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Campaign Reform in New Mexico and First Amendment Limits

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CAMPAIGN REFORM IN NEW MEXICO AND FIRST AMENDMENT LIMITS

> During the whole time of the polling, the town was in a perpetual fever of excitement. Everything was conducted on the most liberal and delightful scale. Exciseable articles were remarkably cheap at all the public-houses; and spring vans paraded the streets for the accommodation of voters who were seized with any temporary dizziness in the head—an epidemic which prevailed among the electors, during the contest, to a most alarming extent, and under the influence of which they might frequently be seen lying on the pavements in a state of utter insensibility.
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> —C. Dickens, *Pickwick Papers*

Campaign abuses may be more subtle now than in Dickens' time, but the Watergate scandal and attendant revelations made it clear that they remain prevalent. Enormous campaign costs lead candidates to depend on large contributions. Contributors play on that dependence by expecting favors in return for their donations. The goal of financial disclosure laws is to allow the public to know who is supporting a particular candidate so that voters may take a candidate's financial backers into consideration when voting. If certain groups reap substantial benefits from an officeholder's actions, the public should be informed as to the extent those groups contributed to the candidate's campaign.

Statutory limitations on contributions are intended to lessen the investigative burden upon voters by prohibiting contributions large enough to give a donor excessive influence upon a candidate. Limitations on total expenditures would reduce a candidate's need for large contributions. Finally, government financing of campaigns would obviate entirely a candidate's need to rely on private contributions.

In the 1974 and 1975 sessions of the New Mexico Legislature several bills to reform state campaign finance laws were introduced. All were defeated. The legislature may have another chance in the 1976 session to pass a campaign reform bill. An interim Election Code Review Committee[1] has been appointed to draft a bill to be

1. Consisting of: Representative Appelman, Representative Berry, Senator Chavez, Senator G. Hansen, Representative Lucero, Representative Luna, Senator Rutherford.

introduced by way of the Governor's message.[2] Whether the Committee will complete its task, or whether the Governor will introduce such a bill remains uncertain.[3]

New Mexico is very much in need of new laws controlling campaign finance. Although the state has had some form of controls since its admission to statehood,[4] the present statute[5] requires little of candidates and contains innumerable loopholes. This Comment will briefly examine the New Mexico law and its defects. It will discuss possible provisions of a campaign reform bill in the light of constitutional objections to their validity.

PRESENT NEW MEXICO LAW

The New Mexico statute requires reporting of contributions and expenditures but places no limitations on either.[6] Reports must be made after the election to either the Secretary of State or the county clerk.[7] The name of a successful candidate who fails to report after a primary election will not be printed on the ballot[8]; a successful candidate who fails to report after a general election will not be allowed to assume office.[9] And a candidate or committee treasurer who fails to report is guilty of a petty misdemeanor.[10]

New Mexico law fails to attain the goal of full disclosure in a number of ways. A few of the more glaring loopholes follow.

1. Candidates themselves are required to report only their expenditures,[11] but are not required to report receipts. Such a provision will bring to light corrupt practices only if the candidate is honest enough to report expenditures of $1,000 to buy the votes of 40 derelicts or of $500 to an election official to stuff the ballot box. Reporting of expenditures is effective only if receipts are also reported so that the two amounts can be crosschecked for slush funds or other suspicious circumstances. Furthermore, reports of contribu-

2. Interview with Ruby Appelman, New Mexico State Representative, in Albuquerque, New Mexico, June 29, 1975.

3. Interview with Joan Ellis, Legislative Council Service, in Santa Fe, New Mexico, Sept. 2, 1975. The Committee held hearings on campaign reform in late August.

4. N.M. Laws 1912, ch. 63.

5. N.M. Stat. Ann. § § 3-19-1 et seq. (Repl. 1970).

6. N.M. Stat. Ann. § § 3-19-2, 3-19-4, 3-19-9, 3-19-11, 3-19-18 (Repl. 1970).

7. N.M. Stat. Ann. § § 3-19-5, 3-19-12, 3-19-21 (Repl. 1970). Reports by candidates must be filed within ten days after the election. N.M. Stat. Ann. § § 3-19-2, 3-19-9 (Repl. 1970). Reports by political committees must be made within thirty days after the election. N.M. Stat. Ann. § 3-19-18 (Repl. 1970).

8. N.M. Stat. Ann. § 3-19-7A (Supp. 1973).

9. N.M. Stat. Ann. § 3-19-13 (Supp. 1973).

10. N.M. Stat. Ann. § § 3-19-7 and 3-19-13 (Supp. 1973).

11. N.M. Stat. Ann. § § 3-19-2, 3-19-9 (Repl. 1970).

tions are important by themselves to identify for the public a candidate's supporters.

2. New Mexico does require political committees to report all receipts,[12] but contributions need not be made to a committee. Anyone can give money to the candidate, who can then pass it on to the committee, which will report a receipt from the candidate.

3. There is no limit to the number of campaign committees a candidate may set up. Although establishing a myriad of committees to support a single candidate does not necessarily defeat the goal of full disclosure, it makes voter investigation a much more bewildering task. Interested voters must add up all the figures and check between the various committees to find contribution totals. Most campaign reform legislation limits the number of committees.[13] This is more convenient not only for voters and for any enforcement agency, but also for candidates.

