contributions do buy access, we can't effectively limit them because of the independent expenditure. One effect of this has been the funding of single interest groups which were so devastating in this last

election to a bunch of liberal senators. I think it is very dangerous when people become polarized because of the limitations on contributions to candidates and must find another outlet for their speech by finding specific groups to which they can contribute. Those groups in turn jump on a particular candidate for a single issue. The result is that we will push candidates away from taking positions on issues that are important because the candidates will know that if they go out on a limb on a particular issue, they will be more than likely to get their ears pinned back by a single interest group. This is detrimental to the entire system.

FRED WERTHEIMER: Let me just make one point on the independent expenditures because I think there is another important perspective on those activities. In the 1980 House and Senate races, we will probably see three hundred million dollars spent by the congressional candidates. The total amount spent on independent expenditure activities is roughly three to four million dollars. From a percentage standpoint of the totals involved, the independent expenditure is a very small amount. On the other hand, it is targeted, it has become a focal point of our interest, and it will grow in the 1982 election. This can be illustrated by looking at some of the 1980 races. In Indiana, where Birch Bayh was defeated, approximately one hundred twenty-five thousand dollars were spent in independent expenditure activities, compared to two and one-half million dollars spent by Senator Bayh. There is a tendency to let the actual numbers and the extent of activity get out of line with what actually happened.

DEAN REDLICH: Yes, but isn't that the problem which people are complaining about? The criticism of the law is that we are discouraging the kind of independent activity that has been traditional in campaigns. I didn't quite understand Mr. Schwarz's point. It would seem to me that we've seen single issue candidates and groups in the campaign in those jurisdictions where there were no campaign finance laws at all.

FRED WERTHEIMER: The argument in the past has not focused on the discouragement of independent activity but on whether grassroots involvement in the candidates' own campaigns has been discouraged.

THOMAS SCHWARZ: Dean Redlich, I don't quite understand what you are referring to by discussing areas in which there are no restrictions. There are certainly limitations on the amount of money that can be spent in a senatorial election or in a congressional election, notwithstanding that there is no campaign financing provided by the federal government.

DEAN REDLICH: I'm talking about state assembly races.

THOMAS SCHWARZ: I wasn't referring to those races but rather to the single interest groups which have evolved in the context of federal campaign finance.

DAVID IFSHIN: I'm finding myself in the unusual position of agreeing with Fred, or at least coming to Fred's defense. There's a lot more going on in these independent committees and single issue groups than can simply be attributed to the Federal Election Campaign Act. When something happens, we tend to look for the nearest cause. Single issue politics and the decay of the two party system in many ways antedate the campaign laws. It goes too far to say that the defeat of Bayh and Church and those senators can be attributed to these independent groups. Frankly, it's giving the independent groups too much credit. I agree with George Will, who observed that there are a lot of corporals taking credit for Napoleon's victory, and tend to see Terry Dolan [of NCPAC] as one of those corporals.

RONALD EASTMAN: I'd like to raise a question that I don't think can be answered. I think it will take some empirical study, but it's one side of the equation which is rarely addressed. That is, have the contribution limitations accomplished what they are supposed to accomplish? Is there more or less force to narrow the influences on those who come to power in federal government than there was before the contribution limitations? I don't know the answer to that, but let me report a few things that I saw in this campaign. Most of you know that the National Education Association was a very forceful, aggressive supporter of President Carter in 1976 and again in 1980. It is no secret that the Carter Administration established a separate Department of Education. It may have been the result of study, or a totally independent movement amongst scholars. You also know that the machinists vigorously supported Senator Kennedy. He would have owed them a very substantial debt had he won the Democratic nomination and then the presidency. President-elect Reagan received large contributions from elements of the trucking industry. The President-elect has already begun to back off from trucking deregulation. There are probably many other examples that I don't have at my fingertips. It would be interesting if anybody had a comment, but I hope that Common Cause or the Ford Foundation or Congress will examine whether the contribution limitations have really made the kind of difference that the authors of the Federal Election Campaign Act might have expected.

