

## Maryland Law Review

---

Volume 47 | Issue 2

Article 10

---

# Maryland Campaign Finance Law: a Proposal for Reform

Carville B. Collins

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Politics Commons](#)

---

### Recommended Citation

Carville B. Collins, *Maryland Campaign Finance Law: a Proposal for Reform*, 47 Md. L. Rev. 524 (1988)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol47/iss2/10>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

# Comment

## MARYLAND CAMPAIGN FINANCE LAW: A PROPOSAL FOR REFORM

### I. INTRODUCTION

Current Maryland campaign finance law<sup>1</sup> is a thirty-year-old accumulation of statutes outdated by the campaign practices and technologies of the 1980s. The growing importance of state and local government and the accompanying decentralization of federal government have given rise to intensified concerns of special interest groups and increased candidates' campaign funding needs for state and local elections. Inflation and enhanced communication technologies have caused campaign costs to rise dramatically. Since the Maryland General Assembly last adopted comprehensive campaign finance legislation,<sup>2</sup> there has been a proliferation of Attorney General Opinions and minor statutory revisions which address the many ambiguities in the current law but which cannot adequately remedy the need for a thorough statutory overhaul in response to Maryland's evolving political system.

The inadequacy of the current statutory scheme includes a broad array of shortcomings in the areas of contributions and transfers, campaign expenditures, disclosure of contribution and expenditure activity, fundraising by legislators and lobbyists, and enforcement of campaign finance regulation. This comment addresses what arguably lies at the heart of the current law's inadequacy: the need for viable and enforceable limits on contributions to campaigns and on transfers of monies between statutorily defined entities participating in the electoral process. The primary focus will be on a discussion and proposal of an enhanced regulatory scheme for political committees. Additional attention will center on the realization that legislative reform of the financial activities of political committees necessarily entails alteration of all other conduits for campaign contribution activity, including contributions by entities other than political committees, in-kind contributions, loans, activities statutorily exempt from limitation, and other loopholes in current law. This comment proposes reforms accordingly.

---

1. See MD. ANN. CODE art. 33 (1986 & Supp. 1987).

2. Maryland Fair Election Practices Act of 1957, 1957 Md. Laws 739.

*A. Legislative Background*

In late 1985, Governor Harry Hughes appointed a Commission to Review the Election Laws (Commission), charged with the responsibility of examining campaign finance law and making recommendations to the 1987 Maryland General Assembly. The Commission's report<sup>3</sup> provided the basis for comprehensive legislation introduced in 1987.<sup>4</sup> The legislature, however, took no action on the bills except to refer them to study during the 1987 interim session. Legislation in 1988,<sup>5</sup> incorporating concepts recommended by the Commission and an Election Laws Workgroup (Workgroup) of legislators assigned to implement the 1987 summer study, received extensive review by the Constitutional and Administrative Law Committee in the Maryland House of Delegates. In mid-March of 1988, the bill was withdrawn because of confusion among legislators over current law and opposition to numerous changes in the law proposed in the legislation. This comment examines the adequacy of the methods and recommendations of the Commission and the Workgroup with regard to the central issue of contribution and transfer activity. In some areas this comment proposes alternative reforms that the General Assembly should consider when it revisits this controversial and difficult problem of self-regulation.

*B. Policy Objectives*

This comment proposes that campaign finance reform be tailored to further five major policy goals considered essential to the viability of the state's political system.<sup>6</sup> First, and most important, campaign finance reform should promote public confidence in the electoral, legislative, and executive governance processes. The derivation and disclosure of campaign funds are not merely concerns at election time, for they have a significant impact on public perception of the influence of contributors and the integrity of elected officials in the context of all governmental decisionmaking.

---

3. REPORT OF THE GOVERNOR'S COMMISSION TO REVIEW THE ELECTION LAWS (Jan. 15, 1987) [hereinafter GOVERNOR'S COMMISSION REPORT].

4. The 1987 legislation consisted of five bills: H.B. 831, 832, 834, 1117, 1118, Md. Gen. Assembly, 393d Sess. (1987). Companion bills in the State Senate were S.B. 648, 649, 650, 651, 652, Md. Gen. Assembly, 393d Sess. (1987).

5. Campaign finance reform legislation was consolidated into a single bill, H.B. 1253, Md. Gen. Assembly, 394th Sess. (1988). No companion legislation appeared before the State Senate in 1988.

6. See GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 22-23 (listing major policy objectives of campaign finance reform).

Second, any statutory scheme regulating campaign finance must be administrable and enforceable. Otherwise, full compliance would be unlikely and the credibility of other state statutory schemes would be correspondingly diminished.

Third, campaign finance reform should promote the development of an informed electorate. Intelligent voting for candidates and accurate evaluations of elected officials' performance serve to ensure governmental responsiveness to public concerns. Fulfillment of this third objective depends, in large measure, on the ability of candidates to communicate effectively with an increasingly media-saturated electorate in Maryland.

Fourth, reform should enhance public participation in the electoral process. Public involvement in elections shapes the policy agenda ultimately pursued by elected officials and is permissibly manifested, under first amendment freedoms, in such forms as voting, candidate advocacy, contributing, organizing, and volunteering.

