A DECADE OF ELECTION LAW REFORM

REMARKS OF STEVEN J. UHLFELDER

This decade has been one of the most active in the history of election law reform. There have been dramatic shifts in public opinion about candidates, parties, and government itself. Of the four presidents who served between 1971 and 1981, one was forced out of office, while two others were rejected by the electorate. During this period, we have seen a substantial decline in the importance of our two major parties and a dramatic increase in the impact of political action committees (PACs) and other single-issue groups. We have witnessed the rebirth of organized religion's influence on politics. The "moral majority" recently claimed it has registered four million new voters and has activated ten million more. Even with the growing influence of single-issue groups, voter participation has declined from sixty-three percent in 1960 to fifty-four percent this year. During this period, we have also seen a substantial increase in the number of laws and ordinances enacted by citizen initiative; this has occurred at the voting booth, instead of in local councils and legislatures. In addition, state legislatures have attempted to insure that public officials do not violate the public trust by comprehensive enactments which require financial disclosure by candidates and public officials. Nonetheless, scandals and violations of the public trust by officials persist.

A brief summary of the significant events of the past decade may shed some light on what lies ahead. Perhaps the most significant event of this period has been the attempt by Congress to reform our election laws. Despite the recent attention paid in the past decade to federal election practices, regulation of elections is not a new phenomenon. The problems caused by the unrestrained flow of money to political campaigns were recognized by Congress in the early part of this century. In 1907, Congress passed the Tillman Act,[1] which was designed to inhibit political influence-buying and to protect shareholders by prohibiting the expenditure of corporate treasury funds for political purposes. A similar prohibition was extended to labor unions in 1943[2] and became part of the Labor Management Relations Act in 1947.[3] A provision of the 1940 Hatch Act[4] established a $5,000 limit on political contributions by individuals. That provision, however, was easily circumvented by candidates who set up multiple campaign committees, each of which was capable of receiving up to $5,000. Regula-

1. Ch. 420, 34 Stat. 864 (1907) (repealed 19-22).
2. War Labor Disputes Act of 1943, ch. 144, § 9, 57 Stat. 163, 167 (1943) (current version at 2 U.S.C. § 441b(a),(b)(1)(1976)).
3. Ch. 120, § 304, 61 Stat. 159 (1947) (current version at 2 U.S.C. § 4416(a),(b)(1)(1976)).
4. Ch. 640, 54 Stat. 767, 770 (1940).

tions requiring disclosure of campaign contributions and expenditures in congressional races were codified in the Corrupt Practices Act of 1925,[5] which required disclosure of contributions and expenditures only by congressional candidates. Their campaign committees, and those of presidential candidates were not covered. The 1925 Act, which remained the major attempt at election law reform until 1971, was seldom enforced.

The Federal Election Campaign Act of 1971[6] represented a reaction to the weaknesses of the Corrupt Practices Act, and it marked a turning point in American election law reform. Some believe that without this measure and its disclosure requirements, the illegal contributions to the 1972 Nixon campaign would not have been discovered.

The 1971 Act established more stringent reporting and disclosure requirements; candidates and committees receiving and spending more than $1,000 were required to report all contributions and expenditures over $100. The required frequency of reporting was also increased. The 1971 Act limited the total amount that could be spent in a campaign for federal office, as well as the amount that could be spent on the media. The Act further reduced the amount that a candidate for federal office could spend from his own financial resources. Congress also facilitated public financing of presidential campaigns by allowing taxpayers a one-dollar presidential campaign contribution checkoff.[7]

The 1971 Act did not eliminate the campaign abuses which led to its enactment. As a result, only two months after Nixon's resignation in 1974, Congress amended the Act,[8] thereby effecting the most sweeping changes in our election law history. These amendments to the Federal Election Campaign Act placed a ceiling of one thousand dollars on the amount an individual could contribute to the campaign of a candidate for federal office; established stringent expenditure ceilings for candidates and parties; attempted to regulate expenditures by independent non-affiliated committees; restricted contributions from PACs; established a system of public financing for presidential primaries; required candidates to establish central campaign committees to channel all contributions; retained strict disclosure requirements; and established an independent commission to regulate federal elections.

Shortly after its passage, the Act was challenged by Senators James Buckley and Eugene McCarthy. The Supreme Court's opinion in *Buckley v.*

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5. Ch. 368, §§ 304, 305, 43 Stat. 1070 (1925) (current version at 2 U.S.C. § 431 (Supp. IV 1980)).

6. Pub. L. No. 92-225, 86 Stat. 3 (codified at 2 U.S.C. §§ 431-55 (1976 & Supp. IV 1980)).

7. Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (current version at 26 U.S.C. § 6096 (Supp. IV 1980)).

8. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980)).

Valeo[9] is probably the most significant election law case in our history. The Court delicately tried to balance the first amendment rights of individual candidates and committees with the right of the government to insure integrity in the electoral process. *Buckley* selectively invalidated portions of the Act and its amendments. The decision upheld the contribution limitations, disclosure requirements, and public financing, but rejected the overall spending ceilings for non-publicly financed campaigns and the limitations on use of a candidate's personal funds. The Court also found that the government could not regulate independent expenditures made by committees not affiliated or associated with any candidate's campaign. Obviously, the case was not a clear victory for either side.