4. The statute defines a "political committee" as one organized for the election or defeat of a candidate.[14] Thus the statute might be construed as excluding a committee organized in a campaign for a primary election from the definition and exempting it from the reporting requirement.[15]

5. The statute does not set a date on which the reporting period for candidates is to begin.[16] Yet some candidates campaign for months or years before an election. If the reporting requirement begins when candidacy is formally announced, the campaign could have spent thousands of dollars before the candidate is required to begin reporting. Some definition of the word "candidate" is needed so that a person can have a clear indication of when that status is attained and when reporting requirements begin.[17]

12. N.M. Stat. Ann. § 3-19-18 (Repl. 1970).

13. Massachusetts limits a candidate to two committees. Barnhill, *Massachusetts Political Finance Laws–An Overview*, 59 Mass. L.Q. 235, 245 (1974). One "model" reporting law requires a candidate to designate one treasurer and one depository through which all campaign funds must pass. Rodgers, *A Model Bill on the Reporting of Campaign Contributions and Expenditures*, 23 Vand. L. Rev. 293, 306 (1970).

14. N.M. Stat. Ann. § 3-19-14 (Repl. 1970).

15. An attempt was made in the last session of the New Mexico Legislature to remedy the defect by defining a "political committee" as one organized for the *nomination*, election or defeat of a candidate. S. B. 398 (N.M.), 32nd Leg., 1st Sess. § 8 (1975).

16. Political committees must report receipts and expenditures for a period beginning ninety days before the election and ending on the day the report is filed. N.M. Stat. Ann. § 3-19-18 (Repl. 1970).

17. Massachusetts has one subjective test and three objective tests for determining who is a candidate. First, a candidate is anyone who intends to run for office. Second, a candidate is anyone who a) receives a contribution or makes an expenditure for the purpose of influencing his or her nomination or election for office, b) takes action necessary to qualify for nomination of election, or c) if an office holder, receives money or makes expenditures resulting from a fundraising activity. Barnhill, *supra*, note 13, at 236-7.

6. Since reports need not be filed until after the election, they are of no help to voters who want to compare candidates' financial supporters before deciding for whom to vote. Although general election voters may refer to financial statements from the primary when deciding how to vote, a candidate's primary election contributors may be very different from his or her general election contributors. And no such guidance is offered to voters during the primary campaign.

7. Reports are to be made to partisan elected officials rather than to an independent body.[18] A hungry watchdog appointed to guard a steak may keep everyone else away, but he may eat it himself. Even the most honest Secretary of State or county clerk may find it hard to be objective towards members of his or her own party and an unscrupulous official could render the law meaningless.

8. The enforcement provisions of the statute are inadequate. Election officials are not charged with bringing violations to the attention of the Attorney General or district attorney. There are no means of crosschecking figures through bank statements of a central depository. And the penalties—mainly petty misdemeanors—are very light for so serious an offense as attempting to subvert the election process. Winning candidates are subject to the penalty of losing their place on the ballot or their certificates of election, but as long as there is so little supervision over the veracity of reports, winning candidates need not fear punishment for what they turn in, as long as they turn in something.

In Bernalillo County, at least, little effort has been made by the County Clerk's office to verify the content of financial statements. The reports are filed as they come in, and no further attention is paid to them. A list of candidates who have failed to file is printed in the newspapers, but this sanction holds so little terror for candidates that many never turn in reports.[19]

POSSIBLE PROVISIONS OF A CAMPAIGN REFORM BILL

Two problems face drafters of a campaign reform bill. First, provisions must be chosen which will most effectively fulfill the goals of campaign reform. Second, although it is for the courts rather than the legislature to reject a bill because it is unconstitutional, careful drafting should minimize serious constitutional problems inherent in such statutes.

18. N.M. Stat. Ann. § § 3-19-5, 3-19-12, 3-19-21 (Repl. 1970).

19. Interview with Tenny Culp, Deputy Clerk for Bernalillo County, in Albuquerque, New Mexico, June 30, 1975. Ms. Culp noted that the financial statements for the last election were filed before the present County Clerk took office.

Any regulation of political activity is suspect under the First Amendment.[20] The guarantee of free speech was intended primarily to protect political acticity, to ensure a free flow of ideas throughout society and to invite the widest possible range of philosophical contribution to government.[21] Although campaign reform laws impose limitations on some political activity, they are also designed to give access to government to a greater number of people by reducing or eliminating special influence by the wealthy. A law's effectiveness in achieving that goal should count in its favor when it is challenged on First Amendment grounds. One court recently said of the federal campaign law, "There is a positive offset to . . . invocation of the First Amendment in . . . that the statute taken as a whole affirmatively enhances First Amendment values."[22]

Professor Emerson has proposed some guidelines for determining the constitutionality of regulation of political expression:

> [T]he burden of proof is on the proponents of the regulation to establish (a) that the control is clearly necessary to correct a grave abuse in the operation of the system and is narrowly limited to that end, and that this objective cannot be achieved by other means; (b) that the regulation does not limit the content of expression; (c) that the regulation operates equitably and with no undue advantage to any group or point of view; (d) that the control is in the nature of a regulation, not a prohibition, and does not substantially impair the area of expression controlled; and (e) that the regulation can be specifically formulated in objective terms and is reasonably free of the possibility of administrative abuse.[23]

But few effective statutes fit Professor Emerson's mold. Three courts have come to differing conclusions on the constitutionality of various provisions of campaign reform laws. Their analysis resembled Professor Emerson's "ad hoc balancing test"[24] in that they based their holdings on the necessity of campaign regulation to satisfy a compelling state interest and on the possibility of less restrictive alternatives. Both the Washington and Oregon Supreme Courts found the statutory limitations on campaign expenditures in their states unconstitutional.[25] The United States Court of Appeals for the

20. Bullock v. Carter, 405 U.S. 134 (1971); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

21. This theory is eloquently expressed in J. S. Mill, On Liberty (1849), and more recently in A. Meiklejohn, Political Freedom (1948).

22. Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975).

23. T. Emerson, The System of Freedom of Expression 634 (1970).

24. *Id.* at 717.

25. Bare v. Gorton, 84 Wash.2d 380, 526 P.2d 379 (1974); Deras v. Myers, Ore. 535 P.2d 541 (1975).

District of Columbia in *Buckley v. Valeo*[26] held that all the major provisions of the Federal Election Campaign Act of 1971[27] (FECA) and the Federal Election Campaign Act Amendments of 1974[28] (FECAA) were constitutional.[29]

Reporting of Contributions and Expenditures

Campaign disclosure laws are the most common and the least controversial constitutionally of the reform measures. As of August 1974 all but four states had enacted some form of disclosure law.[30] Disclosure requirements for federal elections, included in FECA, prompted Maurice Stans's hurried trip in late 1971 to collect contributions for Richard Nixon before the law went into effect.[31] Without the reporting requirement of FECA the notorious "slush fund" of the Committee to Re-elect the President might never have been revealed.[32] Reporting provisions are at the heart of the "Model State Campaign Contributions and Expenditures Reporting Law"[33] and the "Model State Statute: Politics, Elections and Public Office."[34]

To increase the effectiveness of their disclosure laws, some states have provisions to centralize receipt and disbursement of money. A candidate may be limited to one or two treasurers or committees.[35] All contributions and expenditures may be required to be made by the campaign treasurer.[36]

Items included in the reports should be detailed enough to give voters the desired information but not so detailed as to unreasonably inconvenience the candidate or treasurer. Federal law requires that

26. 519 F.2d 821 (1975).

27. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified in sections of 2, 18, 47 U.S.C.).

28. Pub. L. No. 93-443, 88 Stat. 1263 (1975) (codified in sections of 2, 5, 18, 26, 47 U.S.C.).

29. The Court in *Buckley v. Valeo* expedited its proceedings so that an appeal could be taken to the U.S. Supreme Court during the present term. 519 F.2d at 834-5. One of the plaintiffs in the case anticipates that oral arguments will be heard by the Supreme Court by the end of November. Speech by Eugene McCarthy, University of New Mexico School of Law, Sept. 28, 1975.

30. 32 Cong. Q. 2360 (1974). The four states without disclosure laws at that time were Idaho, Illinois, Louisiana and North Dakota.

31. C. Vernstein and B. Woodward, All the President's Men 55 (1974).

32. N.Y. Times, March 1, 1973, at 1, col. 2.

33. National Municipal League, Model State Campaign Contributions and Expenditures Reporting Law (4th draft 1961).

34. H. Alexander and J. Molloy, Model State Statute: Politics, Elections and Public Office (1974). The statute was drafted under the auspices of the Citizens' Research Foundation, an organization which has sponsored a number of studies on campaign finance. Their thoughtful analysis should be considered by drafters of proposed legislation.

35. *Id.* at § 304(c); Barnhill, *supra* note 13; National Municipal League, *supra* note 33, at § 3; Rodgers, *supra* note 13.

36. National Municipal League, *supra* note 33, at § 4.

reports of contributions include the name, address, occupation and total sum contributed by each contributor of more than $100.[37] Alexander and Molloy's model bill requires name, home and business address, occupation and social security number for each contributor of $100 or more.[38] New Mexico's present law requires "each sum," no matter what its size, received by a political committee to be reported with the date and the name but not the occupation of the donor.[39]

Commentators have questioned the constitutionality of forcing a contributor to reveal his or her identity.[40] They note the possible "chilling effect" on an individual's right of political expression which might result from fear of retaliation for contributing to an unpopular cause. The case most frequently cited to support this argument is *NAACP v. Alabama,*[41] in which the Supreme Court held that Alabama could not require the NAACP to provide a list of its members because members' fears of retaliation would inhibit the exercise of their First Amendment rights. One author considers *NAACP* inapposite because there was in Alabama at that time a "genuinely threatening atmosphere" which justified the members' fears, an atmosphere which is not present in the context of political contributions. Also, Alabama's interest in having the membership list of thyNAACP was less substantial than the public's interest in knowing the names of contributors to political campaigns.[42] Nonetheless, requirements that the identity of contributors be disclosed run afoul of what has been described as a "right to anonymity," which protects supporters of unpopular causes from fear of retaliation.[43]

The disclosure requirements of FECA have been challenged twice in federal courts on the grounds that the required disclosure chills the exercise of First Amendment rights. Both courts declined to decide the question absent concrete evidence of retaliation. The

37. 2 U.S.C. § 434(b) (Supp. IV 1974).

