CAMPAIGN UNDER SIEGE: REFLECTIONS ON ONE SENATOR'S DEFEAT

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I

INTRODUCTION

A. The Emergence of the Independent Spender

The 1980 election was marked by the entrance of a significant new participant in the electoral process: the independent spender.[1] Under the Federal Election Campaign Act,[2] (FECA) the independent spender is unhampered by the rules and regulations that affect everyone else. The independent spender is not limited in the amounts of money that can be spent[3] or by the effective constraints of reporting.[4] In a broader perspective, the independent spender is not subject to the "rules of the game" generally associated with American campaigning.

An independent expenditure under the FECA is spent in the election or defeat of a candidate and is made without the cooperation or consent of any candidate.[5] Constraints are placed upon groups in raising funds for independent spending[6] and responsibilities are imposed on such groups both to register and to report their income and expenditures to the Federal Election Commission if they receive or spend[7] certain threshold amounts. In spite of these minimal requirements, courts have been loathe to punish unregistered groups, acting in effect as independent spenders, which do not fall strictly within the statutory definition. In *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,*[8] a case involving a 1976 congressional race, the court took just such a limited view. A John Birch Society affiliate, Central Long Island Tax Reform Immediately (CLITRIM) published a bulletin listing Long Island Democrat Jerome Ambro's voting record on tax reduction.[9] The FEC filed suit against CLITRIM and the National Tax Reform Immediately organization (National TRIM), charging

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1. For purposes of this article, an "independent spender" is one who makes "independent expenditures," as defined in 2 U.S.C. § 431(17) (Supp. IV 1980).
2. 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980).
3. Buckley v. Valeo, 424 U.S. 1, 51 (1976).
4. Although there are statutory reporting requirements, 2 U.S.C. § 434(c) (Supp. IV 1980) (amending 2 U.S.C. § 434(e) (1976)), they have not been effective. *See* text accompanying notes 6-8 *infra.*
5. 2 U.S.C. § 431(17) (Supp. IV 1980).
6. 2 U.S.C. § 441a (1976).
7. 2 U.S.C. §§ 433, 434 (Supp. IV 1980).
8. 616 F.2d 45 (2d Cir. 1980).
9. *Id.* at 52.

both with violating, *inter alia,* section 304 of the Federal Election Campaign Act. This section requires any person making contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate in an amount exceeding one hundred dollars to file an information statement with the Commission.[10] More than a year later, the FEC proposed a settlement whereby CLITRIM would pay a civil fine of one hundred dollars. The Second Circuit resolved the issue by holding that the organization did not "expressly advocate the election or defeat" of Mr. Ambro.[11]

Federal campaign law depends for its enforcement on the assumption that candidates will watch each other and report infractions to the FEC. As a result of such scrutiny, candidates will be careful to comply with the law in order to avoid the potential costs of being accused of breaking it; this is especially true in this post-Watergate era, when the voting public seems to have a low tolerance for corruption of the political system.

The independent spender is less constrained by the fear of public censure. There is some concern that a heavy-handed independent expenditure campaign will elicit underdog sympathy for the candidate under attack, but there is also a recognition that the hostility that may be aroused will harm the group more than the opposing candidate. It is also true that some of the independent spenders are more concerned with removing someone from office than they are with electing a particular candidate. They are almost entirely issue purists. This was often the case in the 1980 Senate elections.[12]

Given the limited resources of the FEC and the length of time the regulatory agency takes to make a ruling after a complaint has been filed, the costs of infraction of the rules are minimal compared to the benefits. One state party chairman noted in 1978, "If we interpret things conservatively and the other side doesn't, we'll lose the election and they'll get a $5,000 fine next April."[13] If the individual or group spending the money is not running for office, the constraints on misrepresentation or other infractions of the rules are even more minimal. In the oft-quoted words of John T. Dolan, Director of the National Conservative Political Action Committee (NCPAC), a group like his "could lie through its teeth and the candidate it helps still stays clean."[14]

Given this advantage it is appropriate to consider the rationale for this apparent imbalance in the political process. The Supreme Court held in

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10. 2 U.S.C. § 434(e) (1976).

11. 616 F.2d at 52-53.

