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Recommended Citation

Acker, Jordan. "Public Financing, George Bush and Barack Obama: Why the Publicly Funded Campaign Does Not Work, and What We Can Do to Fix It." American University Legislation and Policy Roundtable, Fall 2008, 59-66.

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THE LEGISLATION AND POLICY ROUNDTABLE



ELECTION LAW: LEGISLATION AND CONTROVERSIES

**VOLUME 1, ISSUE 1
FALL 2008**

Public Financing, George Bush, and Barack Obama: Why the Publicly Funded Campaign Does Not Work, and What We Can Do to Fix It²⁶³

Jordan Acker

I. Introduction

After the Supreme Court upheld the Federal Election Campaign Act in *Buckley v. Valeo*,²⁶⁴ the modern system for campaign finance was born; since the 1980 election, most presidential candidates have accepted some form of public financing. In order to understand why these campaigns took public financing, it is important to understand the previous system.

Prior to 1976

Prior to the enactment of the Federal Election Campaign Act (FECA), campaigns for President, such as anti-war Democrat Senator Eugene McCarthy's 1968 campaign,²⁶⁵ were generally funded by a small group of wealthy donors. However, the prime example of money-gone-amok in politics was the 1972 campaign of President Richard Nixon. From his first campaign for Vice President through his election in 1972, Richard Nixon battled campaign finance violations.²⁶⁶ The Committee to Re-elect the President (CREEP) allegedly, through

²⁶³ A special thank you to Kevin Barnett, Washington College of Law J.D. Candidate, 2010, for discussing ideas described in this paper.

²⁶⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976) (Upholding the constitutionality of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431).

²⁶⁵ Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 89 (2004).

²⁶⁶ That speech, broadcast in 1952, denied his wrongdoing in the management of a political fund. Contrasted to his speech regarding the campaign finance violations in Watergate, see *Nixon's Speech on Watergate Contrasts With Checkers Talk*, N.Y. TIMES, May 1, 1973, available at <http://select.nytimes.com/gst/abstract.html?res=F1091EF93D5C15738DDDA80894DD405B838BF1D3&scp=1&sq=Checkers%20Speech%201952&st=cse>.

Mexican banks, had been laundering illegal donations for years.²⁶⁷ The criminal convictions of several Nixon campaign officials, in large part, contributed to the enactment of FECA.

Public Financing of Elections: The Current Rules

Today, there are very different public financing rules for both the general and primary election. In the primary, if a candidate meets the requirements for public funding, the federal government will match up to \$250 of an individual's total contributions to an eligible candidate.²⁶⁸ In order for this to occur, candidates must adopt strict finance limits.²⁶⁹ In the general election, if an eligible candidate accepts public funding, he or she must cease fundraising after the conclusion of the primaries, and spend the public funding that the Federal Election Commission (FEC) grants them.²⁷⁰ This money covers all campaign expenditures, except for compliance issues.²⁷¹

II. Problems with the Current System

While the current campaign finance system is a major upgrade over the previous system, there are still two major problems. First, the current system discourages the participation of the majority of voters in the political process. Second, the current laws do not reduce the cost of running for President. With these issues in mind, I will briefly propose a solution that will continue the improvements brought on by the FECA and update the system for the 21st century,

²⁶⁷ See CARL BERNSTEIN & BOB WOODWARD, *THE FINAL DAYS* 138 (1976) (stating that while they were put on trial in New York, both Maurice Stans and Nixon's Attorney General, John Mitchell, were acquitted of all charges related to campaign finance, although Mitchell was eventually convicted of several Watergate-related charges).

²⁶⁸ Federal Election Commission, *Public Funding of Presidential Elections Brochure* (2008), <http://www.fec.gov/pages/brochures/pubfund.shtml>.

²⁶⁹ *Id.*

²⁷⁰ *Id.* (for the 2008 election cycle, the General Election Limit was \$84.1 million).

²⁷¹ Juliet Lapidus, *What's a "Compliance Fund?"*, SLATE, Sept. 12, 2008, <http://www.slate.com/id/2199935/> (stating that campaigns may break the finance rules in a general election for funding to "follow the rules" that is, to file reports, and for general Get Out The Vote operations).

using the 2008 Presidential election between Senator Barack Obama and Senator John McCain as a model.

*The Current System Limits Participation to a “Donor Class”*²⁷²

One of the major problems with the current system is that a small, relatively homogenous group of donors is responsible for a majority of the campaign donations in recent years. In 2004, while 51.3% of eligible voters cast ballots, the percentage that donated to presidential campaigns was much smaller.²⁷³ Nearly 70% of the money donated to current President George W. Bush and 63% of the funds raised by his Democratic opponent, Senator John Kerry, was given in donations between \$200 and \$2000.²⁷⁴ The numbers become even starker when considering that while only 13.4% of Americans earned \$100,000 per year, those Americans made 85.7% of the donations in the 2004 election.²⁷⁵ The Internet, however, has revolutionized the way candidates can raise money.