38. H. Alexander and J. Molloy, *supra,* note 34, at § 305(1).

39. N.M. Stat. Ann. § 3-19-19 (Repl. 1970). The statute requires that the name of the person from whom received be reported for each receipt. However, inspection of the financial statements filed in the county clerk's office in Bernalillo County reveals at least one report of anonymous gifts totaling $200.

40. *See* Ferman, *Congressional Controls on Campaign Financing: An Expansion or Contraction of the First Amendment?* 22 Amer. U. L. Rev. 1 (1972); Redish, *Campaign Spending Laws and the First Amendment,* 46 N.Y.U. L. Rev. 900 (1971).

41. 357 U.S. 449 (1958).

42. Rosenthal, *Campaign Financing and the Constitution,* 9 Harv. J. Legis. 359, 405 (1972).

43. *See Talley v. California,* 362 U.S. 60 (1960), *Shelton v. Tucker,* 364 U.S. 479 (1960), see also Note, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil,* 70 Yale L.J. 1084, 1111 (1961), Redish, *supra* note 40, at 924-932.

Pichler v. Jennings,[44] court relied on *Laird v. Tatum,*[45] in which the plaintiff claimed his First Amendment rights were chilled by Army surveillance. In *Laird* the Supreme Court held that the plaintiff's asserting his First Amendment rights by bringing suit indicated that he was not inhibited by the Army action. He therefore lacked standing to challenge the surveillance program. In *Buckley v. Valeo,* the court said,

> It may well be that a party (or candidate) can demonstrate such harassment to itself or to its supporters as to underpin a ruling that disclosure in particular circumstances cannot consitutionally be required. [Citing *NAACP v. Alabama*] . . . [C]ourts sit to act in such cases when presented with a proper record.[46]

The Supreme Court has not yet addressed the question of the constitutionality of FECA. However, in *Burroughs & Cannon v. United States,*[47] it did declare constitutional FECA's predecessor, the Federal Corrupt Practices Act of 1925.[48] The Act was not challenged on First Amendment grounds, but rather on grounds that disclosure requirements violated Article II, § 1 of the Constitution, by usurping State power to determine the manner of appointment of presidential electors.[49] The Court held the exercise of Federal power valid because the Act regulated [multistate] political committees beyond the power of the states to regulate adequately, noting,

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone . . . Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied.[50]

Burroughs has been interpreted as foreclosing inquiry as to whether

44. 347 F.Supp. 1061 (S.D.N.Y. 1972).
45. 408 U.S. 1 (1972).
46. 519 F.2d at 868.
47. 290 U.S. 534 (1934).
48. 43 Stat. 1053, 1070, Title III (1925) (repealed Pub. L. No. 92-225, 86 Stat. 3, § 405 (1972)).
49. "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ." U.S. Const. art. II, § 1.
50. 290 U.S. at 547-48.

there is a substantial connection between disclosure requirements and a compelling governmental interest.[51] The court in *Buckley v. Valeo* noted[52] that *Burroughs* was cited with approval in *United States v. Harriss,*[53] in which the Supreme Court upheld against a First Amendment challenge the validity of a statute requiring disclosure of contributions for lobbying. The Supreme Court could rely upon *Burroughs* and *Harriss* in holding the provisions of FECA constitutional. However, both cases were decided before First Amendment protection of a right of anonymity attained its present status.

Set against the individual's right of privacy, expression or association is the "public's right to know" which was held to be protected by the First Amendment in *New York Times v. Sullivan*[54] and *Red Lion Broadcasting Co. v. FCC.*[55] In *Sullivan,* the Supreme Court required that a public official prove actual malice before recovering damages for defamation. Otherwise, freedom of expression of opinion regarding official actions and the public's right to access to information and opinions about government figures might be inhibited. In *Red Lion,* the FCC's "fairness doctrine" was held constitutional in part, because, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience. . . ."[56]

A disclosure law may also be unconstitutionally overbroad for the purpose of preventing corruption, since not everyone who makes campaign contributions does so to obtain improper influence over a candidate. In *Talley v. California,*[57] the Supreme Court invalidated a California statute requiring that all handbills bear the name of the author. Although the governmental interest in preventing fraud was found to be substantial, the Court held that the statute was overbroad because it inhibited the speech of persons who did not have a fraudulent intent but who might fear expressing unpopular views if their identity were disclosed.[58] A statute narrowly tailored to achieving its purpose without unnecessarily impinging upon First Amendment rights is required.

51. *Pichler v. Jennings,* 347 F.Supp. 1061, 1068 (S.D.N.Y. 1972).
52. 519 F.2d at 864.
53. 347 U.S. 612 (1954).
54. 376 U.S. 254 (1964).
55. 395 U.S. 367 (1969). This balancing of interests was suggested in Note, *The Constitutionality of Financial Disclosure Laws,* 59 Cornell L. Rev. 345 (1974). It should be noted that the right to know cases are cited in arguing against the constitutionality of limits on campaign expenditures. See text accompanying note 81 *infra.*
56. 395 U.S. at 390.
57. 362 U.S. 60 (1960).
58. *See* Tussman and tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341 (1949).