12. N.Y. Times, Jan. 11, 1981, at A12, col. 4.

13. Kayden, *Campaign Finance: The Impact of Parties and PAC's,* in AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972-78 4-19 (1979) (final report of the Campaign Finance Study Group, Institute of Politics, Harvard University, for the Committee on House Admin. 96th Cong., 1st Sess.).

14. N.Y. Times, May 31, 1981, at A1, col. 1.

Buckley v. Valeo[15] that dollar limits placed on independent expenditures "relative to a clearly identified candidate during a calendar year," imposed a direct and substantial restraint on the quantity of political speech,[16] and held this to impermissibly impinge on first amendment freedom of expression.[17] Independent political spending is thus equated, for purposes of constitutional protection, with political speech. A political justification for these expenditures has also been advanced. David Keene, a political consultant and advocate of independent expenditures, noted that independent expenditures are a reflection of the fact that the system—with the presidential campaign totally financed by the federal government and by necessity a closed operation—doesn't involve people who like to be involved; as long as people want to be involved in politics, they will be.[18]

The United States has a long tradition of relatively open participation in political campaigns. Recent campaign finance laws and technological developments have restricted much of the local activity. Campaigns used to provide a good deal of entertainment and motivation for supporters. Elections were also a vehicle for entrance into political life. They provided opportunities for proving one's self, and much of that proof depended on the free flow of activities. Restrictions—both intended and unintended—have recently forced campaigns to become increasingly centralized, limiting the opportunity for local participants to demonstrate their political ability. The question remains, however, whether independent activities are an adequate alternate route. Independent spending itself has tended to be almost as centralized as the campaigns themselves. The history and consequences of independent spending will help to clarify this point.

B. Independent Spending Prior to 1980

The liberation of independent expenditures by the decision in *Buckley v. Valeo,*[19] came in the spring of a presidential election year. In reaction to *Buckley,* campaign managers made every effort to discourage potential independent spenders from participating in or sponsoring campaign activities. Opposition to independent spending was based on a fear of "dirty tricks" being played by those with little responsibility, on the recognition that "external" groups could cause a backlash in the electorate and perhaps most importantly to the campaign managers, on the understanding that such expenditures were by definition uncontrollable.[20]

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15. 424 U.S. 1, 51 (1976).
16. *Id.* at 39.
17. *Id.* at 12-23, 39-51.
18. Remarks at conference at the Institute of Politics, Harvard University (December 1980).
19. 424 U.S. 1, 51 (1976).
20. X. KAYDEN, REPORT ON CAMPAIGN FINANCE: BASED ON THE EXPERIENCE OF THE 1976 PRESIDENTIAL CAMPAIGNS, 40-41 (1977).

On the whole, however, 1978 was a time of considering options and very little was done that could be considered controversial. Spending was largely in favor of candidates. In contrast to this traditional endorsement of a candidate, in 1979 NCPAC announced "Target 80," a program of independent expenditures designed to unseat five liberal Democratic Senators: Alan Cranston of California, Frank Church of Idaho, George McGovern of South Dakota, Birch Bayh of Indiana, and John Culver of Iowa.[21] To my knowledge, it was the first major salvo in the use of "negative" expenditures, spending aimed at defeating rather than electing candidates. Soon other right and New Right groups followed their example.

The NCPAC program called for the Washington-based organization and whatever field organizations they could mount to do the following: undertake a voter survey to establish the strengths and weaknesses of the senators, install a full-time field representative in each state to marshall the opposition, research and distribute the targeted incumbent's record to conservatives, coordinate free media programs against the senators, send letters to voters in each state to expose the liberal senators' "record of radicalism" and involve the recipient in the campaign, launch a paid advertising campaign to emphasize national defense and inflation (i.e., the issues deemphasized by the targeted senators), and recruit candidates to oppose the incumbent.[22] All resources developed during the independent campaign were at some point to be turned over to the candidates who were best able to represent the conservative viewpoint and who were deemed most likely to defeat the incumbent.[23]

As it happened, money was not the issue in the 1980 senatorial campaigns. Although far more was spent than ever before by groups such as NCPAC, the senators under attack were able to marshall their own supporters. Nevertheless, the exploitation of the new campaign finance laws by special interest groups such as NCPAC has become a major problem for candidates. The campaign of incumbent Senator Birch Bayh illustrates the counter-strategies candidates are forced to develop in response to the negative spending tactics of special interest groups.[24]

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21. There have been questions as to why NCPAC chose some of those they did. It has been suggested that Senator Alan Cranston was selected because so many of NCPAC's potential contributors live in California, and that Senator Edward Kennedy has been targeted for 1982 more because they can raise money against him than that they expect to unseat him.