Finally, reform should further the assurance of a level playing field, to the greatest extent possible, for incumbents and challengers.<sup>7</sup> Accountability and responsiveness of elected officials is determined, in large part, by the potential for election defeat at the hands of challengers. The minimization of obstacles for challengers has provided a constructive check on nearly all significant incumbent activity.

## II. PRESENT LAW ON POLITICAL CONTRIBUTIONS

In the area of contribution limits, an "individual"—including, for purposes here, a person, corporation, association, or any other organization that does not meet the statutory definition of a political committee<sup>8</sup>—may contribute \$1000 per election to any one candidate and an aggregate of \$2500 to all candidates in an election.<sup>9</sup>

---

7. The Commission's report included the first four policy objectives outlined above, but did not include the assurance of a level playing field. Also, the Commission proposed four additional policy objectives: (1) promoting the availability of qualified candidates for state and local office; (2) providing candidates with the opportunity to communicate effectively with the electorate regardless of the candidates' personal financial resources; (3) protecting the integrity of the legislative and executive governance process; and (4) providing for substantial disclosure of the sources and uses of campaign funds. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 22-23.

8. MD. ANN. CODE art. 33, § 1-1(a)(14) (1986) defines a political committee as any combination of two or more persons appointed by a candidate or any other person or formed in any other manner which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election.

9. *Id.* § 26-9(b) (1986).

This means that in 1986 state races, for example, an individual could contribute a total of \$2000 to any one candidate (\$1000 in the primary and \$1000 in the general election) while subject to a \$5000 aggregate limit to all candidates (\$2500 per election). These limits, commonly known as individual limits, apply to all things of value donated to candidates.<sup>10</sup> A "thing of value" includes all money, goods, and services provided to a candidate, thereby including in-kind contributions (nonfinancial contributions).

In 1976 the United States Supreme Court, in *Buckley v. Valeo*,<sup>11</sup> established an exception to the applicability of limits on goods and services provided to a candidate. Expenditures expressly made to promote the election of a candidate without any approval, support, or participation of that candidate, known as independent expenditures, are constitutionally protected from limitation in elections at all levels of government.<sup>12</sup> In addition, a number of exemptions to the contribution limits are provided by statute and by Attorney General Opinions, and they will be addressed below.

Persons subject to these individual limits who combine, in groups of two or more people, to "assist in any manner the promotion of the success or defeat of any candidate"<sup>13</sup> constitute a political committee, an entity to which no limits on contributions to candidates apply.<sup>14</sup> Contributions derived from political committees or other nonindividual entities are statutorily termed "transfers."<sup>15</sup> Since the 1950s, a variety of entities falling under the statutory classification of political committee have formed, most notably the political action committee (PAC). PACs in Maryland have been formed in a number of contexts, including, but not limited to, employees of a corporation, members of a labor union or trade association, groups of unions or corporations, and individuals with a common viewpoint on political philosophy or a public issue. In early 1987, 225 PACs were registered in Maryland, comprising an

---

10. *Id.* § 1-1(a)(5). This provision defines "contributions" as a gift, transfer or promise of gift or transfer of money or other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election. *Id.*

11. 424 U.S. 1 (1976).

12. *Id.* at 58-59. For example, if an organization purchases radio and television time and runs its own advertisements advocating the election of a particular candidate, these expenditures are independent provided that there is no consultation or contact with the candidate concerning these activities.

13. MD. ANN. CODE art. 33, § 1-1(a)(14) (1986). See *supra* note 6.

14. *Id.* § 26-9(c).

15. *Id.*

estimated 10,000-20,000 contributing individuals.<sup>16</sup>

### III. POLITICAL COMMITTEE LIMITS

The central focus of campaign finance reform, involving the imposition of limits on transfer activities of political committees, was the issue least adequately considered by the Commission. Using wholly inadequate data<sup>17</sup> and reflecting a predisposition toward significant restriction of political committee activity, the Commission recommended first-time limits on transfers by political committees without regard for the realities and policy concerns of campaign finance in Maryland. Specifically, the Commission recommended \$8000 and \$6000 limits on transfers to statewide-office candidates and other candidates, respectively.<sup>18</sup> These limits were proposed to apply to a full four-year period, which includes both the primary and general elections.<sup>19</sup> Restrictions also were urged for receipts by candidates, such that not more than 30 percent of all receipts may be from political committees.<sup>20</sup>

The 1987 Workgroup proposed far more restrictive limits in its 1988 reform legislation. It recommended a single \$3000 limit on political committee transfers to any candidate for state or local office for the full four-year period.<sup>21</sup> In place of the Commission's 30 percent cap proposal, the Workgroup called for a four-year \$30,000 limit on all transfers by any political committee.<sup>22</sup> These proposals entailed the elimination of the Commission's differential between limits on transfers to statewide-office and other candidates, the lowering of the Commission's limits on transfers to a candidate, and the imposition of a new aggregate dollar limit on transfers by political committees. Such measures represent a substantial deviation from the Commission's recommendations and a distinct movement away from a compromise with the groups who oppose any such limits.