For this reason, it is very important to choose a reasonable figure as the minimum contribution which must be reported. It must be low enough to include most of those contributors who might be seeking undue influence and high enough to exclude most of those contributors who are not. A high limit might also assure that those contributors who are reported are wealthy enough to be immune from retaliation.[59]

Most commentators agree that the $100 floor on contribution reports in the federal law is too low to survive a challenge for overbreadth.[60] The provision did, however, survive in *Buckley v. Valeo.* The court said:

> Since the individual contribution limit is set at $1000, disclosure limited to amounts in excess thereof would be tantamount to requiring those committing a crime to file reports of their offense. A disclosure law serves the function of informing the electorate, and must also function as an effective enforcement tool and loophole-closing device. Unless the disclosure threshold is set substantially below the contribution limit, patterns of giving (such as by all or most of the members of an interest group) will pass unnoticed. The legislature must have reasonable latitude as to where to draw the line.[61]

Regardless of the constitutionality of the $100 minimum in federal elections, such a provision would almost certainly be proper in a state legislator's or county official's campaign.

Limits on Contributions

Limitations on contributions are intended to prohibit large contributions which lead to undue influence and to minimize the effect that one person may have on the electoral process. The argument against the constitutionality of contribution limits is based on the premise that contributions are a form of political expression.[62] The contribution itself has been termed the "cognitive" element of the expression, and size of the contribution the "emotive" element. If the emotive element of expression is restricted, it is argued, the cognitive element will also be diluted because the two elements taken together constitute speech.[63] Cases such as *Tinker v. Des Moines Independent Community School Dist.*,[64] in which a student wore a

59. Rosenthal, *supra* note 42, at 406.
60. Ferman, *supra* note 40, at 28; Redish, *supra* note 40, at 931; Rosenthal, *supra* note 42, at 407 n. 167.
61. 519 F.2d at 865.
62. For a detailed analysis of this concept, see Ferman, *supra* note 40, at 8-12.
63. Ferman, *supra* note 40, at 23.
64. 393 U.S. 503 (1968).

black armband to protest the war in Vietnam, and *Cohen v. California,*[65] in which a young man wore an obscene message concerning the draft on the back of his jacket, are cited to show that the form of the expression may be as important as the expression itself.[66]

In response an analogy is drawn between contributions and expenditures and the activity regulated in the cases of *Saia v. New York*[67] and *Kovacs v. Cooper.*[68] Both cases dealt with the use of loudspeakers; their combined effect was to hold that while expression by loudspeaker could not be prohibited altogether, it could be limited to certain times and places. Professor Freund has said,

> We are dealing here not so much with the right of personal expression or even association, but with dollars and decibels. And just as the volume of sound may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.[69]

A dissenting opinion in *Buckley v. Valeo* replied directly to this argument:

> Dollars are *not* merely the functional equivalent of decibels. By regulating sound trucks through a noise ordinance, the Government was not regulating the *quantity* of speech; Mr. Kovacs could broadcast *as much and as often* as he desired. That is not the case here. Congress is attempting to limit quantity and frequency of speech, a wholly different situation for which *Kovacs* offers no support.[70]

Dollars may not be decibels, but they are certainly not pure speech. Along with money, the donor is giving the candidate the power to change that money into other items. Such a power can cause results as noxious as any loudspeaker. Limitations on contributions do not prohibit a donor from making a political expression, nor do they change the content of that expression. They merely reduce the volume. The governmental interest in *Saia* and *Kovacs* was the preservation of the public quiet. An interest in preserving the integrity of the electoral system should be even more compelling grounds for upholding a regulation of expression.

The court in *Buckley v. Valeo* held the contribution limitation constitutional by finding that it serves a compelling governmental interest, reducing excessive influences and that any restriction of expression is incidental.[71] The constitutional problems, however,

65. 403 U.S. 15 (1971).
66. Ferman, *supra* note 40, at 9.
67. 334 U.S. 558 (1948).
68. 336 U.S. 77 (1949).
69. Freund, *Commentary,* in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 72 (1971).
70. 519 F.2d at 916-17 (Tamm, concurring in part and dissenting in part).
71. 519 F.2d at 832.

were sufficient to persuade the drafters of the Citizens' Research Foundation's model bill to omit limitations of any kind.[72]

As with the floor on reporting of contributions, the amount of the contribution limit will be important in deciding the question of overbreadth. A high limit will allow individuals more flexibility in their choice of amount and will lessen the danger of restriction of political expression. But the higher the limit, the less likely it is to achieve its goal of equalizing influence. And the less likely it is to achieve its goal, the less justifiable any restriction of expression would be.

As of August 1974, 17 states had passed laws setting limits on contributions.[73] In 1974 Congress enacted the FECAA, which limits an individual's contributions to $1,000 per candidate per election and an aggregate of $25,000.[74] State limitations range from $600 in New Jersey to $150,000 in New York.[75] A common figure for states with low population and little industry such as Alaska and Vermont is $1,000. The limitations in the bills introduced in the last session of the New Mexico Legislature ranged from $1,500[76] to $3,000[77] for statewide offices and from $250[78] to $1,000[79] for other offices. One thousand dollars for statewide offices and $500 for other offices seem equitable, but the best figures would probably be found through a careful study of such factors as per capita income and past patterns of contributions.