22. N.Y. Times, Nov. 30, 1980, at A39, col. 1.

23. Undated NCPAC letter to potential supporters.

24. The Bayh campaign was selected because the author had studied the Senator's previous campaign for reelection in 1974, and she was invited back by the campaign manager, David Bochnowski. The return visit was made the last weekend before the election. It would not have been possible without the support of the Campaign Finance Study Group of the Institute of Politics, Harvard University. Section II is based on the author's personal observations.

II

STRATEGIES UNDER SIEGE: THE DEFEAT OF BIRCH BAYH

The issue of New Right political activity will be a topic of debate for several years to come, and liberal campaign activity may resurge in reaction to it. But whether attacks come from the right or the left, the issues will remain fairly constant for incumbent or regular party candidates.

In the case of Senator Bayh, the advance publicity and long-range nature of the NCPAC program, together with the 1978 defeats of Senators Dick Clark of Iowa and Thomas McIntyre of New Hampshire, provided ample notice to the Bayh campaign staff that independent spenders would be a serious threat to Bayh's reelection. Both Clark and McIntyre were defeated in upset elections by relatively unknown New Right candidates who had little regular Republican Party backing.[25] Interviews with campaign workers and observations during the most intensive period of attack, the last weekend before the election, revealed eight potential defensive strategies for the Bayh campaign: attacking the independent spenders head on; attacking out-of-state money and influence; linking independent spending with the opposing candidate; filing complaints with the Federal Election Commission; ignoring independent spenders and their messages; relying on surrogate attackers; anticipating last-minute attacks and allocating resources accordingly; and trying to convince the independent spenders that the attack was not worth the money, time and effort in the first place. These alternatives are explored below.

A. Attacking the Independent Spenders Head-On

NCPAC was the most visible independent spender against Birch Bayh, but it was hardly the only outside player in the campaign. Other independent groups advocating Bayh's defeat included Americans for Life, the National Right to Work Committee, Christian Voice, the Religious Roundtable, the Fund for the Conservative Majority, the Moral Majority, and specially created groups such as Ship Out Bayh, which relied on John Birch Society literature in its campaign. Of those groups opposing Bayh, only a few actually spent money in the state, and even fewer reported their spending to the FEC.

Campaign strategists felt that if Bayh responded to the New Right attacks, many of which were identical despite coming from different groups, he would have been forced to campaign on these groups' issues, instead of his own. Although a third-term senator would ordinarily be

25. M. BARONE, ALMANAC OF AMERICAN POLITICS (1980).

expected to run on his record and power in the Senate, Bayh's campaign staff decided that 1980 was not the year for this—a lesson his staff drew from the 1978 McIntyre and Clark defeats. Nor was 1980 the year for Birch Bayh to focus on issues such as abortion and New Right ideology.

Part of Bayh's problem was that he had opposed a constitutional amendment against abortion and other New Right issues. He was, after all, a liberal. To be charged with liberalism was accurate even if it was politically unfortunate in Indiana in 1980. In the past, Bayh's favorable personal ratings had carried him through several hotly contested races against very strong candidates. In 1974, he had based his campaign on his record of service to the state. His strategy was to emphasize his positive record and to avoid attacking his opponent. To engage in a negative campaign would have been personally difficult for the Senator, even if it had been politically advisable. During the campaign, polls in several of the states besides Indiana whose senators were under attack from the right suggested that attacking the New Right and the independent spenders might work, but it never seemed to be a realistic option given the politics and the personality of Birch Bayh.