An improved reform proposal is attainable through a broader

---

16. Data Collected from the Maryland State Administrative Board of Election Laws (SABEL) (Nov. 1987). Given current reporting requirements, there is no way to discern the exact number of contributors to PACs. The 10,000-20,000 estimate is based on an approximation that the average membership of a PAC is less than 100 and in the 45-90 range, but there is little statistical information to verify this conclusion. It is based solely on the author's careful study of 1983-1986 disclosures by PACs and familiarity with PAC operations in numerous organizations.

17. Indeed, the Commission apparently used no data at all.

18. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 33, 62-63.

19. *Id.* at 31-32, 56-57.

20. *Id.* at 33, 63.

21. H.B. 1253, Md. Gen. Assembly, 394th Sess. (1988).

22. *Id.*

contemplation of the full spectrum of arguments relating to the practicality, ease of administration, and final effect of such limits, particularly with respect to their applicability to PACs. Furthermore, utilization of data from the 1986 federal elections, as well as 1986 state election finance data, compiled for the first time in a manner relevant to the campaign finance debate, provides a more coherent and formidable rationale for reform than that underlying the Commission's proposals.

#### A. Arguments in Favor of Limits

The principal argument for political committee limits in Maryland is the presence of individual limits and the lack of commensurate curbs on political committees. This partial regulation serves only to provide an incentive for the proliferation of political committees and promotes ever increasing amounts of transfers.

1. *First Amendment Considerations.*—Federal law provides an insightful and tested scheme, extensively scrutinized by the Supreme Court, demonstrating the viability of state controls on political committee transfers. A limit of \$5000 to any one congressional candidate per election is imposed, amounting to a \$10,000 limit for the congressional election cycle (primary and general races).<sup>23</sup> The Supreme Court, in *Buckley v. Valeo*,<sup>24</sup> upheld the constitutionality of political committee limits as well as limits on other entities, providing an informative articulation of the rationale for such governmental regulation.

The Court's analysis involved a three-step inquiry after a finding that the imposition of contribution limits presented a first amendment infringement sufficient to trigger strict scrutiny. In determining, first, whether substantial governmental interests existed for regulation, the Court found that the primary statutory purpose, which is to limit the appearance and actuality of quid pro quo arrangements between a contributor and a candidate, constituted a substantial governmental interest.<sup>25</sup> The Court reasoned that potential corruption caused by a candidate's dependence upon the support of contributors to run costly campaigns, as well as the associated public awareness of the "opportunities for abuse," undermine the integrity of and confidence in American representative

---

23. 2 U.S.C. § 441(a)(2)(A) (1982); see 11 C.F.R. § 110.2(b)(1) (1987).

24. 424 U.S. 1 (1976).

25. *Id.* at 26-27.

democracy.<sup>26</sup>

Second, in assessing whether the federal limitations directly and narrowly served the substantial governmental interest, the Court concluded that restrictions on contributions focused "precisely upon the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified."<sup>27</sup> The Court did not assume that all large contributors seek improper influence over a candidate or officeholder, therefore recognizing that contribution limitations may prove somewhat overinclusive as a means of curtailing *actual* abuse.<sup>28</sup> Nevertheless, the Court found the statute not overbroad because it furthered the legitimate objective of lessening the *appearance* of corruption. A limit on contributions safeguards against "the appearance of impropriety" by reducing the potential for corruption "inherent in the process of raising large monetary contributions."<sup>29</sup>

Third, the Court inquired whether the government's objective could be met by using less intrusive means. The Court examined criminal laws prohibiting bribery and found them inadequate to preclude actual corruption because they are effective against "only the most blatant and specific attempts of those with money to influence governmental action."<sup>30</sup> The Court also asserted that exhaustive statutory disclosure obligations applying to all contributions and contributors were inadequate as a lone restraint on actual or apparent electoral abuse.<sup>31</sup> Accordingly, the Court held that no less intrusive means were available. Finding all three tests fulfilled, the Court upheld the regulation of contributions to candidates under its strict scrutiny analysis.<sup>32</sup>

2. *Other Apparent Improprieties.*—Proponents of political committee limits further argue that contributions are a form of participation in the political process available only to those with adequate financial resources. To the extent that this electorate-participation differential is furthered by the lack of political committee limits, advocates of limits cite the potential for substantial access to and influence on elected officials in relation to wealth. In muting the voices

---

26. *Id.* at 25-27.

27. *Id.* at 28.

28. *Id.* at 29.

29. *Id.* at 29-30.

30. *Id.* at 27-28.

31. *Id.* at 28.

32. *Id.* at 29.



of affluent persons and organizations, limits act to equalize the resources available to candidates and the relative ability of all citizens to influence election results.<sup>33</sup>

With the exception of campaigns for statewide office, state and local political campaigns in Maryland involve budgets predominantly under \$100,000 per four-year election cycle.<sup>34</sup> In the 1983-1986 election cycle, average receipts for victorious General Assembly campaigns totalled \$61,759 for State Senate candidates and \$29,745 for House of Delegates candidates.<sup>35</sup> Campaigns of losing General Assembly candidates in the 1986 general election received considerably smaller infusions of funds, averaging \$16,090 in Senate races and \$12,037 in House races.<sup>36</sup> The potential for a single political committee to transfer amounts equivalent to all or a significant portion of a campaign budget raises further concerns for the appearance of impropriety in a system void of political committee limits.