Limits on Expenditures

The purpose of limiting expenditures is to stem rapidly increasing campaign costs and to give the opportunity of running for office to persons lacking substantial personal fortunes or party backing. In this regard it should be noted that the 1972 Congressional race for New Mexico's First District, neither a highly populous nor an unusually wealthy area, was the thirteenth most expensive Congressional campaign in the country.[80]

There are several theories which support arguments against the constitutionality of expenditure limitations. First, if a candidate's ability to spend is limited, his or her ability to communicate all the issues to all of the people is limited as a result, and the public's right,

72. H. Alexander and J. Molloy, *supra* note 34, at 7.
73. 32 Cong. Q. 2362-5 (1974) (Table of State provisions).
74. 18 U.S.C. § 608(b) (Supp. III 1973).
75. *Supra* note 73.
76. H.B. 102 (N.M.), 32nd Leg., 1st Sess. § 6A(2) (1975).
77. S.B. 263 (N.M.), 32nd Leg., 1st Sess. § 4B(1) (1975).
78. *Id.*
79. S.B. 331 (N.M.), 32nd Leg., 1st Sess. § 9A(2) (1975).
80. Common Cause, Campaign Finance Monitoring Project (1973).

recognized in *New York Times v. Sullivan,*[81] to be fully informed on all issues having to do with government may be affected. It has been suggested that present campaign advertising does not inform people of the issues and that limiting the expenditures might force candidates to rely more on informative programs than on 60-second "spots."[82] Although many contemporary political advertisements communicate little, it does not follow that less money will result in more information. And if the government rationale is that less money will promote more meaningful political information, the government is deciding what is worthwhile political expression, which may amount to influencing the content of the expression.

It is also argued that the fear that big money will buy elections is unfounded, since an election is influenced by many factors, of which money may be among the leas important. The restriction on political expression is therefore not balanced by sufficient benefit to the electorate.[83] The governmental interest in promoting a wider range of candidates may even be injured by expenditure limitations since a challenger may need a great deal of money to unseat an incumbent who has all the advantages of franking privileges, newsworthiness and party backing.[84]

On the other hand, it can be argued that, like limitations on contributions, limiting expenditures can be justified by a substantial governmental interest in allowing wider participation in the electoral process. It neither flatly prohibits speech nor changes the content of speech and may therefore be sustained against a First Amendment challenge.

Finally, some statutes require that a candidate and his or her treasurer have veto power over expenditures made by other persons on the candidate's behalf.[85] As the candidate approaches the ceiling on expenses, certain people will be absolutely barred from expressing their political beliefs either by donation or by expenditures on behalf of the candidate. This will also allow the candidate to veto expenditures by persons or groups whose support he or she does not want to publicize.

81. 376 U.S. 254 (1964). *See also, Red Lion Broadcasting Co. v. F.C.C.* 395 U.S. 367 (1969) and discussion of both cases in text accompanying notes 54-56, *supra.*

82. Note, *supra* note 55, at 361.

83. See the discussion on this point in *Deras v. Myers,* 535 P.2d at 546-8.

84. "Incumbents and those pursuing established policies . . . get less for each dollar than those seeking to challenge the status quo. . . . I am afraid that a limitation on the use of money in campaigns would be a way of institutionalizing a political cartel in this country." Winter, *Commentary,* in A. Rosenthal, Federal Regulation of Campaign Finance: Some Constitutional Questions 76 (1971).

85. Ore. Rev. Stat. § 260.154 (Supp. 1973); S.D. Comp. L. § 12-25-7 (1975 Rev.); Vt. Stat. Ann. tit. 17, § 2055 (Supp. 1975); Wyo. Stat. Ann. § 22.1-401 (Supp. 1975).

In *Bare v. Gorton,* the Court found Washington's statute limiting expenditures vague, but said that even were it not, the absolute prohibition on political expression after the expenditure limit was reached was a violation of freedom of speech.[86]

The Oregon Supreme Court, in declaring Oregon's expenditure limitation statute unconstitutional in *Deras v. Myers,* found the first two arguments persuasive, but based its holding on the third argument because the parties agreed that the statute limiting expenditures and the statute giving a veto over expenditures to the candidate were so intertwined that they had to stand or fall together.[87] The Court reasoned that the veto power created an absolute prohibition on the political expression of some people. Such a prohibition could not stand unless necessary to achieve a compelling state interest. Even a compelling state interest could not save the statute if less restrictive alternatives existed to achieve the same ends. The alternative the Court suggested is public subsidy of campaign expenses.[88]

There are several problems with the Oregon decision. First, the Court decided the case under the Oregon constitution and declared itself not bound by United States Supreme Court First Amendment decisions.[89] The Court's decision is susceptible neither to use as precedent in other states nor to United States Supreme Court reversal.

Second, the "less restrictive alternative" the Court suggests, public subsidy, has its own substantial constitutional problems.[90]

Third, Congress, in the FECAA, provided that political supporters could make donations or independent expenditures even after the candidate's expenditure limit had been reached. The candidate may receive a limitless number of contributions and may use money in excess of the expenditure limitation for any legitimate purpose, as long as its use is reported to the Election Commission.[91] This provision was cited by the court in *Buckley v. Valeo* in holding constitutional the FECAA expenditure limitations.[92] Furthermore, supporters may make independent expenditures "relative to a clearly identified candidate" up to $1,000.[93] This amount is in addition to the $1,000 limitation on donations and is not included in the candi-

86. 526 P.2d at 382.

87. Ore. at , 535 P.2d at 543.

88. *Id.* at , 535 P.2d at 549.

