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Campaign Finance: The Impact on the Legislative and Regulatory Process

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CAMPAIGN FINANCE: THE IMPACT ON THE LEGISLATIVE AND REGULATORY PROCESS

JOHN B. ANDERSON*

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INTRODUCTION

During a Senate campaign more than four decades ago, revelations of a \$5,000 contribution offer to Senator Karl Mundt of South Dakota precipitated a Senate investigation. At that time, Congress was considering legislation dealing with the regulation of natural gas. The discovery of the contribution offer ignited such a furor that it prompted President Eisenhower to declare he would veto any bill relating to natural gas regulation enacted under a cloud of suspicion.¹ He carried out his threat, and it was another

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1. During that era, reporting of contributions was non-existent. To his great honor, a

decade before Congress finally enacted legislation deregulating natural gas at the wellhead. Since that time, as the costs of campaigns have increased, the fear that campaign contributions will destroy the integrity of the legislative process has grown.²

In 1997 and the upcoming year, the focus on, and controversy over campaign contributions continues.³ Although the final figures from the 1996 campaign are difficult to assemble because many contributions are still being discovered and returned,⁴ it is generally accepted that between 1992 and 1996 there was a veritable explosion in campaign spending at all levels, especially in federal races.⁵ One study estimates that contributions during these four years rose thirty-three percent – from \$1.6 billion to \$2.2 billion.⁶

The impact of campaign finance on the regulatory process is a new twist. The regulatory role of the federal government was extremely limited a century ago. In fact, except for the Interstate Commerce Commission (ICC), very little state or federal regulation of business existed during the period that gave birth to the age of *Lochnerism*⁷ and *laissez-faire* econom-

Senator who received a contribution in the form of cash in an unmarked envelope from an anonymous donor, promptly made public what he believed was an attempt to influence his vote.

2. See Ellen S. Miller and Micah Sifry, *Move Over Big Money*, WASH. POST, Apr. 7, 1997, at A17. The authors point out that, during the 1896 presidential election, the fabled Chairman of the Republican National Committee, Mark Hanna, raised some \$7 million in direct contributions from banks, insurance companies, railroads, and other large business interests to help William McKinley defeat William Jennings Byran. *Id.* They assert that in terms of 1996 dollars the amount would equal approximately \$150 million. *Id.*

3. Senate Majority Leader Trent Lott (R-Miss.) has agreed to take up the issue of campaign finance reform in March of 1998. See Helen Dewar, *March Deadline Set for Senate Campaign Finance Bill: Compromise Clears Way for Votes on 'Fast Track' Authority, Amtrak, and FDA Legislation*, WASH. POST, Oct. 31, 1997, at A4. The issue of campaign finance reform has taken on a new twist. The focus is now on campaign contributions emanating from foreign governments and non-U.S. citizens. See Susan Schmidt, *House Panel to Begin Hearings on Campaign Finance Abuses*, WASH. POST, Sept. 11, 1997, at A10.

4. Hearings on 1996 fundraising abuses were suspended in October of 1997 by Senator Fred Thompson (R-Tenn.), Chairman of the Senate Governmental Affairs Committee. See Edward Walsh, *Fund-Raising Hearings Are Suspended in Senate; With Change in Deadline Unlikely, Probe Effectively Ends*, WASH. POST, Nov. 1, 1997, at A1. Senator Thompson, however, stated that if additional hearings were necessary he would reconvene the Committee. See *id.*

5. See Eric Pianin, *Money Machine: The Fund-Raising Frenzy of Campaign '96; How Business Found Benefits in Wage Bill*, WASH. POST, Feb. 11, 1997, at A8 (noting that in 1996 "corporate PACs showered House and Senate candidates with more than \$77.5 million — more than twice as much as they spent a decade ago....").

6. See Miller & Sifry, *supra* note 2, at A17.

7. *Lochnerism*, a term derived from the Supreme Court case *Lochner v. New York*,

ics. Today, in contrast, the regulatory role of the federal government is pervasive, indeed massive; prompting the flow of campaign contributions and generating louder calls for reform.⁸

It is obvious that what seemed to be an attempt to buy congressional votes during the Eisenhower era, involved corruption of the legislative process, not the regulatory or administrative process, at least not directly. With the rapid growth of the administrative state since World War II, and the explosive expansion of the regulatory process in such new fields as the environment, international trade and commerce, and telecommunications, regulations have become the intense object of interest and attention by lobbyists and contributors who formerly concerned themselves mainly with the legislative process. It is one thing to corrupt a non-elected government official with a bribe and quite another matter where the *quid pro quo* for favorable action on legislation favored by the campaign donor is a contribution from his company's political action committee (PAC).⁹

I. WE CANNOT SURVIVE WITHOUT CAMPAIGN FINANCE REFORM

In a recent interview, Professor Archibald Cox, Former Solicitor General and famed Watergate Special Prosecutor fired by then President Richard Nixon, was asked the following: "Do you think we'll see meaningful campaign finance reform soon?"¹⁰ His reply included this chilling indictment of our present system of campaign financing: "We can't survive as a self-governing people if it doesn't happen."¹¹

I begin with this statement because it was the cover-up of Watergate and

198 U.S. 45 (1905), encompasses the idea that freedom of contract was a substantive element of due process. Both federal and state governments were barred under the due process clauses of the Fifth and Fourteenth Amendments from interfering with the employer-employee relationship unless the laws reasonably related to the safety, health, morals or general welfare of the public. Some 200 state laws and federal regulatory efforts were declared unconstitutional during the three decades that this doctrine prevailed. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW – PRINCIPLES AND POLICIES* 482 (1997). *But see* *Nebbia v. New York*, 291 U.S. 502 (1934) (signaling departure from *Lochner* approach to social legislation).