B. Attacking Out-of-State Money and Influence

Attacking the out-of-state money and influence is similar to the first strategy; the difference is that the former approach focuses on the substance and the latter focuses on the process. One can quite easily call foul in this approach without bringing up sensitive substantive political issues. The 1980 race in Indiana involved more PAC money than any other senatorial race in the nation. Dan Quayle, the Republican candidate and eventual victor, ranked fourth in the nation in PAC contributions; Bayh ranked seventh.[26] Even though Bayh ranked high in terms of PAC contributions, his staff was careful to point out that most of this money came from organizations with close ties to Indiana. This was relevant in light of their charges that the New Right opposition was controlled by out-of-state interests.

There is, in fact, a serious issue emerging from the changes that have taken place in political contributions to congressional candidates. The amount of money has more or less stabilized, but the balance between individual and group money, the size of contributions, and the balance between in-state and out-of-state money are significant in understanding who and what the candidate represents—especially when candidates are self-chosen instead of selected by their parties. A typical Democratic campaign, for example, will gain most of its resources from individual donations, followed by committee donations. Outside the South, fifty percent of the

26. Common Cause Report, Sept. 1980.

committee donations usually come from labor.[27] Other funding sources are the candidate's own monies and party resources. Republicans are far more likely to benefit from party financing than are Democrats.[28] Moreover, the fact that the independent contributions to Bayh's opponent came largely from out-of-state sources raises questions about whose interests a senator from Indiana must respect.

The Bayh campaign did, at least once, attack the out-of-state influence. The Sunday before election day, the Bayh campaign held a press conference to refute literature distributed originally by Faith America and later by Bayh's opponent, Dan Quayle. Questioning in part the credibility of his opposition, Bayh's campaign director, David Bochnowski, asserted that the pamphlet, purportedly a scorecard on votes important to the New Right, "seriously and consistently misrepresented Senator Bayh's position."[29]

C. Linking Independent Expenditures with the Opposing Candidate

At the same press conference, the Quayle campaign was also charged with coordinating its activities with Faith America, a group which appeared to be violating federal election law. In fact, the Bayh campaign planned to file charges against Faith America with the FEC for these violations.[30] In addition, during the last few weeks of the campaign, literature was distributed by New Right groups which had appeared in identical formats under the auspices of the Quayle campaign. One example was a pamphlet distributed by the Indiana Right to Life Political Action Committee. Entitled "Who Cares About the Unborn Child?" it advocated the election of Quayle. The piece was a fold-out pamphlet with a grey border, blue headlines, and black print. A similar pamphlet with the same color printing but in a different size was later issued by the Quayle campaign. The Quayle pamphlet was practically identical in substance to the one distributed by the allegedly independent group. The regulations on independent expenditures prohibit independent groups from reproducing literature for purposes of distribution which was originally designed and issued by a candidate's campaign organization.[31] The converse is apparently not illegal: a candidate may reproduce literature originally published by an independent organization.

It is possible that an independent group may legitimately make a campaign contribution for the very purpose of producing literature, and both organizations may distribute the literature if the total cost does not exceed

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27. Schneider & Schell, *The New Democrats,* PUBLIC OPINION, Nov./Dec. 1978, at 10.

28. *See* Kayden, *Nationalizing of the Parties,* in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 257 (M. Malbin ed. 1980).

29. Press release, Birch Bayh for Senator Committee (Nov. 2, 1980).

30. *Id.*

31. 11 C.F.R. §§ 109-110 (1981).

the $5,000 maximum that a committee is allowed to contribute to a federal candidate.[32] Although very few groups have filed reports of independent expenditures with the FEC,[33] which suggests that independent spenders are actually ignoring the law, it further appears that many so-called "independent" groups are not independent at all.

In any case, the strategy of linking the opposing candidate to independent spenders is akin to traditional underdog strategies and may be effective if the candidate can show external influences and distortions. In the Bayh case, however, the issue of coordinated spending occurred quite late in the campaign and there were few opportunities for such a charge to have impact on public opinion. The goal of the Sunday press conference immediately before the election was to encourage the press to ask Quayle about links to independent groups and about his distortion of the issues.