The most recent and formidable documentation of an appearance of electoral impropriety is the practice of supporting several, often opposing, candidates in a single race. In the 1983-1986 election cycle, at least twenty-five PACs regulated under Maryland law were cited as supporting two or more candidates, for the same state office, espousing clear philosophical differences in political viewpoints.<sup>37</sup> Such an insurance-policy approach to contributing could only be for purposes of gaining influence with the winner, whomever it turns out to be, regardless of philosophical and political views held by the candidate or the political committee.

---

33. *Id.* at 25-26.

34. *Report of the 1986 Election Campaign Fund Reports Filed with SABEL by Maryland Business for Responsive Government* (May 26, 1987) (unpublished manuscript) [hereinafter *Report Filed with SABEL*]. These reports indicate that only 8 out of the 188 winning candidates for the 1986 Maryland General Assembly races reported total campaign budgets in excess of \$100,000.

35. *Id.*

36. *Id.*

37. See COMMON CAUSE/MARYLAND, PACS MARYLANDIA 1986: AN ANALYSIS OF POLITICAL ACTION COMMITTEE CONTRIBUTIONS TO CANDIDATES FOR STATE OFFICE IN MARYLAND IN THE 1986 GUBERNATORIAL ELECTION CYCLE 5-10 (Feb. 1987).

This report indicated 97 instances in the 1986 races for Governor, Attorney General, and State Senate, where a PAC contributed to two or more candidates for the same office. Twenty-five of these involved contributions to philosophically distinct candidates in the gubernatorial race (William Donald Schaefer and Melvin A. Steinberg vs. Stephen H. Sachs and Parren J. Mitchell) and in the 16th Legislative District Senate race (Howard A. Denis vs. Marilyn Goldwater).

*B. Arguments Against Limits*

The opponents of political committee contribution limits rely primarily on the lack of hard evidence of any abuse of the electoral or legislative processes in Maryland resulting from PAC activities. Some perceive the limits set forth under federal law as part of a post-Watergate regulatory spirit involving actual documentation of abuses in the federal system. Accordingly, any actual or imagined exchange of political favors for political committee funds remains a hypothetical possibility, and nothing more, in Maryland. This viewpoint is premised on a battery of statistical insights into the contemporary political climate in the state, as well as a careful analysis of past and present practices by the participants in Maryland's electoral process, both of which are discussed below.

In response to the single most prevalent criticism, that PACs wield dominant and unhealthy influence over political campaigns, opponents of political committee limits assert that the 20.6 percent share of all contributions made to 1986 state races by PACs<sup>38</sup>—the year of greatest PAC activity during the 1983-1986 election cycle—hardly constitutes unhealthy dominance. More broadly, in the full four-year cycle, winning State Senate candidates received 18.6 percent of their total contributions from PACs, while successful House of Delegates candidates received 19.8 percent of all revenues from PACs.<sup>39</sup> PAC dollars accounted for less than 8.5 percent of monies received by candidates losing in 1986 general election contests.<sup>40</sup> In the federal setting a similar indication that individuals and political parties, not PACs, are the dominant source of all campaign contributions is derived from the 1986 congressional elections, in which PACs accounted for 28 percent of total contributions to congressional candidates.<sup>41</sup> In all previous congressional elections the share of PAC receipts has been 26 percent or less.<sup>42</sup>

The notion that political campaigns in Maryland are characterized by excessive and increasing spending due in large measure to

---

38. *Report Filed with SABEL, supra note 34.*

39. *Id.* Winning State Senate candidates received \$540,118 from PACs out of a total of \$2,907,413 in revenues, and winning House of Delegates candidates took in \$833,908 in PAC monies out of \$4,193,431 in total receipts.

40. *Id.* General election losers in 1986 State Senate races received 4.9% of their funds from PACs (\$21,337 out of \$434,436), while in the 1986 House of Delegates races, general election losers derived 9.9% of receipts from PACs (\$97,423 out of \$974,982).

41. Federal Election Commission, Press Release on the 1986 Congressional Elections (May 10, 1987).

42. *Id.*

PACs is rebutted by what PAC advocates assert is a more appropriate inquiry into the relative cost of campaigns. Although a comparison of campaign costs to other expenditures will likely show that the cost of campaigning has increased in disproportionately greater amounts, such comparisons do not reflect the unique value of campaign costs. For example, while in election year 1982 approximately \$16.5 million was spent on all nonfederal political contests in Maryland,<sup>43</sup> monies spent on coin-operated amusements in the state totalled \$74.5 million in 1983.<sup>44</sup> Compared to an array of other goods, services, and activities, Maryland residents spend a small portion of their resources on state and local politics—arguably one of the more important elements of contemporary American society.

In response to the claim that a political committee could potentially transfer an amount equivalent to the full budget of one candidate's campaign, opponents of political committee limits assert that the record in Maryland indicates no such tendency. While such funding levels remain a possibility, only 12 of the 188 winning candidates for the General Assembly received more than 50 percent of their funds from PACs, while no loser in the 1986 general election exceeded a 50 percent share.<sup>45</sup>

Given our competitive and pluralistic governmental forms, self-interest cannot be legislated out of existence by the imposition of political committee limits. Maryland's first attempt in campaign finance regulation in 1908,<sup>46</sup> when the legislature set forth limits on campaign expenditures by candidates, is widely acknowledged to have failed completely. "[C]ompliance with the bare letter of the law, and certainly not with the spirit, led candidates to evade specific prohibitions by the creation of additional committees to administer their campaign funds."<sup>47</sup> In the context of the first statutory overhaul of the 1908 Act in 1957, when additional limits were contemplated, commentators noted that the realities of the first half century of campaign finance demanded recognition of such a tendency to-

---

43. See MINORITY REPORT OF THE GOVERNOR'S COMMISSION TO REVIEW THE ELECTION LAWS 10 (Feb. 5, 1987) (noting 1982 Audit Report of SABEL) [hereinafter MINORITY REPORT].