8. See Cass R. Sunstein, *Congress, Constitutional Moments and the Cost-Benefit State*, 48 *STAN. L. REV.* 247 (1996) (discussing failure of 104th Congress to reform federal government's regulatory system in meaningful way).

9. A story that has made the rounds in Washington about the late Senator Russell Long (D-La.) who was, for many years, Chairman of the Senate Finance Committee, may be apocryphal. Senator Long is reported to have observed that when a campaign contribution is made to a member of a committee before whom a legislative matter of concern to the donor is on the current agenda, the line between a contribution and a bribe becomes vanishingly small.

10. *Conversation with Archibald Cox*, *HARV. L. BULL.*, Summer, 1997, at 10.

11. *Id.*

its connection with illegal fund-raising activities and disbursement of hush money out of campaign coffers that threatened the very foundation of our constitutional government a quarter of a century ago. Now, twenty-five years later, we are again in the deep throes of congressional hearings.¹² This time we are examining the charges and countercharges of both major political parties regarding the raising of campaign funds for the 1994-1996 federal election cycle, especially in the November 1996 presidential race.

The voting public's deepening cynicism towards the explosion of campaign spending is apparent. The most costly presidential race in history turned out, in percentage terms, the lowest voter participation since 1924.¹³ Such a statistic challenges the legitimacy of our form of self-government — one that boasts the world's oldest democracy — a government where it is the people who decide.

II. ONE MAN, ONE VOTE: A HOLLOW MOCKERY

This brief contribution to the Anniversary issue of the *Administrative Law Review* is dedicated to the memory of the late Judge J. Skelly Wright of the District of Columbia Court of Appeals who wrote for the majority in the 1975 decision *Buckley v. Valeo*.¹⁴ In *Buckley*, the court of appeals upheld the Federal Election Campaign Act's (FECA)¹⁵ limitations on the amount of campaign contributions a campaign could receive.¹⁶ Judge Wright later authored an article discussing that decision.¹⁷ In this truly remarkable epistolary of his intellectual journey toward his position — that the valid principle of "one man, one vote" was becoming, in his words, a "hollow mockery" — he makes reference to the views of Alexis de Tocqueville and Jean-Jacques Rousseau.¹⁸ Both understood the linkage between genuine democracy and a self-governing democratic form of government; that they not only intersect, but flow together in a stream made up of an enlightened and energized citizenry, whose tides carry us forward toward a goal of ever increasing liberty. As such, in expressing my views, I shall use their words.

Tocqueville, reflecting on his travels through America in the 1830s,

12. See Sandra Sobieraj, *Clinton Presses for Reform on Campaign Fund Raising*, MIAMI HERALD, Sept. 14, 1997, at 4A (quoting President Clinton as saying that recent campaign finance debate presented "a time of testing").

13. Curtis Gans, *Pollyanna's America*, WASH. POST, Aug. 6, 1997, at A19.

14. 519 F.2d 821 (D.C. Cir. 1975), *rev'd*, 424 U.S. 1 (1976).

15. 2 U.S.C. §§ 431-41 (1994).

16. See 519 F.2d at 843.

17. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609 (1982).

18. See *id.* at 627.

mused:

[T]he principle of the sovereignty of the people hovers over the whole political system of the Anglo-Americans....Each individual forms an equal part of that sovereignty and shares equally the government of the state....Let us suppose that all the citizens take a part in the government and that each of them has an equal right to do so. Then no man is different from his fellows, and nobody can wield tyrannical power; men will be perfectly free because they are entirely equal, and they will be perfectly equal because they are entirely free. Democratic peoples are tending toward that ideal. That is the completest possible form of liberty on this earth.¹⁹

Perhaps even more telling, as Judge Wright marshals his arguments for political equality, is his reference to John Rawls, a political philosopher of the Twentieth Century, who observed that when wealth comes to control the political process, the exercise of political equality by the people is impossible.²⁰ Rawls, stated:

The liberties protected by the principle of participation lose much of their value whenever those who have greater private means are permitted to use their advantage to control the course of public debate. For eventually these inequalities will enable those better situated to exercise a larger influence over the development of legislation.²¹

Pluralists, of course, would argue, or at least suggest, that the legislative process, which stands *in loco parentis* to the regulatory process through enabling legislation, does not represent individuals.²² While there is a great measure of truth in that statement, it does not, in my opinion, detract from the conclusion that today interest groups are using money as their chief weapon to achieve those compromises.²³ For the most part, the goal of

19. *Id.* (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 49 (J.P. Mayer, et al., eds., 1966)).

20. *See id.* at 629-30.

21. *Id.* at 630 (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 225 (1971)).

22. *See* Phillip P. Frickey, *Legislative Processes and Products*, 46 J. LEGAL EDUC. 469 (1996) (discussing different theories of legislative process, with particular criticism of traditional pluralist model). Rawls argued that instead citizens organize into diverse and cross-cutting interest groups, which, in turn, pressure legislators into reaching compromises.

23. In March 1979, I testified before the House Administration Committee, and delivered a verdict on the effect of PACs on the financing of federal election campaigns. I stated: The manner in which congressional elections are currently financed is a national disgrace. Special interests view campaign contributions as a way to buy into the office of a present or future member of Congress....A major source of [the public's] distrust comes from the changing way in which our campaigns are being financed. More and more political action committees...are being created and are involving themselves in congressional elections. Their pattern of contributions, largely to incumbents, is what causes public cynicism....It is becoming a system of purchasing access and the expectation of legislative favors, and its time for change.