D. Filing a Complaint with the FEC

It is so commonplace in American politics for one candidate to call the other a liar in one form or another that we have come to expect it and few take such charges seriously. Appearing aggrieved and deeply personally affronted is a classic pose for many politicians in the waning days of a campaign. One way to legitimize charges of unfair behavior is to file a complaint with the FEC and in so doing announce to the world that a particular candidate is willing to submit to an independent legal authority to assess the grievance. Appealing to such a neutral authority provides legitimacy, a valued commodity in political campaigns. The major strategic drawback, however, is that once a grievance is filed with the FEC, both sides are forbidden to talk about it.[34] Unless the press becomes interested and continues to investigate the charges, the alleged grievance will disappear from view, often until months after the election. An alternative approach is to announce that one is considering pressing charges with the FEC; this enables the candidate to use the issue for at least a short period of time. To my knowledge, no FEC or judicial ruling resulting from an FEC complaint has overturned an election. If the defendant in such a complaint was not even the candidate who won office, the plaintiff's "victory" would be even less significant.

E. Ignoring Independent Spenders and Their Message

Theoretically a candidate runs on the platform of what he or she can do for the constituency or the nation. The platform can be negative, in the

32. *Id.*

33. As of January 1, 1981 my research of the filings at the Federal Election Commission revealed that some independent spending groups I knew to be active in Indiana had not yet filed with the FEC.

34. FECA § 309(a)(12), 2 U.S.C. § 437g(a)(12) (Supp. IV 1980).

sense of "going to Washington to oppose those big spenders," but it is clearly designed to emphasize the candidate's strengths and, if possible, the weaknesses of the opposition. Clearly, in the Bayh campaign, responding to issues raised by the independent spenders would damage Bayh by emphasizing his disagreements with his more conservative constituents. No incumbent can be in total agreement with his electorate, especially if he or she serves a large and diverse district. Responding to New Right issues would negatively portray Bayh for a few voters while misleading many more about his concerns while in office. On the other hand, to ignore the New Right attacks as a matter of campaign strategy would require a candidate to refuse interviews on those issues and to base his campaign on different issues.

The defeats of Senators McIntyre and Clark were instructive to Bayh's campaign. Although McIntyre and Clark led their opponents in the early part of their campaigns, they lost ground and only began fighting back in mid-October. Bayh's staff believed that the defeated senators had recognized the threat of the independent spenders too late to compensate for their poor standing in the polls. The staff realized the importance of timing reversals in the polls. Thus, although Bayh's early strategy was to ignore the independent spenders and run a positive campaign, he expected to discard this tactic by the end of the first week in October.

F. Relying on Surrogate Attackers

It is usually easier to do battle in a just cause when that cause relates to the honor or character of another. This phenomenon has led to the strength of the independent spenders in the first place. It is not the challenging candidate who stoops to attack, or feels constrained by self-interest. By the same token, a surrogate used to counter the attacks of opponents aids the candidate under attack without making that candidate appear defensive.

Surrogates the Bayh campaign considered included Republicans, labor and business leaders, and ministers unsympathetic to the New Right and fundamentalist groups such as the Moral Majority. The Bayh staff tried to avoid using liberal groups or individuals so clearly identifiable as Bayh supporters that their counteroffensive would be predictable. The objective was to project legitimate outrage over the alleged offenses of the independent spenders. Characterizing these offenses in a particularly heinous way encouraged those normally not expected to support Birch Bayh to defend him on these special occasions.

The problem with the use of such surrogates is mobilization, because if the surrogates truly come from "the other side" they will be under considerable pressure not to respond publicly. On the surface, there would appear to be no reason for anyone to speak out, and undoubtedly the campaign was turned down at times by individuals Bayh had approached to act as surrogates. There were, however, two factors acting in Bayh's favor in the 1980 election: his long incumbency, which resulted in favorable relationships with

a wide array of Indiana civic leaders, and the controversial participation by independent spenders and fundamentalist Christians. Many established political and religious figures were more than a little concerned about these activities. Some were willing to speak out against them, even if that meant supporting a senator they would not have otherwise supported.