44. See *id.* (noting data received from the Comptroller of the Treasury, State of Maryland, Sales Tax Division, Baltimore, Maryland).

45. Report Filed with SABEL, *supra* note 34 (unpublished manuscript). Moreover, only four candidates losing in the 1986 General Assembly general election races, out of a total of 108 losers, received more than 25% of their receipts from PACs.

46. Corrupt Practices Act, 1908 Md. Laws 122. This legislation involved the enactment of 15 new sections of article 33 of the Annotated Code of Maryland.

47. Pettingill, *Regulation of Campaign Finance—The Maryland Experience*, 19 MD. L. REV. 91, 103 (1959).

ward circumvention.<sup>48</sup> This sentiment manifested itself in the ultimate legislative determination to avoid any further imposition of limits, which "might well have resulted in driving campaign finance 'underground' even more"<sup>49</sup> than it already was in 1957.

Inevitable circumvention of political committee limits also emerges from the Supreme Court's invalidation of limits imposed upon independent expenditures in *Buckley v. Valeo*.<sup>50</sup> While the Court articulated a fundamental difference between independent expenditures on behalf of a candidate and contributions or transfers directly to a candidate,<sup>51</sup> the current sophistication of political committees in Maryland and elsewhere creates the potential for equal effect on elections by either of these two campaign-support alternatives. Imposition of a contribution limit will simply prompt a proliferation of independent expenditures, leading to nondisclosure and greater potential for abuse because present Maryland law does not regulate independent expenditures in any way.<sup>52</sup> Opponents of limits further point out that the regulation of independent expenditures is complex, as the contributor would be solely responsible for disclosure, placing the beneficiary candidate at risk if disclosures were improperly made or omitted altogether. Further regulatory difficulties lie in avoiding any intrusion on the first amendment protections for independent expenditures outlined by the Supreme Court. Finally, since independent expenditures entail no knowledge of the expenditure by the candidate, the proliferation of independent expenditures denies candidates the opportunity to choose whether to accept a particular contribution. This may be of great importance to candidates receiving support from certain controversial contributors who might offend the candidate's constituents. The Commission implicitly recognized these concerns and the associated constraints on imposing any state controls, proposing very

---

48. *See id.*

49. *Id.* at 107.

50. 424 U.S. 1, 23 (1977).

51. The *Buckley* Court justified limits on contributions to candidates by concluding that contributions function merely as vicarious speech: although a contribution may symbolize the contributor's support for a candidate, it does not articulate precisely the political sentiments or opinions underlying the gift. Only in the hands and at the behest of the recipient candidate will such articulate expression be realized. *Id.* at 21-22.

On the other hand, the Court described an independent expenditure as a means of facilitating the spender's own political speech. As limitations upon independent expenditures directly restrict the degree to which the spender can speak autonomously, limitations would excessively burden political expression and violate the first amendment. *Id.* at 19-20.

52. Article 33 neither defines nor regulates in any part independent expenditures.

little in the way of a regulatory scheme for independent expenditures.<sup>53</sup>

The difficulty of legislating contribution limits is confirmed in the federal campaign finance experience. In 1966 Congress passed legislation attempting to implement public financing as a total substitution for private financing of elections, only to repeal it five years later.<sup>54</sup> The abandonment was prompted primarily by an observed failure to limit the "raising and spending of private funds in behalf of presidential candidates or any other candidates."<sup>55</sup> And in imposing political committee limits, the federal statutory scheme has failed to curb the recently documented phenomenon of "bundling," by which individual contributions (each subject to a \$1000-per-election limit) are bundled together in amounts exceeding the \$5000-per-election limit on political committees. The ultimate effect of bundling is to circumvent political committee limits because candidates may derive more than the \$5000 limit from certain organizations seen by the recipient as the source of the contribution.

Finally, opponents of political committee limits assert that the full disclosure requirements of federal and Maryland law substantially obviate the need for such limits. In Maryland pre-election disclosure by all political committees and candidates of all contributions received and all transfers or expenditures made is mandated,<sup>56</sup> effectuating a system of "corrective action, whether judicial (prosecution in the courts) or political (retribution by the voters at the polls)."<sup>57</sup> Full disclosure, in effect, furnishes practical limits on receipt levels, as candidates must weigh the benefits of the contribution against the risk of unfavorable publicity or electoral retaliation for the perceived impropriety of the reported contribution.

---

53. See GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 39-40, 80. The Commission's only recommendations were to add a definition of independent expenditure to the Code and to require the disclosure of the identity of the contributor on any campaign literature or media advertisement generated by the independent expenditure. *Id.* at 80-81.