Two such examples in 2008 have been Democratic Senator Barack Obama and Republican Congressman Ron Paul.²⁷⁶ Obama has, through September, raised money from nearly 4 million people, averaging just \$100 per donation.²⁷⁷ Paul, despite low support in the polls, had a strong grassroots effort that catapulted him to the money lead in the first half of 2008.²⁷⁸ Indeed, the Internet has revolutionized the way candidates, especially Democrats, raise

²⁷² The inspiration for this section comes from the person I discussed this topic with, Professor Spencer Overton of George Washington University.

²⁷³ Overton, *supra* note 3, at 75.

²⁷⁴ Anne Gearan, *Supreme Court Eyes Campaign Finance Laws*, ASSOCIATED PRESS, Sept. 5, 2003.

²⁷⁵ Overton, *supra* note 3, at 75.

²⁷⁶ Andrew Malcolm, *News Shocker: Ron Paul Was Biggest GOP Fundraiser Last Quarter*, L.A. TIMES, Feb. 2, 2008 (stating that Paul, by “a Texas mile,” out-raised GOP frontrunners Romney and McCain).

²⁷⁷ Jonathan D. Salant, *Obama’s Fundraising Machine Still Rolling as Campaign Stays Coy*, BLOOMBERG, Sept. 13, 2008, <http://www.bloomberg.com/apps/news?pid=20601070&sid=auPofEVcBXrs&refer=politics>.

²⁷⁸ *Id.*

funds for elections. For example, in 2004, Howard Dean, the former Governor of Vermont, raised \$25.4 million, mostly in small donations (his average donation was under \$80).²⁷⁹

Kerry's opponent, George W. Bush, had a decidedly different tack in the primaries. Relying primarily on the "Bush Rangers," who would raise sums of \$100,000 or \$200,000 each, Bush was able to raise nearly \$260 million in his uncontested 2004 primary, money he had to spend before the 2004 Republican National Convention. Similarly, Senator Hillary Clinton took a similar fundraising tack in her failed 2008 bid for President. Clinton's 233 "Hillraisers," modeled after Bush's 2004 and 2000 plans, bundled contributions of \$52 million in the 2008 campaign.²⁸⁰ Like Bush's Rangers, a "who's who" of Republican politics and nineteen of whom became ambassadors, the Hillraisers were an amalgam of Clinton-era officials, the Hollywood elite, and wealthy Democrats.²⁸¹

The Cost Of Running For President Has Not Decreased

In 1972, Richard Nixon, running for reelection, raised an extraordinary amount of money, spending nearly \$60 million.²⁸² By today's standard, this is well over \$200 million.²⁸³ By 1992, well after the passing of FECA, Ross Perot, a Texas billionaire, spent nearly \$60 million, most of it from his personal fortune, in his quest for the White House.²⁸⁴ In the intervening years, however, the amount of money that was spent on the election skyrocketed. By 2004, when President George W. Bush ran for reelection, the amount of money both candidates would spend

²⁷⁹ Center for Public Integrity, *The Buying Of The President 2004*, <http://projects.publicintegrity.org/bop2004/report.aspx?aid=604>.

²⁸⁰ David Kirkpatrick, *Use of Bundlers Raises New Risks For Campaigns*, N.Y. TIMES, Aug. 31, 2007.

²⁸¹ Center for Media and Democracy, *Bush's Rangers*, (2004), http://www.sourcewatch.org/index.php?title=Bush%27s_Rangers.

²⁸² Center for Public Integrity, *The Buying Of The President: 1972*, http://www.buyingofthepresident.org/index.php/the_hanna_project/election_year/1972_nixon_vs_mcgovern/.

²⁸³ Lawrence H. Officer, *Measuring Worth*, <http://www.measuringworth.com/index.html> (using the Consumer Price Index). (last visited Oct. 12, 2008).

²⁸⁴ Elizabeth Kolbert, *Perot's 30-Minute Ads Defy the Experts, Again*, N.Y. TIMES, Apr. 19, 1992.

on the election was staggering.²⁸⁵ The President spent \$367.2 million on that campaign, or \$5.92 per vote.²⁸⁶ Meanwhile, John Kerry spent \$326 million on his campaign, or \$5.52 per vote. The total spent in 2004 was nearly \$718 million; in constant dollars, it was nearly nine times more than was spent on the 1980 election.²⁸⁷

The amount spent on elections in 2008 will be even more staggering. As of October 12, 2008, John McCain, Mitt Romney, Hillary Clinton and Barack Obama, the four major candidates for President, spent \$833 million, with nearly three weeks remaining until the election.²⁸⁸ It is highly probable that these candidates will eclipse the billion-dollar mark before election day. This staggering number will be reached despite McCain restricting his campaign to public financing after the Republican National Convention.²⁸⁹ His opponent, however, did not accept public financing, deciding, rather, to raise the funds to run for President himself.²⁹⁰