89. The Court says: "The cases relied on by defendant were tested under the federal constitution which . . . is not controlling where this court is of the opinion that our constitution should provide a larger measure of protection to the citizen." 535 P.2d at 549.

90. *See* text accompanying notes 96-102 *infra.*

91. 2 U.S.C.A. § 439a (Supp. IV 1974).

92. 519 F.2d at 860.

93. 18 U.S.C. § 608(e) (Supp. IV 1974).

date's expenditures. The Report of the Senate Rules and Administration Committee said of this provision:

> Limiting the amount of independent expenditure someone may make in support of a candidate, *but not counting* such amounts for purposes of the overall spending limit of the candidate, is the best compromise of competing interests in free speech and effective campaign regulation.
>
> It controls undue influence by a group or individual. Yet it avoids the dilemma of either giving candidates a veto over such independent expression or subjecting the candidate to the independent decisions of his supporters, even if he prefers using his permitted expenditure in other ways.
>
> Thus, the bill preserves to everyone some right of political expression, which they can undertake *regardless* of whether the candidate has already used up his permitted expenditures *and regardless* of whether the expression they wish to make on the candidate's behalf "fits in" with his campaign plan.[94]

The two FECAA provisions seem an adequate response to the criticisms expressed in *Bare v. Gorton* and *Deras v. Myers.* Similar provisions in a state campaign reform law might well allow the law to survive a constitutional challenge.

Thirty-two states and the federal government have enacted statutes limiting total campaign expenditures.[95] Although there are several different ways to compute the limitation, the most logical seems to be to allow a certain amount for each registered voter in the candidate's district. This method has a rational relationship to the campaign process in that a candidate in a more populous district has more people to reach and so needs more leaflets, more workers, and more media space. The amount per voter should depend on the media facilities available, the geographic size of the district, the availability of transportation and favored campaign methods.

Public Subsidies

Public financing of campaigns, either totally or by matching funds, through tax check-offs has been considered a more desirable means of equalizing the opportunity to run for office than are limitations on expenditures.[96] As a less restrictive alternative, however, it leaves something to be desired. If the subsidy is divided between the two major parties, it discriminates absolutely against minority parties.

94. S. Rep. No. 93-689, 93d Cong. 2d Sess. (1974).

95. 32 Cong. Q., *supra* note 73.

96. Ferman, *supra* note 40; Nicholson, *Campaign Financing and Equal Protection,* 26 Stan. L. Rev. 815 (1974); Comment, *Loophole Legislation–State Campaign Finance Laws,* 115 U.Pa. L. Rev. 983 (1967).

And if it is to be divided among all parties, how does one decide which is a real party and which a sham? The Supreme Court said recently, in a case where an indigent was not allowed to run for office because he would not pay the filing fee,

> This legitimate state interest [in limiting ballots to serious candidates with some prospects of public support], however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.[97]

The new federal law distributes money to minority parties on the basis of votes in past elections.[98] Such a system obviously perpetuates existing party structures. Furthermore, a defunct party could receive funds on the strength of an election four years before while a new, but growing party would receive no financing.

In *Buckley v. Valeo,* the court said of public financing provisions,

> We do not find them, on their face, to be invidiously discriminatory. At the same time, we recognize the necessity for all concerned to maintain a careful scrutiny as the provisions are implemented.[99]
>
> . . .
>
> We recognize that under this scheme pre-election funding will depend on figures almost four years old. But other devices which might have been chosen to make the figures more current have their own potential deficiencies.[100]

A state law, of course, can base its distribution of funds on electoral results every two years or oftener. The viability of third parties and independents will be easier to estimate on the state level. These factors should make the threat of discrimination against minority parties, at least as far as government financing is concerned, more remote.

The most equitable system is probably to allow the taxpayer to designate the party to which the contribution will go. There is still a problem with funds for which taxpayers did not designate a party. However, a division in proportion to the amount that each party has already received might be considered. One bill introduced in the last session of the New Mexico Legislature provides for a taxpayer check-

97. Lubin v. Panish, 415 U.S. 709, 716 (1974).
98. 26 U.S.C. § 9004(a) (Supp. III 1973).
99. 519 F.2d at 880.
100. 519 F.2d at 882.

off of one dollar to a designated political party.[101] Of course, such a scheme discriminates against those too poor to pay taxes.[102]

Other suggestions include giving vouchers to people which can be donated by them to the candidates of their choice and exchanged for government campaign assets, making available to the candidates free or less expensive access to the media[103] and reasonable franking privileges, and tax incentives to encourage a large number of small contributors.

Enforcement

Essential to the effectiveness of any campaign reform law is that the responsibility for enforcement be taken out of the office of an elected official and put into a nonpartisan or at least a bipartisan commission with extensive powers and a generous budget.

Plans of varying degrees of elaborateness have been proposed to ensure impartiality of the enforcing agency. In Massachusetts the state chairpersons of each political party, the state secretary, and the dean of a Massachusetts law school appointed by the Governor act as a commission to choose by unanimous vote a Director of Campaign and Political Finance.[104] The federal Election Commission has six voting members, two of whom are appointed by the Senate, two by the House and two by the President. And each body must appoint two members not affiliated with the same political party.[105] On the other hand, the Citizens' Research Foundation's model statute establishes a commission of five members, appointed by the Governor with the advice and consent of the state Senate. No more than three members of the Commission may be associated with the same political party, and none may hold elective or party office.[106] A bill introduced in the last session of the New Mexico Legislature would have set up a State Ethics Authority, consisting of three members appointed by the Governor and approved by the Senate. No member could be of the same political party as any other member.[107]

Penalties should be heavy enough to deter offenses. Denying a winning candidate his or her office should be effective if enforced.