Hearings on H.R. 1 and Related Legislation Before the House Administration Comm., 96th

greater political equality is simply not on the bargaining table during the compromise process.

Often the power of money channeled through interest groups is not designed to achieve compromise. Rather, the current campaign finance system is designed to achieve stasis — inaction which will not disturb the *status quo* of those who are fairly well-off and intend to keep it that way. The proof lies among the thousand of bills that flood the hopper in the House but never see the light of day, let alone debate and discussion, nor are they intended to. A subsequent section of this Article makes it clear that in fighting its bitter rear-guard action, the tobacco industry is fighting against, rather than for, further legislation and regulation.²⁴ The same conclusion could be drawn from the millions of dollars business, labor, and other interest groups contribute to campaigns.²⁵

A number of legal scholars, led by Professor Ronald Dworkin of New York University School of Law, have signed a statement calling for the reversal of the Supreme Court's decision in *Buckley v. Valeo*,²⁶ which held that political campaign expenditures are protected as free speech.²⁷ The statement reads in part:

We believe that the *Buckley* decision is wrong and should be overturned. The decision did not declare a valuable principle that we should hesitate to challenge. On the contrary, it misunderstood not only what free speech really is but *what it really means for free people to govern themselves*.²⁸

If there is any doubt about the principle enunciated in Mr. Karpinski's

Cong. 216 (1979) (statement of Representative John B. Anderson).

24. See discussion *infra* Part V.

25. Union experience with PACs arose when labor leader John L. Lewis established Labor's Non-Partisan Political League and continued with the Committee on Political Education (COPE). See Edwin M. Epstein, *Business and Labor Under the Federal Election Campaign Act of 1971*, in *POLITICS, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS* 110 (Michael J. Malbin ed., 1980). Business became involved with PACs primarily after 1972 as a reaction to FECA. See *id.* at 110-11. Prior to its enactment, "[t]here was little need for business PACs; money from business-related sources could enter in almost unlimited amounts in the form of individual contributions by wealthy persons affiliated with corporations and other business organizations." *Id.* at 111. For a history of PACs in the United States, see Edwin M. Epstein, *The Emergence of Political Action Committees*, in *POLITICAL FINANCE* 159 (Herbert E. Alexander ed., 1979).

26. 424 U.S. 1 (1976).

27. See *id.* at 19, n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.").

28. *Free Speech and Campaign Finance Reform: Hearings Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 105th Cong. (1997) (statement of Gene Karpinski, Executive Director, United States Public Interest Research Group) (emphasis added).

statement — that money has a crowding out effect in the legislative and regulatory processes as candidate and office-holders are flooded with cash — there is further proof. Donald F. Fowler, the former Democratic National Committee Chairman, recently testified before the Senate Governmental Affairs Committee that he arranged access to officials at the highest levels of government on behalf of some of the Democratic Party's largest donors.²⁹ His calls even included a call to the Central Intelligence Agency on behalf of an international oil financier, who had given a total of \$300,000 to various party organizations, and who was seeking support for the construction of an international oil pipeline in Central Asia.³⁰ Mr. Fowler expressed his bland acceptance of responsibility for his actions and said, "I believe it wholly appropriate for the head of a national party to secure a meeting for a supporter with an administration official and to advocate a worthy cause."³¹ Proof also lies in the oft quoted assessment given by the President's former Deputy Chief of Staff, Harold Ickes: "Washington is basically about power, access, and influence."³²

It is, of course, the Supreme Court's decision in *Colorado Republican Federal Campaign Committee v. F.E.C.*,³³ that enabled the executive branch to become so heavily involved in raising campaign funds during the most recent federal campaign cycle. In *Colorado Republican*, the Supreme Court created a loophole in FECA by holding that political parties have a First Amendment right to both receive and make unlimited independent expenditures on behalf of a candidate.³⁴ As a result, both major political parties are soliciting "soft money" contributions, instead of "hard money" contributions.³⁵ Allegedly, during the 1996 elections, both presidential and congressional candidates crossed the line between "soft money" and "hard money."

One man, one vote refers to more than a constitutional standard based on equipopulous voting districts. Our voting rights jurisprudence for the past four and one-half decades has clearly embraced the proposition that there are other ways in which an individual's right to vote can be debased and

29. See David E. Rosenbaum, *1996 Democratic Chief Admits Arranging Access for Big Donors*, N.Y. TIMES, Sept. 10, 1997, at A1.

30. See Rebecca Carr, *Ex-White House Aide Vividly Recounts ... Being Pressured on Big Donor's Behalf*, 55 CONG. Q. WKLY. REP. 2194 (1997).

31. Rosenbaum, *supra* note 29, at A1.

32. Francis X. Clines, *Still Offstage: Ickes Has Star Billing at Hearings*, N.Y. TIMES, Sept. 11, 1997, at A24.

33. 116 S.Ct. 2309 (1996).

34. See *id.* at 2317.

35. Soft money is a term applied to contributions donated directly to a political party which is later distributed to party candidates, while hard money is the term applied to expenditures made to support a specific individual's campaigns.

suffer dilution. Chief Justice Warren, writing for the majority in *Reynolds v. Sims*,³⁶ made it clear that economic or other group interests are not permissible factors in departing from the one man, one vote requirement for districts which must be equal in size from the standpoint of population.³⁷

The evidence is simply overwhelming that the economic and individual interests who furnished the massive amounts of these funds have enabled major parties and their candidates to address their particular issues with an unprecedented use of the paid media. This has shaped and controlled the course of public debate by literally drowning out opposing views. This development has served to make a mockery of the idea of one man, one vote.