54. Presidential Election Campaign Fund Act, Pub. L. No. 89-809, 80 Stat. 1587 (1966), *repealed by* Revenue Act of 1971, Pub. L. No. 92-178, § 802(b)(1), 85 Stat. 573.

55. 113 CONG. REC. 8062-63 (1967) (statement of Sen. Albert Gore).

56. MD. ANN. CODE art. 33, §§ 26-11(a)(1) to -11(a)(2), -11(c)(1) (1986 & Supp. 1987). Only candidates' receipts in the last 11 days before the general election and the last 28 days before the primary election go unreported until after the respective elections.

57. L. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 181 (1984).

### C. Conclusion on Political Committee Limits

1. *Reforms Proposed.*—The weight of evidence presented by both sides of the political committee limitation debate provides the basis for recommending a newly imposed limit on political committee transfers precluding large infusions of monies from single political committees and the associated appearance and potential for electoral or candidate influence. Such a limit, however, must account for the actual cost and societal importance of electorate activity and expression in political campaigns. Also, the limit must not be so unduly restrictive as to foster legal and creative brands of non-disclosed circumvention of the intent of campaign finance law. Minimal restriction will ensure full disclosure and will allow the courts and the electorate to be the ultimate checks on what is undoubtedly an activity not easily controlled by legislation. Accordingly, a limit of \$16,000, applicable on a four-year election cycle basis (including primary and general elections), is recommended for transfers from a political committee to a candidate for any state office.<sup>58</sup> Given the increased costs and importance associated with campaigns for statewide offices, a \$20,000 four-year limit is proposed for the gubernatorial, attorney general, and comptroller races. Federal campaign finance law offers a comparative context in which the \$16,000 and \$20,000 limits must be viewed. In United States House of Representative races, run in districts considerably larger than State legislative districts, political committees may transfer up to \$5000 per election, amounting to a \$10,000 limit for the two-year election cycle. When comparing dollar-per-year allowances, the proposed \$16,000 and \$20,000 State limits amount to a \$4000- and \$5000-per-year allowance, which is less than or equal to the \$5000 federal dollar-per-year limit.

This comment further proposes that there be no aggregate limit on a political committee's transfer activity and no cap on receipts by candidates of political committee transfers. In both cases, such restrictions would bring about a proliferation of independent expenditures, an activity noted as constitutionally protected from

---

58. A \$16,000 limit represents a reasonable compromise between unlimited transfers and the overly limited transferability recommended by the Commission. To date, very few political committees have contributed in excess of \$16,000 to any one candidate for state office.

To prevent abuse of this proposed limit, a political committee comprised of two individuals would be limited to \$8000 in transfers to any one candidate (two times the proposed individual limit of \$4000), and a political committee of three persons would be limited to \$12,000 in transfers (three times the proposed individual limit of \$4000).

limitation<sup>59</sup> and significantly more difficult to regulate.

2. *The Commission's Proposals.*—The 30 percent cap<sup>60</sup> on political committee receipts is unequivocally the most unworkable and flawed recommendation from the Commission. In an attempt to limit the influence of PACs in any one election—a rationale clearly articulated in the majority opinion submitted by the Commission<sup>61</sup>—this provision encourages PACs to rush in early with transfers and poses administrative problems for campaign treasurers as they can only guess, in the heat of a campaign battle, as to the amount of actual dollars available for campaign use. Campaign budgets for candidates receiving significant PAC transfers will fluctuate as overall spending will be dictated by whether adequate individual contributions have been received. Moreover, this practice will encourage heightened solicitation of individual contributions so as to enhance eligibility for political committee transfers.<sup>62</sup> Most significant is the fundamentally flawed rationale of the 30 percent cap which seeks to preclude a PAC or group of PACs from becoming “unduly dominant”<sup>63</sup> in campaigns, a basis which remains a hypothetical possibility but an unrealistic prediction in Maryland’s campaign finance system. Recent campaign disclosure indicates that many candidates in Maryland races receive transfers from a variety of PACs representing different and even opposing points of view, thereby dispelling any notion that one PAC’s transfer influences a campaign or, subsequently, the candidate’s post-election behavior. For the few candidates who may receive significant transfers from a single PAC or a group of similarly oriented PACs, the present disclosure requirements in Maryland afford at least a partial check on such activity by providing campaign opponents and the electorate with the amount and source of the transfers. This allows electoral

---

59. See *supra* text accompanying notes 9-10.

60. See *supra* text accompanying note 18.

61. GOVERNOR’S COMMISSION REPORT, *supra* note 3, at 33.

62. We should ask whether it is desirable to give candidates further incentives to solicit money from individuals. The current trend is that individuals generally contribute on their own initiative or upon invitation to fundraising events. Candidates’ ability to enhance eligibility for political committee transfers by collecting increased levels of individual contributions will likely bring increased pressure upon individuals to contribute, leading possibly to harassment of constituents and increased overall spending by candidates. Furthermore, an incentive is created for incumbents to spend more time on fundraising and arguably less time on their formal duties as elected officials.

63. GOVERNOR’S COMMISSION REPORT, *supra* note 3, at 33. Advocates of PAC limits widely concur with the Commission’s finding that PACs wield undue dominance and influence.

scrutiny and possible voter retribution if the transfers are deemed excessively influential or otherwise problematic.