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101. S.B. 36, 32nd Leg., 1st Sess. (1975).

102. Nicholson, *supra* note 96, at 851-52.

103. *But see Gore Newspapers Company v. Shevin*, 397 F.Supp. 1253 (S.D.Fla. 1975), in which a Florida statute, Fla. Stat. Ann. § 106.16 (1975), requiring newspapers to charge political candidates the lowest local advertising rate was declared unconstitutional on First Amendment grounds.

104. Barnhill, *supra* note 13, at 238-39.

105. 2 U.S.C. § 437c (Supp. 1975).

106. H. Alexander and J. Molloy, *supra* note 34, § 201.

107. S.B. 339, 32nd Leg., 1st Sess. § 1A (1975).

Some states have a similar provision for losing candidates in that they cannot hold elective, appointive or party office for a period related to the gravity of the offense.[108]

Fines in the amount of, or a multiple of, an illegal contribution or expenditure seem an equitable punishment.[109] As for other offenses, the penalty will vary with the gravity of the offense. But attempted subversion of the political process should be punished more severely than a traffic violation.

CONCLUSION

The heart of any campaign reform bill is reporting of contributions and expenditures. Reporting provisions also stand in the least danger of being unconstitutional. Drafters should, however, keep in mind the right of anonymity and the possibility of overbreadth and should provide a fairly high minimum on the contributions that have to be reported.

Although some legal scholars find limitations on contributions unconstitutional, no court has done so. The causal relationship between large contributions and undue influence is clearcut and can be justified as a regulation, not a prohibition, of political expression. The primary danger of overbreadth may be avoided by judicious selection of the maximum contribution.

The greatest problems are created by limitations on the total expenditures of candidates. Incorporation of provisions similar to those in the FECAA[110] protect a supporter's right to political expression, but the limitation on expenditures by the candidate

108. Kan. Stat. Ann. § 25-905 (1973); Md. Ann. Code art. 33, § 26-16 (Repl. 1971).

109. Tex. Election Code art. 14.05 (Supp. 1974) provides:

> (a) Any candidate, campaign manager, assistant campaign manager, or other person, who makes an unlawful campaign contribution or expenditure in support of a candidate shall be civilly liable to each opposing candidate whose name shall appear on the ballot in the next election after such contribution or expenditure is made for double the amount or value of such unlawful campaign contribution or expenditure and reasonable attorneys fees for collecting same.
>
> (b) Any candidate, campaign manager, assistant campaign manager, or other person, who makes an unlawful campaign contribution or expenditure not expressly supporting any candidate but opposing a particular candidate or candidates shall be civilly liable to each of such opposed candidates for double the amount or value of such unlawful campaign contribution or expenditure and reasonable attorneys fees for collecting same.
>
> (c) Any candidate, campaign manager, assistant campaign manager, or other person, who makes an unlawful campaign contribution or expenditure shall, in addition to any other penalties, be civilly liable to the State of Texas for an amount equal to triple the amount or value of such unlawful campaign contribution or expenditure.

110. *See* text accompanying notes 91-94, *supra.*

affects not only the candidate's freedom of expression, but the public's right to know. Added to this is the possibility that expenditure limitations will obstruct wider political participation rather than aid it. Drafters might be justified in relying on other methods to fulfill the goals of campaign reform.

Public subsidy also raises serious problems, but is not hampered by the same doubt of its effectiveness as expenditure limitations. A good faith effort to match the distribution of funds to the wishes of the public should render a subsidy provision constitutional.

The further away from Watergate the country gets, the less momentum the legislature will have to pass a campaign reform law. Legislators have claimed in the past that New Mexico does not need campaign reform because political scandals don't happen here. But, as the court in *Buckley v. Valeo* pointed out, it is as important to prevent the appearance of undue influence as to prevent the influence itself "in order to avoid the corrosion of public confidence that is indispensable to democratic survival."[111] A bill, and a strong bill, should be introduced and enacted in 1976.

ELIZABETH CUNNINGHAM

This term the United States Supreme Court issued an opinion in *Buckley v. Valeo,* 44 U.S.L.W. 4127 (U.S. Jan. 30, 1976), reviewing the FECA. The Court held the reporting provisions, the limitations on contributions to candidates and the provisions for public financing constitutional. The limitations on total expenditures by a candidate and on personal resources a candidate could use were held unconstitutional. The Court also struck down the section which limited independent expenditures directly related to a candidate's campaign on the grounds that such expenditures did not help campaigns enough to create undue influence and that such limitations were too great a burden on First Amendment rights.

State Senators Tom Rutherford and Willie Chavez introduced a campaign reform bill into the Second Session of the 32nd New Mexico Legislature which was substantially the same as the bill recommended by the Election Study Review Committee. The bill contained only reporting provisions, but closed many of the loopholes in the present law and was, as the Committee said in their Report, a first step towards campaign reform. At press time, the fate of the bill was undecided.

111. 519 F.2d at 841.