III. THE LEGISLATIVE AND REGULATORY OR ADMINISTRATIVE PROCESS

A. *The Effect*

There is an abundance of anecdotal evidence that the effect of campaign contributions is to sway members of Congress to support positions that are contrary to their constituents' best interests. Former Representative Dan Hamburg of California, who ran two expensive races for the House of Representatives,³⁸ wrote an amazingly candid article about the cause and effect relationship between contributions and the legislative process.³⁹

For example, in exchange for the maximum allowable contributions from a union PAC, Representative Hamburg attended a White House meeting and argued for more money for infrastructure in the budget — a seemingly innocent request.⁴⁰ Yet, he honestly conceded that his request included the freeway-widening project for which union leaders were having difficulty getting funding, and had expressly lobbied him for just the day before.⁴¹

Representative Hamburg represented a district with numerous wineries that would routinely give large checks to candidates. When, in 1993, the Clinton administration considered raising taxes on alcohol to balance the budget and cut the deficit, the vintners had little difficulty connecting with, and influencing, Representative Hamburg's judgment.⁴²

Representative Hamburg further recounts that when the United Parcel

36. 377 U.S. 533 (1964).

37. *See id.* at 580 ("Citizens, not history or economic interests cast votes.").

38. Money spent in each campaign totaled approximately one million dollars. *See* Dan Hamburg, *Inside the Money Chase*, NATION, May 5, 1997, at 23, 25.

39. *Id.* at 23-25.

40. *See id.* at 23.

41. *See id.*

42. *See id.* at 24.

Service (UPS) faced problems with a bill on air transit fees which was before his committee, the company also influenced his judgment:

The UPS lobbyist meets you at the door of your office as you're returning from the floor (lobbyists have an uncanny knack for finding members and waylaying them). He states his case. He's a nice guy, he sounds authoritative on the subject. You're inclined to say, "[f]ine I'll be glad to support your position" or at least, "I can't say how I'll vote but I think what you say has a lot of merit." The fact that this person handed you two checks for \$5,000 over the past months certainly helps seal the deal.⁴³

I can relate to that, of course, from my own personal experience of many years past,⁴⁴ in an era when, although the financial costs of campaigns were a fraction of what they are today, the same temptations existed. One recollection involving a former colleague, who shall go unnamed, stands out in my memory. The roll was being called on an agricultural bill involving increased price supports for dairy farmers. My friend represented an entirely urban area; a large city whose residents would feel the results of a favorable vote on the legislation in the form of higher milk prices at the supermarket. He lamented to me, "how can I not vote for this bill when the milk producers' lobby just gave me \$5,000 for my next campaign?" He did vote for the bill, it became law, and his constituents paid the higher prices. This was not, and is not, uncommon.

Some years ago a citizens' lobby, Common Cause, then headed by Professor Archibald Cox, whose remarks on the need for campaign finance reform began this Article,⁴⁵ published an article discussing the plight of many members of Congress who must spend exorbitant amounts of money to get elected and rely on PACs to bail them out.⁴⁶ Members must borrow, quite literally, hundreds of thousands of dollars to run for Congress, and publicly admit their inability to pay off that indebtedness during the term for which they were elected.⁴⁷ It is these debt-burdened members who attract the interests of PACs. As an example, in a letter of invitation to a debt retirement fundraiser for a newly elected member of Congress — a member of a committee vital to their interest — top officials of the defense industry openly welcomed the member as a "valuable ally."⁴⁸ The cause and effect

43. *Id.*

44. The author served ten terms in the U.S. House of Representatives from 1961 to 1981.

45. *See supra* Part II.

46. Peter Overby, *Run Now, Pay Later: Burdened with Campaign Debt, New Lawmakers Quickly Learn to do Business, Washington style*, COMMON CAUSE, Mar./Apr. 1991, at 14.

47. *See id.* at 14-15. For example, in the 102d Congress, the combined indebtedness of freshmen members totaled nearly \$3.1 million. *See id.* at 14.

48. *Id.* at 16.

connection with the legislative process is abundantly clear. There is very little subtlety involved here. The indebted candidate had clearly taken positions favorable to maintaining a high level of defense expenditures. He was now in a strategic position to shape legislation to that end. By hosting this debt retirement party, an implicit bargain of this continued financial support was being struck.

All of these are examples of how unlimited campaign contributions shape the legislative process to the detriment of constituents. The effect becomes clear to individuals who see that money makes the decisions rather than concerns over a district's best interests.

B. *The Cause*

1. *EPA Regulations*

More recently, the battle has raged over whether regulations promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act are so draconian in their impact on industry as to be economically disastrous.⁴⁹ The new limits on smog and emissions of particulate matter could have a dramatic effect on auto-makers, truckers, petrochemical companies, and utility companies, especially those located in the Midwestern states who rely heavily on coal. Even before the regulations were announced, all of these groups stated that Congress would be one of the chief targets in their efforts to delay, limit, or kill the new regulations.⁵⁰ Such efforts are recognized and may have an effect. Even in hailing the new regulations as a victory for cleaner air, a lead editorial in the *New York Times* acknowledged, "the battle now shifts to Congress, which has the power to overturn the new regulations. Industry lobbyists are out in force and the administration will need all its weapons to resist them."⁵¹ It is understandable that environmentalists have repeatedly expressed their fears that as regulations evolve those who have cultivated relationships with the regulators will get better seats at the table.