G. Anticipating Last-Minute Attacks

Because momentum was considered crucial in the 1980 election, the Bayh campaign gave much thought to the timing of their strategies and their opponents' strategies. Knowing that the independent spenders had left little time for momentum to shift toward McIntyre and Clark at the end of their campaigns, the Bayh campaign expected both Quayle and the independent spenders would sponsor a last-minute blitz against Bayh through direct mail appeals rather than through the media. If the blitz occurred the weekend before the election, there would be virtually no time to respond. The only possibility would be to quickly formulate a response and hope that they could afford sufficient media time to be effective.

The campaign staff was correct in expecting a last-minute blitz. They had not anticipated, however, the breadth of the attack. On the Sunday before the election, Greg Dixon, the leader of the Indiana Moral Majority, announced that fundamenalist ministers planned to hold a press conference on Monday to demand that Bayh make clear his position on homosexuality. Churches were leafletted with a Faith America pamphlet which distorted Bayh's position on an array of moral issues. All this was in addition to the regular mailings and media presentations of the Quayle campaign. While the Bayh campaign had reserved funds for a response, they were uncertain how to respond. Countering charges concerning Bayh's morality would require more than a last-minute denial.

H. Attempting to Convince the Potential Independent Spenders of the Futility of Their Efforts

One of the interesting aspects of the independent spending campaign undertaken by NCPAC was its visibility. NCPAC announced its program well ahead of the 1980 campaign, giving everyone advance notice. In making the attack public, NCPAC hoped to enhance its ability to raise funds. At the same time, however, NCPAC's announcement enabled those under attack to raise "counterfunds" and to consider strategies for convincing NCPAC that an attack would be fruitless. The Bayh campaign attempted to do this. According to campaign sources, the Bayh campaign relied on the *Baron Report,* a biweekly newsletter published by Alan Baron, a liberal political journalist read by many knowledgeable political activists of all political tendencies. The message Bayh sent to NCPAC through the *Baron Report* was that Bayh was strong in Indiana and that media time in Indiana would be very expensive for NCPAC. In March of 1980, Baron reported that Bayh

was comfortably ahead in the polls. Baron also projected that Bayh would probably make an issue of Quayle's family ties to the state's leading newspaper. In September, Baron was still reporting Bayh's strength with grassroots organizations and Bayh's successful in-state and out-of-state fundraising, despite Bayh's decline in the polls.[35]

For various reasons, including the Quayle campaign's request that NCPAC stay out, Target 80 considerably reduced its planned expenditures in Indiana. Unfortunately for Bayh, however, other groups similar to Target 80, in particular the Moral Majority, which was strongly organized in the state, were not similarly deterred.

III

CONCLUSION

Birch Bayh lost his bid for reelection to the United States Senate. He lost by significantly fewer votes than Jimmy Carter in Indiana (Carter lost by 400,000 votes; Bayh by 160,000), but there is no second place in politics. It is difficult to determine, however, whether Bayh lost as a result of the independent spending. There is some evidence to suggest that he did. On the Sunday before the election, the polls showed the candidates in a dead heat: forty-one percent for each; forty-four percent each if the "leaners" among the undecided were included. Bayh had come back in the polls, so there was a possibility the momentum would carry him to victory. The election, however, was not a close one. The activities of the Moral Majority throughout that last weekend may have made the difference. Sermons, telephone and door-to-door canvassing of church members, and leafletting probably had some effect. This was no shock troop appeal such as those we have grown accustomed to in presidential primaries where the faithful tread from state to state. This was one's neighbors and religious leaders applying the pressure. The argument can be made, but it cannot be proved.

Other factors may have also played a role in Bayh's defeat. The high inflation and unemployment rates seemed to hurt many Democrats at the polls. Moreover, Bayh was running for a fourth term, and no senator in Indiana history has been elected to four terms in office. In addition, many of Bayh's positions on social issues were more liberal than those of his constituents, and the combined impact of the Quayle campaign and the independent spending may have succeeded in emphasizing those differences to Indiana voters at a time when they seemed to matter more than the positive attitudes Hoosiers have held toward Bayh in the past.

The question remains whether independent expenditures have substantially altered American politics. Whether or not independent expenditures were decisive in Bayh's defeat, the expenditures clearly had an impact on

35. THE BARON REPORT (Mar. 11 & Sept. 29, 1980).

how he campaigned. Part of the nature of elections is that the impact of campaign activities is unknown until the votes are counted. Even then it is speculative to say that a particular activity made the difference.