FRED WERTHEIMER: Well, I have a comment. Prior to this election, and following the first election, President Carter thought that this was a terrific law. The process and the results may have changed things. It is quite true that campaign finance laws and contribution limits treat money differently than other forces in the political process. A basic problem for the political process arises when an individual or a group can go to an elected public official and hand that elected public official very large sums of money in exchange for political favors. Campaign finance laws were never based on the theory that all forms of influence and capacity to provide support for ideas or anything else were going to disappear. If you put limits on what

executives of General Motors could do, these institutions would be brought to their knees and eliminated. All the power in our society would be gone.

RONALD EASTMAN: Fred, I think you missed the point. I can tell you from experience, both on the Democratic and the Republican side, that interest groups still send checks, not to the candidates themselves, but to their campaigns. Whether they expect a quid pro quo for it is a matter of opinion. The fact of the matter is that money as speech, as a mechanism for obtaining influence, is still a factor.

AUDIENCE QUESTION: Mr. Hocker, you stated earlier that disclosure will have an inhibiting effect on the third party and independent candidates, such as your candidate, Ed Clark. Without disclosure, how else will the public know who is funding the candidates?

CHRIS HOCKER: I mentioned disclosure to give an idea of the barriers we faced. It has been our experience that disclosure inhibits contributions to a new political movement, which is often perceived as crazy, radical, or flaky. Someone who is about to contribute an amount which would have to be reported may not make the contribution if it is going to be made public. But if I had to choose one thing I could live with from among all the aspects of election laws, it would be the disclosure rules. I view the whole complex of these laws in most cases from the viewpoint of individual rights. Individual rights take precedence in most cases to the amorphous "public right to know."

STEVEN UHLFELDER: The Supreme Court addressed that problem to some extent in the *Buckley* case. It did not uphold disclosure per se. Rather, the Court said that if there are instances in which there can be a demonstration that disclosure would subject a new or minor party to harassment, the party could become exempt from those disclosure requirements. In fact, the Socialist Workers Party asserted this position in *Buckley* and gained a disclosure exemption until 1984 or 1985.

DAVID IFSHIN: I'm not as convinced as you are that this problem is confined solely to new parties and minor parties. Disclosure would strongly affect associates in Wall Street law firms or Washington law firms who may think about giving one or two hundred-dollar contributions to the Democratic candidate when the partners strongly favor the Republican candidate. This is a problem which shouldn't be glossed over by urging repeal of the law with the exception of disclosure. Disclosure itself has its problems.

DEAN REDLICH: Mr. Hocker, it may help you when addressing civil liberties groups to remind them that in *Buckley v. Valeo*, which upheld the disclosure provisions, the Court cited the case of *Communist Party v. Subversive Activities Control Board*\* for support.

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\* 367 U.S. 1 (1961).

**AUDIENCE QUESTION:** We heard earlier that a large proportion of campaign funds are spent on radio and TV advertising. I'm sure that candidates feel compelled to raise lots of money to buy television and radio time. Would it be constitutionally permissible, and perhaps advisable as a matter of public policy, to expect those licensed to use the public airwaves to make available a substantial block of time for a range of political parties and candidates, without charge, as part of their public service obligation? This would extend to fringe political groups so that there would be opportunity for the expression of diverse political views. To carry this analysis further, would you also instruct federally regulated airlines to provide the candidates with free air travel?

**DAVID IFSHIN:** There is a difference between the Federal Communications Commission and the Civil Aeronautics Board. The courts are taking the attitude that the broadcast waves are finite, and they relied on this characteristic in distinguishing the print media in *Tornillo*.<sup>\*</sup> I think the courts could compel free media time, although I suppose there is some point where it becomes an unconstitutional taking. The CAB presents a different kind of issue.