Whatever the far-reaching consequences of *Buckley* may be, its immediate effect was to force Congress to amend the existing law. After the Court decided *Buckley*, Congress passed a second set of amendments in 1976[10] which contained the following provisions: (1) individual contributions to political parties were limited to $20,000 per year, and contributions to other political committees were limited to $5,000 per year; (2) contributions by PACs to the parties were limited to $15,000 per year; (3) the amount that the Democratic and Republican Senate campaign committees may give to candidates was raised from $5,000 per election to $17,500 per year; (4) presidential candidates who accept public financing were limited in their use of personal funds to $50,000; (5) the FEC ruling in the Sun Oil[11] advisory opinion was modified to limit PAC solicitation privileges.

Since 1976, Congress has passed several other amendments,[12] many of which help to encourage volunteer and political activities. The most recent finance reform efforts, however, have focused on ways to limit the impact of PACs. Reformers argue that we must curtail their impact and "kick the PAC habit." In contrast, PAC defenders contend that this source of money is vital and should not be limited. Whatever the benefits and detriments of PACs may be, the reality is that they are here to stay.

Although PACs have existed in one form or another for decades, their number has increased dramatically in the past six years. From the beginning of 1975 to the end of December 1980, the total number of PACs rose from 608 to 2551. By far, the greatest proportional increase occurred in corporate and business-related PACs. Total business-related PACs increased from 248 in 1975 to approximately 1730 in 1980. In contrast, labor PACs increased from only 201 to 297 during the same period. Total PAC spending has likewise increased dramatically.

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9. 424 U.S. 1 (1976).

10. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, (codified as amended in scattered sections of 2, 18, 26 U.S.C. (1976 & Supp. IV 1980)).

11. F.E.C. Advisory Opinion 1975-23, 40 Fed. Reg. 56,584 (1975).

12. Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified in scattered sections of 2, 5, 18, 22, 26, 42 U.S.C. (Supp. IV 1980)).

Dependence on PAC money significantly affects political campaigns in several ways. Politicians have increasingly been forced to turn to PACs for money, rather than to their districts, the traditional source of funding. In addition, PAC pressures have caused elections to turn on very narrow issues rather than on politicians' positions on issues of general concern.

Recently, special interest PACs have been organized around single issues and have actively opposed specific candidates. A typical example is the "New Right" PAC, the National Conservative Political Action Committee (NCPAC). NCPAC was organized five years ago for the sole purpose of defeating a small group of liberal senators. One of the most interesting things about "New Right" groups such as NCPAC is not how much money they raise, but how they spend it. Much of NCPAC's funds are disbursed as independent expenditures, and are used to actively oppose specific candidates rather than to support candidates running against them. This year the negative spending efforts paid off: enough long-term liberal incumbents were defeated to produce a Republican majority in the Senate.

Despite their undoubted success and efficacy, the extent of PAC dominance in campaign finance is unclear. While PAC growth has been great, the total percentage of PAC contributions to Congress did not increase between 1976 and 1978. This may also be true for 1980. Moreover, the increase in business PAC contributions may be illusory; it could represent nothing more than a rechanneling of money previously given as individual contributions by corporations and executives. Even more importantly, it is not at all clear whether PAC dominance of campaign financing is the cause or merely a symptom of our campaign financing ills.

This uncertainty is an example of a more fundamental disagreement as to what the problems really are in our current election system. One obvious problem with the regulation of campaign finance is the effect of inflation on the cost of campaigning. Between 1976 and 1978, the total cost of congressional campaigns nearly doubled from $104.8 million to $199.4 million. It is estimated that costs in 1980 will be up approximately forty percent over 1978, bringing the total to approximately one million dollars for a Senate race and $200,000 to $250,000 for a House race. It is further estimated that the total funds spent on electing a president during the next two years will exceed $300 million. Some observers feel that inflation alone is reason enough to raise the individual campaign contribution limits. Proposals to remedy this situation include a direct increase in the individual contribution limit (up to $1,500 or $3,000), tying the limits to a "cost of campaigning index," and increasing the tax credit for individual contributions to encourage greater individual participation while reducing the impact of PACs. More substantial proposals have included extending public financing to congressional elections. Certainly, this would be a much welcomed improvement. It is unlikely, in light of the composition of Congress, that there will be any legislation mandating public financing for congressional elections in the near future.

Issues other than campaign finance must also be addressed. One important area is the role of the two-party system, particularly as it relates to single-issue groups and committees. Related to this question is the presidential primary process and its impact on party leadership and the nomination process. Another issue which deserves attention is the right of major candidates to receive free media time. Accordingly, this will require a review of the equal-time provision of the Communications Act.[13] The powers of the Federal Election Commission and the continued existence of the electoral college will likewise require consideration.

The road behind us seems long. In some instances, reform efforts have gone too far. It is important, however, that steps be taken to ensure that the electoral system remains competitive and strong. Campaign election reforms will not always guarantee the beneficial results desired; excessive regulation may in fact stifle competition and discourage participation in the campaign process. We must therefore proceed cautiously and judiciously, always remembering that our government and all of its institutions depend upon a sound and healthy electoral process.

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13. Communications Act of 1934, § 315, 47 U.S.C.A. § 315 (West 1977 & Supp. 1981).