It is clear that the administration will need to have its weapons ready in order to combat foes such as the Midwestern and Southern utilities that burn soft coal and give soft money. In the 1996 election cycle, these organizations' PAC and soft money contributions totaled over \$6.65 mil-

49. See Air Quality Implementation Plans; Approval and Promulgation; Various States; Air Quality Planning Purposes; Designation Areas, 62 Fed. Reg. 34,405-23 (1997) (to be codified at 40 C.F.R. pt. 52).

50. See Heather Dewar, *Clinton Backs Tougher Air Standards: Industries Say They'll Fight Proposed New Rules in Congress*, MIAMI HERALD, June 26, 1997, at A6.

51. *A Victory for Cleaner Air*, N.Y. TIMES, June 26, 1997, at A26.

lion.⁵² John Dingell (D-Mich.), the former chairman, now ranking minority member, and still extremely powerful member of the House Commerce and Energy Committee, was the largest single recipient of their contributions, receiving a total of \$69,000.⁵³ To be sure, the air pollution regulations have drawn the ire of Mr. Dingell, a forty-three year veteran of the House from a Michigan district in the environs of the "Motor City," who has been able to keep his seat precisely because he is an acknowledged and indefatigable spokesperson for the automobile industry.⁵⁴ Mr. Dingell has already elected to support legislation that would delay the proposed EPA rule for four years.⁵⁵ In addition, he has remarked that "the [new rule] will not improve the air but will have an appalling effect on investment."⁵⁶ Further, automobile manufacturers and dealers gave a total of \$4,191,365 in the 1996 election cycle to Mr. Dingell, as well as other leading congressional opponents of the EPA regulations.⁵⁷

Other powerful opponents of the EPA regulations who use campaign contributions to shape the political process are found in the business community. In particular, the National Association of Manufacturers stated that the opposition will continue lobbying Congress in an attempt to force a showdown with the Clinton administration over the issue.⁵⁸ Its membership umbrella includes some of the most powerful industry and trade groups in the country, all of whom are fully capable of mustering the financial muscle to affect targeted campaigns.

2. Labor Regulations

Regulations issued by the Department of Labor on Ergonomics also proved to be a controversial issue in the 104th Congress.⁵⁹ These regulations sought to effect changes in the workplace so that workers interact more efficiently and safely with the equipment they use.⁶⁰ The UPS, wor-

52. See NANCY WATZMAN, ET AL., *CASHING IN: A GUIDE TO MONEY, VOTES, AND PUBLIC POLICY IN THE 104TH CONGRESS 15* (1997) (discussing special interests and their respective campaign contributions).

53. See *id.* at 15.

54. See Cindy Skrzycki, *GOP's Best Shot at Curbing EPA: A Democrat Named Dingell*, WASH. POST, July 18, 1997, at G1, G8.

55. *Id.* at G1. See H.R. 1984, 105th Cong. (1997) (creating four-year moratorium on establishment of new standards for ozone and fine particulate matter under Clean Air Act and its 1990 Amendments).

56. Skrzycki, *supra* note 54, at G8.

57. See WATZMAN, *supra* note 52, at 18.

58. See Dewar, *supra* note 50.

59. Ergonomic Protection Standard, 60 Fed. Reg. 23,572-73 (1995) (proposed May 8, 1995).

60. See *id.*

ried about the regulations' possible effect on their competitiveness, despite the linkage of the regulations to the health and safety of workers,⁶¹ lobbied extensively against them. At the same time, UPS increased its contributions to congressional candidates, becoming one of the top contributing PACs registered with the Federal Elections Commission (FEC).⁶²

3. *Technology Exports and Foreign Contributions*

Technology exports, the subject of extensive regulation by the federal government, have come under scrutiny as a result of our electoral process. The United States Department of Commerce is heavily engaged in export promotion for which there is a very important constituency in this country. At the same time, the Department of Commerce is the enforcement arm of the government, regulating sensitive technology. Several recent technology control decisions by the Department of Commerce have come under attack by Republicans in light of the Clinton campaign's alleged receipt of foreign campaign contributions.

Specifically, in May 1997, the Chairman of the House Judiciary Committee, Representative Henry Hyde (R-Ill.), referred to what he alleged were "questionable decisions" made by the Department of Commerce in approving the sale of American technology to China.⁶³ It was alleged that foreign, rather than domestic, contributions were influencing congressional action and the regulatory process.⁶⁴ Foreign contributions are, of course, illegal, whether to a presidential campaign or to campaigns for the House and Senate. Nevertheless, the inquiry made by Chairman Hyde, "whether improper outside influence was brought to bear on administrative officials — including the President — and if that influence...resulted in decisions and policies that have liberalized the transfer of defense related technologies" was accompanied by the request "that [these allegations] receive full

61. A government report shows that UPS had more penalty violations under the Occupational Health and Safety Act than any other federal contractor. UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, OCCUPATIONAL SAFETY AND HEALTH: VIOLATIONS OF SAFETY AND HEALTH REGULATIONS BY FEDERAL CONTRACTORS, GAO-HEHS-96-157, at 140 (Aug. 23, 1996).