**CHRIS HOCKER:** Just for information, as I understand it, the Canadian system works that way. There are a lot of smaller parties in Canada. What they do is allocate the time, according to the percentage of the vote received in the previous election. Your little "flaky" party, and I'm using "flaky" knowing full well that many people consider me a representative of that kind, ends up with three minutes at 2 a.m. while a more conservative party gets one and a half hours of prime time. The idea of the government as the ultimate arbiter of the right of a political party to have access to these public things is very dangerous. One of the real serious problems, even from a regulatory point of view, is that the regulators base their allocations on prior performance so that a political party which could be tremendously viable now, but had some tiny percentage in the past, is thwarted. This presents a basic fairness problem.

**AUDIENCE RESPONSE:** I'm not sure it would be such a terrible thing for Gus Hall to have his hour and Barry Commoner to have his hour.

**STEVEN UHLFELDER:** One of the problems is that we try to get the government too much involved in the process. It would be complicated further by having the government tell television and radio stations who should be on the air, at what times, and for what purpose. This would set a very dangerous precedent. Secondly, I'm not sure people would watch. The reason that the David Garths put thirty-second or sixty-second spots on the air is because that's all people will listen to. That's all you're going to use to

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\* *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

capture their attention. The debates are one extreme example. There was so much media hype on the debates that people actually watched. If you take the average debate in a primary election, however, I don't think you get that attention, nor do I think the government should be telling the media, even though it is licensed and air waves are limited, how it must divide its time.

THOMAS SCHWARZ: I don't think either one of the candidates in the last election could speak for a whole hour.

CHRIS HOCKER: In theory, you and I would probably agree that there would be nothing wrong with giving Gus Hall and Barry Commoner and even Ed Clark an hour. As a practical matter, however, the people whose responsibility it is to make a decision will have to draw lines somewhere, because there were approximately 263 registered candidates for President of the United States in 1980. Somewhere, a line was drawn. When it comes to the equal-time rule, the line is drawn according to whether a candidate is on the ballot in the state of the station in question or is on the ballot in ten other states. This is not a concrete way, in the name of the Constitution, to draw lines.

STEVEN UHLFELDER: I think the repeal of the equal-time provision would do a great deal to encourage more stations to provide free time. I think that would be a step forward.

AUDIENCE QUESTION: The topic of ballot access and wider media access for the parties has been discussed. Theoretically, this could lead to a huge number of candidates in a particular race and one candidate winning with two percent of the vote. Do any of you favor a particular remedy to prevent such a situation?

THOMAS SCHWARZ: My basic philosophy is that in this area especially we ought to do as little as possible to interfere with the process. We ought to interfere only to counter our prior interference.

DAVID IFSHIN: I would have less trouble with this hypothetical ninety-nine-candidates-in-a-runoff situation if we had some sort of constitutional mechanism to deal with it. Just look at the nightmare scenarios that were spun out in the past election—that was only a three-way race. What about the problem of having the House of Representatives make the ultimate decision while simultaneously setting its own rules?

AUDIENCE RESPONSE: That was only with the presidential election.

DEAN REDLICH: Other elections do use that system, as you know.

STEVEN UHLFELDER: In a general election there are primaries, so you don't encounter this problem. The problem is with the presidential election. One thing we need to do is eliminate the electoral college. We are going to have a nightmare one of these days if we don't. The second point is that people deserve what they get. In New York, the splitting of votes between Elizabeth

Holtzman and Jacob Javits which resulted in the triumph of an ultraconservative, is a repeat of the 1970 race. Everyone in New York was aware that the three-way race could have this result, but the public voted for it anyway. I don't think we should try to remedy everything that the people do to themselves.