Further inquiry into the composition of PACs raises another important issue: PACs are made up of individuals who organize to amplify their political expressions, but if these same individuals decide not to form a PAC and to contribute their monies individually so as to bring about the same financial effect on a campaign, the Commission no longer asserts the potential for undue dominance. In fact, the Commission has expressed no concern for the effect of individual contributions and has encouraged their proliferation by proposing that limits on them be roughly doubled,<sup>64</sup> a reform discussed below.<sup>65</sup> The Commission's assertion that undue dominance by a PAC or group of PACs will occur hypothesizes that PACs, as a community or as individual entities, are inherently subversive to the political and electoral process.<sup>66</sup>

The Commission, in its written majority opinion, has misunderstood the constituency of PACs and the role PACs play in Maryland's political process. Its portrayal of PACs criticizes individuals who have joined together, with their resources and points of view, as participants in the political process.<sup>67</sup> The majority view of the Commission is also premised on what must certainly offend elected officials at all levels of government—to be "unduly dominant" necessarily connotes that, to some degree, PACs either influence the outcome of elections or sway politicians in voting and other decisionmaking activity, or both. The Commission cited no authority or data on election or voting influence in its conclusion of undue dominance wielded by PACs.<sup>68</sup> On the contrary, PACs are simply another voice in the electorate seeking to provide support, in the way of funds and endorsements, to the candidates of choice. Given the diffusion of power within Maryland's state and local governmental bodies (in which political power is shared among institutional leadership, committee chairmen, party leaders, geographic regions, and the executive and legislative branches), PACs or any other financial contributors are unlikely to target their individual and limited resources to a single candidate. This is verified by contemporary

---

64. *Id.* at 61.

65. *See infra* notes 82-83 and accompanying text.

66. The majority opinion of the Commission expressly denied the proposition that PACs represent an inherent evil. *Id.* Nevertheless, one can easily conclude that the Commission embraced the concept, based on its inadequate inquiry into the actual role of PACs and its recommendations proposed to curtail PAC activity.

67. *Id.* at 32-34.

68. *See id.* at 34.



Maryland campaign practices, in which the single largest 1983-1986 transfers by the ten most active PACs in 1986 averaged just over 8 percent of their total disbursements during the four-year election cycle.<sup>69</sup>

The Commission's proposed \$8000 and \$6000 limits on political committee transfers are well conceived in three respects. First, these limits attempt to control the actual or apparent impropriety of political committees' unlimited transfer capability, recognized by this comment as the primary policy goal underlying the reform initi-

69. The author's survey of the 10 most active PACs in Maryland's 1986 election year (based on highest transfer levels in 1986) confirms the consistent policy among PACs of broad distribution of their funds. In the chart below, column 1 indicates the PAC name (and affiliation), column 2 shows the PAC's total disbursements for the 1983-1986 election cycle, columns 3 and 4 reveal the candidate receiving the largest transfer given by the PAC during the 1983-1986 period, and column 5 contains, in percentage terms, the largest transfer compared to total disbursements during the four-year period. The PACs are listed in order of greatest to least disbursement activity during 1986.

<u>PAC</u>	<u>Total 1983-86 Disbursements (Dollars)</u>	<u>Largest Transfer Recipient</u>	<u>Largest Transfer Amount</u>	<u>Percentage of Total Disbursements</u>
Realtors PAC of Maryland	361,485	W. Donald Schaefer	8,500	2.35
Maryland PAC (Maryland Businesses)	237,402	Laurence Levitan	10,338	4.35
Maryland Medical PAC	224,336	W. Donald Schaefer	8,500	3.79
Home Builders Association of Maryland PAC	70,611	W. Donald Schaefer	20,000	28.3
Maryland State and D.C. AFL- CIO PAC	165,996	Stephen H. Sachs	21,000	12.65
Building Unions Individual Labor Donations PAC	108,825	Stephen H. Sachs	5,000	4.59
Maryland Motor Truck Association PAC	109,767	W. Donald Schaefer	10,200	9.29
Maryland Educators PAC	242,814	Eleanor Carey	3,000	1.24
Maryland Bankers PAC	47,677	W. Donald Schaefer	3,500	7.34
GOP Senate- House Committee	46,389	Howard A. Denis	3,000	6.47

It is important to note that if candidates for statewide office (Governor and Attorney General) are eliminated from this survey, the percentage of largest transfers to total disbursements is *significantly* lower for each of the PACs listed above. Also, total disbursements may include some expenses in connection with fundraising, solicitation, revenue sharing, and administration.

ative. Second, the Commission proposed limits on a full four-year election cycle, thereby eliminating the documented confusion of determining, in an enforcement context, to which election (primary or general) a transfer should be attributed.<sup>70</sup> Finally, the Commission recommended an insightful provision tying future increases in transfer limits to changes in the Consumer Price Index.<sup>71</sup> Although this adds to statutory and interpretive complexity, built-in cost-of-living adjustments have the beneficial effect of precluding future politicization of the Maryland General Assembly's self-regulation of campaign finance. Recognizing this proposal as one of the most perceptive and effective recommendations by the Commission in its attempt to achieve long-term reform of campaign finance law, this comment proposes that all limits should be adjusted in accordance with this cost-of-living mechanism. On the other hand, in light of current transfer practices,<sup>72</sup> campaign costs, and the importance of effective communication with voters, the Commission's proposed ceilings are unnecessarily restrictive and would probably lead to legal circumvention or nondisclosure of activity.