The objections to independent spenders are many. Some argue that they have an "unfair" advantage in an election because they are unconstrained by the rules under which the candidates run. They have a greater potential impact on opinion formation because they appear to be a neutral element in an election, and, at least in the 1980 election, many independent spenders represented themselves as the voice of morality.[36] Independent spenders also damage the two-party structure of American politics because they make it impossible for parties to structure the compromises necessary to maintain a coalition of diverse interests, which is so crucial to governance. Their ad hoc and temporary nature conflict with the concept of parties, which requires a degree of restraint to make the party system stable and enduring. Moreover, when based on negative appeals, independent expenditures have a tendency to "miseducate" the electorate about the nature and function of government, thereby raising expectations which cannot be met, and in turn fostering frustration and alienation.

In addition to the questionable role of independent expenditures, objections have also been raised to the particular groups active in 1980, especially those epitomized by the Moral Majority. It is argued that the mobilization of this group under the banner of returning America to a higher moral climate will lead to a repressive, homogeneous, perhaps totalitarian society in which church and state are merged. The response is that liberal religious leaders have often played a role in American political life and they are opposing the Moral Majority and similar New Right groups on ideological and class grounds which have little to do with transgression of the separation of church and state. The issue is one of ethics and law: the New Right believing that America is in decline because we have strayed; the established churches and secular leadership believing that the greater danger lies in the linkage of religious dogma and public policy.

But are the activities of independent spenders new to American politics? Single-issue groups have littered American history, and they have often had a moralistic base: abolition, women's suffrage, and temperance groups are but a few. Sometimes the emergence of such groups signals inflexibility in the political system, and on one occasion, our inability to respond to such groups has led to civil war. The question remains whether limiting such groups would restore flexibility or increase alienation. What is new, however, is that the major party candidates have been constrained by recent campaign finance reform while the Supreme Court has held that few con-

36. Studies of opinion formation suggest that of the three elements in the development of an opinion (evaluation of the source, judgment of the source's position, and one's own position on the issue), the credibility of the source can be a significant factor in opinion change. *See* R. LANE & D. SEARS, PUBLIC OPINION 43-56 (1964).

straints may be placed upon independent expenditures because such limitations would abridge freedom of speech.[37] There is a presumption of fair play in elections, but it may be that, under these new rules, the independent spender has an unfair advantage. The question then becomes: what can or should be done about it?

The "can" question is the easier of the two. Clearly, nothing can be done to constrain the content of participation, but something can be done about the process. Independent spenders could be required to register their intent to campaign against a particular candidate with the FEC and with that candidate before independent expenditures are made. The failure to do so would result in a filing of charges against the group. This would help correct the absence of accountability of independent expenditures under the present rules. And of course there is also the option of removing some or all of the restraints imposed on the candidates.

Whether or not action should be taken against independent spending is a more ambiguous issue. One reason for the existence of independent spending is that campaign finance laws have restricted many who would like to participate actively in elections. In addition, independent expenditures are responses to very real issues in American politics; it is questionable whether the increased opportunity to participate is the cause of such participation. It may be that the impact of campaign finance reform has been to remove influence from the hands of the established interests and deliver it to some of the "disestablished." The consequence of this reversal of influence-wielding may impair the stability of the political system, but we cannot deny the effective extension of political participation as a democratic right.

In the aftermath of the 1980 election, it appears that independent spenders are a wild card in campaigns likely to grow even more unpredictable as economic, social, and political issues continue to grow more complex. Appearances, however, may be deceiving. Campaign organizations may learn to cope with being under siege. The evidence suggests that the ability of independent spenders to raise money against a candidate enhances opportunities for the targeted candidate to raise money. Money has been equated with first amendment rights, but money is not the issue. Answering the broader questions about the impact of independent spending on the political process will take time and experience. Those concerned with the strength of the two-party system will be particularly anxious during this period; the parties may be reduced to single-issue platforms through the influence wielded by independent spenders. Next time, it may be the parties, and not the campaigns, which are under siege.

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37. Buckley v. Valeo, 424 U.S. 1 (1976).