AUDIENCE RESPONSE: I basically disagree. I think there's a simple practical solution to the multi-candidate race problem. The system that I advocate is "approval voting" in which you vote for as many candidates as you like in a multi-candidate race. If there are two or three candidates, you wouldn't be restricted to voting for one. You could vote for two if you found two acceptable. In the 1970 Buckley race we have data which shows that if we had had approval voting, the person losing with twenty-four percent would have been approved by fifty-five percent of the voters, compared to approximately fifty percent for the "extremists" on each side. In the 1980 election, it turns out that Holtzman would have been approved by sixty percent of the voters, compared to fifty-four percent for D'Amato, and forty-nine for Javits. The central problem of elections today is multi-candidate races. One can't abjure the voters by saying, "Look, you knew better last time, you better wise up and vote for a serious candidate," when there is a system which allows sincere voting for acceptable candidates and doesn't force the voters to vote insincerely for a second choice simply to prevent his worst choice from winning. This system would admittedly violate the one person, one vote principle. I would suggest a new slogan, "one candidate, one vote." This would require a judgment about each and every candidate: Is he acceptable or is he not? This system has many other desirable properties and contrasts with the one person, one vote principle, which has gotten us into such deep trouble, particularly with the production of minority candidates. Approval voting could be implemented by statute. I have not seen a constitution which proscribes voting for more than one candidate, and I think it would solve a lot of the problems of multi-candidate races.

RONALD EASTMAN: This comment is a little off the point, but it's something that's often overlooked, and was this year. First of all, lawyers should educate the public about something concerning presidential elections. People complain about this conflicting, confusing mix of ballot access laws, and feel it's awful that a presidential candidate has to comply with fifty different ballot access laws. I don't know whether this is awful or not. The reason for it, however, is that article II of the United States Constitution delegates to each state the authority to regulate the ballot for President of the United States. It's part of the compromise that makes up the whole pattern of allocation of function between the states and the federal government, which is so fundamental to our Constitution. Secondly, we have to decide how much nostalgia we have for political parties. One alternative to approval voting and the selection of minority party candidates is the strengthening of political parties in this country. For years, the political party served as a

mechanism for winnowing out candidates. Political parties are agents of compromise and conciliation, helping people to come together and be a more effective political force in an election. For many of the reasons that people have addressed obliquely here today, political parties have been weakened. The state statutes which control ballot access, which have been especially criticized this year, are actually designed to foster the development and strengthening of political parties. The so-called "sore loser provisions" which George Frampton talked about are designed to prevent a candidate from having a second bite of the apple. It is really not that evil to prevent one who simply couldn't get his party's nomination from coming through another route. The rationale is to encourage the parties to assume their traditional role of winnowing out candidates. My observation is that the mix of laws isn't all bad.

**AUDIENCE QUESTION:** This is going back to our discussion on disclosure regulations, and the fact that we have competing policies of wanting to know who's giving to the candidates but not wanting, on the other hand, to inhibit the activities of small parties. What do you think of a proposal which would require disclosure only from candidates of parties that received twenty-five percent of the vote in the previous election? The figure could vary, but disclosing the names of the contributors would be based on a past percentage of the vote.

**THOMAS SCHWARZ:** Twenty-five percent of what? If you are dealing with one particular candidate, let's say in a congressional context, you are destroying the system of disclosure if you say that candidate *X*, who is not a candidate of a party that received twenty-five percent in the last election, need not disclose his funding. This could result in candidate *X* getting all sorts of funds from particular places that the voters would find abhorrent. Yet, he could be elected because he didn't have to disclose them. Obviously, he would have to disclose his contributors in subsequent campaigns.