62. See WATZMAN, *supra* note 52, at 35. UPS gave a total of \$1,491,309 in PAC money and \$146,025 in soft money in 1996. See *id.*

63. See Jeff Gerth, *Lawmakers Question Loosening of Technology Export Controls*, N.Y. TIMES, May 28, 1997, at A19. See also *Apprehension of Tainted Money Act of 1997: Hearings on H.R. 1494 Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 105th Cong. 28-48 (1997) (discussing campaign contributions of foreign nationals). Sales involved equipment ranging from supercomputers to machine equipment used in the manufacture of aircraft, jet engine technology, and highly sophisticated telecommunication equipment. See *id.*

64. See Gerth, *supra* note 63, at A19.

scrutiny in the context of the Justice Department's investigation of campaign finance improprieties."⁶⁵

Clearly, campaign finance improprieties need to be addressed. However, this is not the only issue. Obviously there is a need to change a system which saw \$2.7 billion in political campaign contributions during the most recent election cycle.⁶⁶ Such a system undermines the legislative and regulatory process, as well as public integrity.

IV. THE MINIMUM WAGE AND TAX BREAKS — CONNECTIONS TO CAMPAIGN CONTRIBUTIONS

One criticism of a system of public financing of elections is that it unfairly forces taxpayers to absorb the expense. This is not an article designed to provide the entire rationale for excluding all private monies and substituting a system of public financing; although it is something which I have come to deeply believe is the only truly comprehensive reform for our present system.⁶⁷

Nevertheless, in our examination of the present system, it is important to point out that the legislation passed as a result of special interest pressure often results in added costs to taxpayers. The passage of legislation that increased the minimum wage is an example. While saving American business and industry huge sums of money, the legislation will cost the American taxpayers hundreds of billions of dollars when computed over the next decade. How did this happen? Simply by the extension of tax breaks or tax expenditures.

The *Washington Post* reports the following estimates of lost revenue over the next ten years from tax breaks and tax expenditures contained in the minimum wage bill:

1. Permitting United States corporations operating in Puerto Rico to continue qualifying for Internal Revenue Code (IRC) Section 936 tax credits.

Cost: \$18 billion.

Primary beneficiaries: pharmaceutical companies, computer and electronic manufacturers, and soft drink companies.⁶⁸

65. *Id.*

66. See Ruth Marcus & Charles R. Babcock, *The System Cracks Under the Weight of Cash; Candidates, Parties and Outside Interests Dropped a Record \$2.7 Billion*, WASH. POST, Feb. 9, 1997, at A1, A20.

67. Reform would surely require some ceiling on spending which, under the present state of the law as enunciated in *Buckley*, could only be accomplished by voluntary acceptance of spending limitations by the candidates.

68. See Eric Pianin, *How Business Found Benefits in Wage Bill*, WASH. POST, Feb. 11, 1997, at A1, A8.

2. Changes in pension law.

Cost: \$6 billion.

Primary beneficiaries: members of the National Federation of Independent Businesses (NFIB) representing small business, the retail industry, and manufacturers.⁶⁹

3. Increasing the amount of depreciation on equipment purchased by small business the first year from \$17,000 to \$25,000.

Cost: \$4.7 billion.

Primary beneficiaries: members of the NFIB.⁷⁰

4. Reducing from 39 years to 15 years the time permitted to convenience stores which also pump gas to depreciate the cost of the store.

Cost: \$452 million.

Primary beneficiaries: members of National Convenience Stores.⁷¹

5. Repeal of the United States tax on so-called "excess passive assets" held by foreign subsidiaries of United States companies.

Cost: \$427 million.

Primary beneficiaries: multi-national corporations including Hewlett-Packard, Johnson & Johnson, and Amway.⁷²

6. Expansion of the "tip credit" to pizzerias and other businesses that deliver food.

Cost: \$165 million.

Primary beneficiaries: Pizza Hut, Domino's Pizza, and Godfather's Pizza.⁷³

There is a connection between these tax breaks and the financing of political campaigns. It is estimated that in the previous election cycle, which included passage of the legislation increasing the minimum wage, more than \$36 million in PAC money went to members of the House and Senate tax-writing committees.⁷⁴ The Republicans enjoyed a \$4.2 million advantage over the Democrats in contributions of \$200 or more.⁷⁵ But did these contributions have an impact on the political process? Did they effect changes in the law to the advantage of some particular and identifiable special interests? Clearly they did. Did these changes cost the taxpayer via

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See Pianin, supra note 68, at A8.*

75. *See CENTER FOR RESPONSIVE POLITICS, 10 MYTHS ABOUT MONEY IN POLITICS 7 (1995).*

the revenues that were lost to the Treasury? Obviously they did. A current member of Congress, Representative Mel Levine (D-Cal.) summed it up very well, "[o]n the tax side, the appropriations side, the subsidy side, and the expenditure side, decisions are clearly weighed and influenced by...who has contributed to the candidates....The price that the public pays for this process, whether it [is] in subsidies, taxes, or appropriations, is quite high."⁷⁶

V. THE FOOD AND DRUG ADMINISTRATION V. TOBACCO

In this segment of my examination into the effects of campaign finance on the legislative and regulatory process, the focus is on an industry that, over the years, has consistently been listed among the largest donors to political campaigns. According to a report by the Center for Responsive Politics, the tobacco industry, during the 1996 election cycle, spent a total of \$7,911,979.⁷⁷ Of that sum, it is estimated that eighty-eight percent was disbursed through company PACs and only twelve percent contributed by individuals.⁷⁸ The report also makes the important point that the tobacco industry does not rely solely on direct political contributions.⁷⁹ Rather, the tobacco industry gives generously to conservative think tanks and advocacy organizations, especially those espousing a libertarian pro-market point of view.⁸⁰ For example, Phillip Morris was a major funder of Contributions Watch, a non-profit group conducting state-level research on money and politics which recently released a major study implicating political contributions from trial lawyers — one of Phillip Morris's arch enemies.⁸¹ These contributions are evidence that the threat to the integrity of the political process can take many forms.