Senator Obama, for example, has raised a significant amount of money from small donors. The Obama campaign raised \$66 million in August 2008, from nearly 2.5 million donors, many of them, according to campaign manager David Plouffe, new donors to a presidential campaign. While the official numbers for September 2008 have not been released, David Axelrod, a senior strategist for the Obama campaign, claimed that 1.5 million new donors gave money in September, and the campaign announced that it had raised over \$150 million in September.²⁹¹

²⁸⁵ Federal Election Commission, *Electronic Filings*, (2004), http://www.fec.gov/finance/disclosure/efile_search.shtml.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Matthew Ericson, Griff Palmer & Aron Pilhofer, *Contributions to Presidential Campaigns*, N.Y. TIMES, Sept. 20, 2008.

²⁸⁹ Jeanne Cummings, *McCain Exits Money Race*, POLITICO, Apr. 21, 2008.

²⁹⁰ Michael Luo & Jeff Zeleny, *Obama, In Shift, Says He'll Reject Public Financing*, N.Y. TIMES, June 20, 2008.

²⁹¹ Chris Clizza, *Obama: The \$100 Million Man?*, WASH. POST, Oct. 13, 2008. See Michael Luo, "Obama Recasts the Fundraising Landscape," N.Y. Times, Oct. 19, 2008 (containing actual fundraising numbers).

These fundraising numbers have consequences around the “battleground” states. The Washington Post claimed that Obama was outspending his Republican rival “at nearly a 3 to 1 clip” in the week before the first presidential debate.²⁹² While spending an enormous amount of money, Obama jumped out to a sizeable lead just three weeks before the election. While there are other political factors as to why Obama had such a lead, it is clear that the infusion of cash, mostly through donations from the Internet, allowed Obama to spend significantly more money in more states than his Republican rival, allowing for advertising in such formerly safe Republican territory as Virginia and North Carolina.²⁹³ ²⁹⁴ Although the flow of money into politics has been, at times, nefarious, this election is somewhat different. While in the past, large sums of money were gained through Hillraiser or Ranger-style donating, the Obama campaign claims that their average donation is just \$86, and for them, like the Dean campaign in 2004, the Internet has revolutionized their fundraising ability.²⁹⁵ It seems that grassroots support, not big donors, is driving the Obama campaign’s fundraising efforts.

III. Getting Involved And Staying Involved: A Brief Solution to the Fundraising Mess

As demonstrated by the last three Presidential elections, significant changes need to be made in order to reduce the cost of presidential elections, and make sure that wide swaths of Americans, not small “Bush Pioneer”-style contributions, dominate a presidential campaign. For this, I have two recommendations: a tax voucher, in the amount of \$250, for individuals to donate to any presidential candidate who is on the ballot in his or her home state. The second

²⁹² George Stephanopoulos, *Obama Outspending McCain 3 to 1 in Battleground Ads*, ABC NEWS, Oct. 8, 2008, <http://blogs.abcnews.com/politicalradar/2008/10/stephanopoulo-7.html>.

²⁹³ Ben Smith, *Spending By State*, POLITICO, Oct. 8, 2008.

²⁹⁴ By “Red,” I am referring to states that voted for George W. Bush in 2000 and 2004. For a complete map of “Red” and “Blue” states in 2004 and 2008, see <http://www.electoral-vote.com/>.

²⁹⁵ Dan Morain & Doug Smith, *Obama’s Fundraising Prowess Exposes Flaws In Law*, L.A. TIMES, Oct. 9, 2008.

reform that should be undertaken is that donation limits should be capped at \$500 for the general election, forcing candidates to raise a significant amount of money from small donors.

The second reform would eliminate the current public “lump sum” financing system, and create a system similar to the matching funds in the primaries. However, unlike in that system, there would be no limits on spending in each state. However, the amount that could be donated to each campaign would be lowered from the \$2300 current limit. This would allow middle class Americans to fund more of the presidential campaigns. Through Obama’s 2008 campaign and Howard Dean’s 2004 campaign, we have learned that the Internet has allowed “average” Americans to have a major impact on the Presidential elections. With all candidates forced to raise money in small amounts from the majority of Americans, it is likely that the candidates would spend less time appealing to special interests and more time appealing to the issues that would get them more money raised from average Americans.

The third and final change I would make in order to lower the cost of elections, especially the cost of advertising, would be to provide tax incentives for TV and radio stations to reduce the cost of advertising for political campaigns. These tax incentives would then be passed on to the campaigns themselves, allowing them to spend less money on paid advertising and more money on “Get Out The Vote” and field operations. These operations, unlike advertising, are more dedicated to increasing the amount of voters.

IV. Conclusion

While the public financing system has made great advances over the last forty years, it is still flawed. A truly equitable finance system, unlike the current system, would greatly increase

the public's input and awareness of the political system, forcing politicians to truly fulfill

Lincoln's mantra of government "by the people." 