**DEAN REDLICH:** It's a theory similar to the football draft; you give the benefit to the team that finished last.

**THOMAS SCHWARZ:** The Giants haven't been able to do anything with that!

**AUDIENCE QUESTION:** I would like to address some comments to the entire panel. I'm a political organizer, and would like to focus on the nuts and bolts of a political campaign. First, I think contribution limits are here to stay. That's reality. I believe there should be lawful coordination among independent expenditure groups, political parties, and candidate campaigns, if only because it is impossible to eliminate the coordination. Imagine the difficulty of entering a state and having to find out to whom I could and could not talk. These independent expenditure committees are not evil, but are made up of neighborhood people in an inner city who want some sort of vehicle to express themselves, to show the local and national candidates that

they have a voice. I worked primarily with professional political operatives. The people I met in the independent expenditure committees were among the few people I saw in the past eighteen months who actually believed in a candidate and worked hard. At five o'clock they came home, had a bite to eat, and then went to the local social club or local civic association in the inner cities. These independent expenditure committees would see me and say, "My God, you know, this guy is from Washington, he's from the Democratic National Committee." They would want to tell me all that they had done, and I'd say, "Don't tell me, I don't want to know." Or, "You can't do that, you no longer are allowed to do that." So they'd ask, "Where is the President going to be? We want to have a big demonstration in support." I'd have to say, "Sorry, I can't tell you. Read it in the newspaper." Not only is this ridiculous, but it's unfair to the people. The people are what elections are all about.

There's another problem resulting from overregulation of campaigns. I'm not an attorney, so I looked to the members of the legal committee to tell me what I could and could not do. Some of us are not so careful, however. I can give you an example of the consequences of this. I spoke to one labor union official, and he said, "I heard you need literature—it's the end of the primary season." I said, "Yes, we're running out of money and bumping the ceiling." He responded, "I have tons of literature that my union sent me from headquarters." I said, "Well, I can't use that, thank you." He said, "Don't worry. I know all about the internal communications garbage." He said, "Listen. All you have to know is the method of distribution. My international union used the proper method of distribution by giving it to me, since I'm a local union official." If he were to give me this literature, all I could do is throw it out. The problem is that we are spawning amateur lawyers, which I think is more dangerous than the proliferation of legitimate lawyers.

DEAN REDLICH: I assume you are saying that if we have independent and coordinated expenditures, they ought not be subject to any contribution limits. Because if not, then the contribution limit starts to become a little silly, doesn't it?

AUDIENCE RESPONSE: Of course. My point is that, to me, campaigns involve real, live people. The nuts and bolts reality is that bills have to be paid. You don't get sound equipment to drop out of the sky, you have to pay for it, just as you have to pay for literature, for printing, and for a rally platform.

DAVID IFSHIN: It's awfully hard when you're on the street to find any compelling evil out there. When somebody has posters or literature for a presidential candidate and you say, "You can hand them out to those people but you, over here, can't hand them out," you have a real tough time figuring out what evil is involved. The closer you get to the people who are in politics and the real activists who should be involved in campaigns, the

more and more bizarre it becomes. The worst job in the whole world is to be a lawyer in the campaign field office.

AUDIENCE COMMENT: But if you open this up to the grassroots groups, then aren't you also opening it up to the political action committees?

CHRIS HOCKER: You raise a really interesting point. We want to see people really getting involved in the political process the way they want to. They have no evil intent but may be guilty of violating some arbitrary regulation or limitation. Maybe the question to focus on is whether this kind of involvement is so healthy that we should dispense with coordination regulations, even if we have to put up with the NCPACs. Or, do we think the NCPACs are so dangerous that they must be monitored, even if it hurts the grassroots groups. Is this the price we must pay? I'd rather go with the first alternative.

AUDIENCE RESPONSE: But it seems to me that the purpose of the whole legislation, historically, has been to try and get a handle on big money—the fat cats and the evil influences. The PACs, I think, have become the fat cats of today. This is discussed openly in the Congressional Record. In the Obey-Railsback bill debate, Congresswoman Millicent Fenwick tells a story about voting on a particular issue. She asked a fellow Congressperson, "How are you going to vote on this?" He said, "Well, Millicent, I got \$50,000 from oil PACs, how do you think I'm going to vote on it?" And yet that's the same thing that people are being convicted of in Abscam.