In 1995, David Kessler, head of the Food and Drug Administration (FDA), wrote a letter to the American Heart Association implying that the FDA might attempt to regulate tobacco products. In response, the tobacco industry contributed more than \$1.5 million in PAC money and "soft" money to support congressional candidates and national parties in the first half of 1995.⁸² In fact, Phillip Morris and Brown Williamson "were among

76. MARTIN SCHRAM, *SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS* 89 (1995).

77. See WATZMAN, *supra* note 52, at 39.

78. See *id.* at 43.

79. See *id.* at 38-39.

80. See *id.*

81. See *id.* at 39.

82. See Margaret A. Boyd, *Butt Out! Why the FDA Lacks Jurisdiction to Curb Smoking of Adolescents and Children*, 13 J. CONTEMP. HEALTH L. & POL'Y. 169, 176 (1996) (citing *The Senate Campaign Spending Limits on Election Reform Act of 1995: Hearings on S.*

the top soft-money givers."⁸³

These contributions obviously paid off. After the 1996 elections, the Republicans retained control of Congress and, consequently, the chairs of the various committees continued to be Republican. Before the Republican takeover in the 104th Congress, Representative Waxman (D-Cal.), a supporter of tobacco regulation, chaired the Health and Environment subcommittee. Following the Republican takeover in January 1995, and after the tobacco money had a chance to exert its influence, Representative Thomas J. Bliley, Jr., (R-Va.), who represents the state that is home of the nation's largest tobacco companies, became chair of the full House Committee on Commerce and Energy — the committee to which all proposed bills relating to tobacco regulation were referred.⁸⁴ Representative Bliley quickly announced that he would block further attempts by the FDA to regulate cigarettes.⁸⁵

Ironically, in 1996, after the fallout from tobacco industry leaks and whistle blowers, the tobacco industry became so controversial that all bills relating to tobacco regulation were buried in committee.⁸⁶ But this does not mean, or even suggest, that the tobacco industry's efforts to thwart both legislation and further regulation were abandoned. To the contrary, as it lobbied Congress for approval of the proposed global settlement money, the tobacco industry continues to pour money into the political campaign coffers. In fact, FEC reports compiled by the Center for Responsive Politics show that leading tobacco industry PACs gave \$566,721 to key lawmakers in the first half of 1997.⁸⁷ Four fifths of that total went to Republican Senators and House members, including Representative Thomas J. Bliley, and the three top House leadership posts on the majority side of the aisle: Speaker Newt Gingrich (R-Ga.), G.O.P. Conference Chair, John Boehner (R-Ohio), and Majority Whip, Tom DeLay (R-Tex.).⁸⁸

Despite the tobacco industry's efforts during 1995, the FDA issued related regulations in 1996 that were, by and large, upheld during the indus-

1219 *Before the Senate Rules Committee*, 104th Cong. (1996) (statement of Ann McBride, President, Common Cause)).

83. *Id.* at 176 n.42 (quoting Penny Loeb et al., *The Greening of America, Candidates Will Spend More Money Than Ever to Buy Voters*, U.S. NEWS & WORLD REP., Feb. 2, 1996, at 34, 35).

84. See Peter Bynum, *A Stare Decisis Barrier to Regulating Cigarettes as Drugs*, 12 J.L. & POL. 365 (1996).

85. See *id.*

86. See Michael Whately, Note, *The FDA v. Joe Camel: An Analysis of the FDA's Attempt to Regulate Tobacco and Tobacco Products Under the Federal Food, Drug and Cosmetic Act*, 22 J. LEGIS. 121, 134-35 (1996).

87. See *Tobacco Dollars Flow to GOP Lawmakers Key to a Settlement*, CHI. TRIB., Sept. 1, 1997, §1, at 4.

88. See *id.*

try's legal challenge in 1997.⁸⁹ Support for the complete elimination of agricultural programs aimed at tobacco farmers, however, has been supplanted by the far more modest effort to gradually phase out tobacco subsidies along with those of other agricultural commodities.

Although the evidence is admittedly, as in many other areas discussed, anecdotal rather than empirical, I believe it points to the power of money in politics. Specifically, it points to the ability of special interests, like the tobacco industry, to hamstring and delay regulatory efforts, fending off the passage of legislation damaging to their economic future. This is accomplished by contacts maintained with key committee chairs and ranking members of the House and Senate. The record is indisputably clear — these key players can assist with blocking action which will delay, if not entirely defeat, proposals the industry regards as unfriendly and injurious.

The recent upending of a \$50 billion tax break designed to cushion the impact of the \$368.5 billion global tobacco settlement between a number of State Attorney Generals and four major tobacco companies, inserted almost stealthily into the so-called balanced budget compromise between the President and Congress, was hailed as a stinging rebuke to the industry.⁹⁰ This rebuke, however, should not cause us to forget the years the industry successfully used the power of money to defeat proposed regulations and legislation they believed was detrimental to their goals. It should not be forgotten that in 1994 the industry spent \$4.83 billion on advertising that could be taken as a tax deduction.⁹¹ This subsidy or, properly labeled, tax expenditure, has returned their political contributions to them a hundred-fold. There is no indication, save for the restrictions on advertising designed to capture the youth market, that this subsidy will not continue.⁹²

VI. THE FEDERAL COMMUNICATIONS COMMISSION — PAC MONEY INFLUENCES MORE THAN THE LEGISLATURE

The effects of special interest or PAC money do more than influence legislative acts and legislators. They affect how legislators influence administrators, regulators and their regulations, something of a trickle down effect. While addressed indirectly, the previous sections of the Article demonstrate that when special interests attempt to control the flow of legislative action, there is a further effect. They also seek to influence the

89. *Coyne Beahm, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997) (holding FDA has jurisdiction to regulate tobacco products).

90. See Ceci Connolly & John E. Yang, *Like Senate, House Votes to Repeal \$50 Billion Tax Break for Tobacco Firms*, WASH. POST, Sept. 18, 1997, at A7.

91. See WATZMAN, *supra* note 52, at 38.

92. See Whately, *supra* note 86, at 128.

oversight functions. For example, an interesting and provocative study of the legislative oversight of Congress and its relationship with the Federal Communications Commission (FCC), points out that the failure of Congress to act is often what the broadcasting and telecommunications industries desire most.⁹³ The article states, "[t]his legislative inertia is neither unusual nor surprising. Congress often prefers policy-making through oversight to avoid the pitfalls of substantive legislation."⁹⁴ It goes on to quote a former Commissioner who said, "[i]t is a poor dog indeed that does not know his master."⁹⁵

This is far from a recent or singular phenomenon. House Speaker Sam Rayburn (D-Tex.) gave this advice to President John F. Kennedy's choice for FCC Chairman, Newton Minow: "Just remember one thing son. Your agency is an arm of Congress; you belong to us. Remember that and you'll be all right."⁹⁶ In the same vein and at a much later date, two Senators re-emphasized this belief. Former Senator Robert Packwood (R-Or.) said to FCC Chairman Mark Fowler, "[y]ou are a creature of Congress and you attempt to administer...[the] laws in accordance with what you think Congress has intended."⁹⁷ Even more recently, a former Chairman and now ranking minority member of the Senate Commerce Committee, Senator Ernest Hollings (D-S.C.), warned FCC nominees that "the Commission must follow our lead...you folks take an oath to regulate not deregulate."⁹⁸ It does not take a leap of faith to connect the impact of money contributed to congressional candidates to the regulatory agencies answering to them.

CONCLUSION

This Article began by quoting, with approval, the late Judge J. Skelly Wright's most basic objection to the Supreme Court's decision in *Buckley*.⁹⁹ Specifically, the decision impedes progress toward the goal of equality through law. This fear is supported by "[t]he growing impact of concentrated wealth on the political process, and the glaring inequalities in politi-

93. Neal Devins, *Congress, the FCC, and the Search for the Public Trustee*, 56 LAW & CONTEMP. PROBS. 145, 147 (1993).

94. *Id.*

95. *Id.* at 149 (quoting Glenn O. Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 172 (1978)).

96. *Id.* at 148-49 (quoting ERWIN G. KRASNOW, ET. AL., *THE POLITICS OF BROADCAST REGULATION* 89 (3d ed. 1982)).

97. *Id.* at 149 (quoting *Joint Hearings, The Universal Telephone Service Preservation Act of 1993*, 98th Cong. 67 (1983)).

98. *Id.* (quoting *Congress Asserts Its Dominion over FCC*, BROADCASTING, Aug. 7, 1989, at 27).

99. See *supra* Part II.

cal campaign resources."¹⁰⁰

The prosperity of the 1990s has only served to widen the gulf between those on the upper rungs of the economic ladder and the rest of us. A study of the increasing inequality in our society provides abundant statistical data to show that, as this decade began, inequality was at a sixty-year high, with thirty-nine percent of total household wealth controlled by the top one percent of the wealth holders.¹⁰¹ If the focus is placed on the financial wealth, the richest one percent owned forty-eight percent of the total.¹⁰² In his forward to Wolf's report, Richard C. Leone offers the chilling observation that in mid-decade there is public frustration and acute anger about representative democracy.¹⁰³ It is my conclusion that policy changes are needed to redress concerns about our democracy and that such changes inevitably involve both the legislative and regulatory processes. Both clearly show the results of being seriously affected by our present regime of campaign finance. The words with which Judge Wright closed his opinion in *Buckley*, which, unfortunately, were ignored by the Supreme Court, were eerily prophetic of our present situation:

Our democracy has moved a long way from the town hall, one man, one vote conception of the Framers. Politics has become a growth industry and a way of life for millions of Americans. The corrosive influence of money blights our democratic processes. We have not been sufficiently vigilant...as we moved from the town halls to today's quadrennial Romanesque political extravagances, that politics is neither an end in itself nor a means for subverting the will of the people.¹⁰⁴

100. Wright, *supra* note 17, at 645. See also *Colloquia on Campaign Finance Reform: Law and Politics*, 8 ADMIN. L.J. AM. U. 161 (1994) (discussing problem of unlimited campaign contributions and constitutional implications of campaign finance reform); Jamin B. Raskin & John Bonfianz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing in favor of complete public financing of congressional campaigns).

101. See EDWARD N. WOLFF, *TOP HEAVY: A STUDY OF THE INCREASING INEQUALITY OF WEALTH IN AMERICA* 7 (1995).

102. See *id.*

103. *Id.* at v.

104. 519 F.2d 821, 897 (D.C. Cir. 1975).