CHRIS HOCKER: Does anybody here on the panel besides me think that PACs have arisen and become disproportionately influential because of some of these other limitations?

THOMAS SCHWARZ: Yes.

DAVID IFSHIN: Of course, labor PACs were there before the law. I think the *Pipefitters*\* case really has been ignored in this whole realm. It was the *Pipefitters* case in 1972 that answered a lot of questions about political action committees. The *Pipefitters* Court upheld the legality of PACs. Then, as part of a compromise to get the campaign finance laws through Congress, corporations were given the right to create PACs and to pay administrative costs. Independent committees then began to grow. I'm not sure, though, that you can place the whole blame for political action committees on the Federal Election Campaign Act. The PACs really preceded it, and other developments accelerated their growth.

THOMAS SCHWARZ: You can't place blame on any one factor. The limitation has caused a whole host of other entities to come into existence and to gain importance. PACs are one of them. Special interest groups are another. The

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\* *United States v. Pipefitters Local Union No. 562*, 407 U.S. 385 (1972).

question of whose ox is being gored should really be addressed, because this legislation was in great part a result of a revulsion towards what went on in the Republican Party of Nixon's time, and was supported in great part by an organization to which I belong, Common Cause. Common Cause is a liberal organization which is looking out for the common good, i.e., the small man, and therefore is attempting to get rid of the effect of big money, i.e., Republican big money. We ought to recognize that. And we ought to realize that that is part of the system. If Fred could be perhaps more objective about it, he would recognize that also.

In order to gain some particular advantage, we have thrown a monkey wrench into a system which hadn't worked too badly for two hundred years. The last two elections have been the ones in which we have really suffered. We have to ask ourselves, to paraphrase Ronald Reagan, "Are we really better off now than we were before this whole law came into effect?" I don't know the answer, but if the purpose of the exercise is to have a better government, a cleaner government, a government that is for the people, elected by the people, elected from leaders among our people, you have to wonder, is this thing really working? I, for one, am wondering.

**FRED WERTHEIMER:** The idea of public financing of elections was first suggested by a Republican president named Theodore Roosevelt in 1907.

**THOMAS SCHWARZ:** Yes, I know, Fred, but the fact is that the organization which promoted it was Common Cause. I don't say this critically because I also worked for Common Cause, and I take great pleasure in belonging to the organization. But I think we ought to face the reality of where it came from and why it's here now.

**STEVEN UHLFELDER:** I think there is some merit to the arguments about limits if you can limit the influence of PACs. I'm not sure that you can do that constitutionally, without doing it to everyone. I'd like to know where the money for campaigns is to come from if we don't have congressional financing, and if we restrain the PACs. Where do people get the money to contribute? What about those who aren't wealthy, or don't have access to money? Where is the money going to come from to run the campaign, particularly for congressional races?

**DAVID IFSHIN:** There have been alternatives proposed but they were discounted after the system went into effect in 1974. Maybe now it's time to think about them again. I discounted the idea of a voucher system. I thought that this administrative nightmare wouldn't work, but in light of the last couple of years, maybe it's time to examine it again. In the voucher system, each citizen gets a coupon.

**STEVEN UHLFELDER:** That's public financing.

**DAVID IFSHIN:** Well it is, but I might have fewer problems with a system in which each citizen gets a coupon worth five dollars and could then give it to

a candidate of his choice, which would be redeemable for money from the Treasury. Other systems might be more equitable. I don't think that eliminating the present laws and returning to the old system is that great an idea. However bad things are now, we must remember what preceded this law and the scams we went through during Watergate.

THOMAS SCHWARZ: I don't think we want to go back to that either, but the fact is that Watergate was one horrendous event perpetrated by evil people, and I don't think that we should assume that people are evil. It's not fair to compare the situation today to a known evil and say we are better off today. I'm not saying that you are wrong, but the comparison isn't very fair.

DEAN REDLICH: You have been a fine audience, and we will continue this discussion at the reception. Thank you.