3. *The Workgroup's Proposals.*—The Workgroup's suggestion of limits more restrictive than those recommended by the Commission constitutes a perpetuation of the misguided PAC limitation conclusions made by the Commission. The 1988 proposed legislative reforms reflect a continuing predisposition toward limiting PACs. Furthermore, the unrealistically low \$3000 limit on PAC transfers to any one candidate reveals an ongoing incomprehension of the unintended and inevitable side effect of independent expenditure increases.

Two proposals of the Workgroup were truly unpredictable, given the realities of contemporary campaign finance practices in Maryland. First, the Workgroup and supporters of its findings, composed generally of legislators who do not hold committee chairmanship or key leadership positions, called for the demise of some

---

70. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 30, 55-56.

71. *Id.* at 29, 57. The Commission proposed adjustments not more than once in four years (after each gubernatorial election) and only when changes in the Consumer Price Index brought about incremental increases in the limit of at least \$500. If the threshold is met, the increase shall be exactly \$500 or a multiple thereof. See S.B. 652, H.B. 831, Md. Gen. Assembly, 393d Sess. (1987).

72. See *supra* note 65. Six out of the ten most active PACs in 1986 made transfers several thousand dollars in excess of the Commission's proposed \$6000 and \$8000 limits. The imposition of ceilings under the current transfer levels of a number of PACs will increase the likelihood of widespread circumvention of the limits through independent expenditures and other creative measures.

of their own funding sources by a \$30,000 aggregate limit on transfers by a political committee. The certain result of such a limit would be that large political committees would concentrate their limited funds on leadership and powerful committee chairmen, thereby curtailing the availability of funds for rank and file members of the General Assembly. Second, the Workgroup rejected the Commission's recommendation for the indexing of proposed limits to account for cost-of-living fluctuations. The Commission recognized, in their unpublished 1986 deliberations, that the lack of indexing on existing individual limits was one of the Code's principal deficiencies.<sup>73</sup> Inadequate and outdated spending allowances on individuals, brought about by inflation in the past thirty years, fostered the formation of PACs and other conduits, both legal and illegal, for campaign funds. The Workgroup appears to have ignored the historical source of many campaign finance law problems, as well as the opportunity for long-term reform without the unenviable task of revisiting the highly politicized self-regulation of campaign finance.

#### IV. IMPLEMENTATION

If political committee limits and the overall campaign finance scheme are to be effectively implemented, contributions from nonpolitical committees as well as other vehicles for candidate support must be controlled through an enhanced and enforceable regulatory scheme. Legislative provisions are also needed to revise the current "individual limits" (limits on nonpolitical-committee entities), to clarify what in-kind contribution and financial loan activities apply toward statutory limits, to exempt the proposed limits on contributions and transfers for certain purposes, and to close loopholes in existing and proposed law.

##### *A. Enhanced Regulation and Enforcement*

The Commission noted that perhaps the most serious defects of the current campaign finance laws are their ambiguity and the lack of effective enforcement.<sup>74</sup> Ambiguity has emerged from the proliferation of piecemeal lawmaking, performed predominantly by the Attorney General (often through informal rulings as well as by

---

73. Interview with Robert O.C. Worcester & John Andryszak, Members of the Governor's Commission to Review the Election Laws, in Baltimore, Maryland (Mar. 8, 1988).

74. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 52.

formal opinions) and the Maryland State Administrative Board of Election Laws (SABEL). While a statutory overhaul of campaign finance will reduce the existing ambiguities, future uncertainties will inevitably emerge. The Commission correctly recommended a centralization of the mechanism of statutory interpretation and implementation within SABEL, whereby experts in election and campaign finance law would be newly given the authority to adopt regulations.<sup>75</sup>

The Commission accurately noted that enforcement has been virtually nonexistent. This is primarily because the sole sanction available for statutory violations has been the bringing of criminal charges,<sup>76</sup> often an inappropriate and severe measure in light of the complex and confusing provisions within the statute and the frequency with which minor and unintentional violations occur.<sup>77</sup> To address current enforcement problems, as well as those anticipated under the newly reformed statute, the Commission proposed a system of civil penalties as the primary, though not exclusive, enforcement tool.<sup>78</sup> The proposed system would include measures assuring that only significant violations are punished, with enforcement vested in the better equipped Office of the Attorney General rather than the Secretary of State. In the case of criminal prosecution there would be an increase in the potential fine from the current \$1000 level<sup>79</sup> to \$5000.<sup>80</sup> The Commission built in reasonable protections for those charged with violations, recommending a "clear and convincing" standard to prove violations and an opportunity for the defendant to obtain expedited court response to civil penalty actions brought in an election year and prior to the general election.<sup>81</sup> These reforms reflect a more potent and realistic response to the enforcement problems inherent in an unusual and complex regulatory scheme.

The lone weakness in the Commission's enforcement reforms is the relocation of injunction and civil penalty powers to the Attorney General, who, though better suited to perform enforcement functions, is still an elected public official and recipient of campaign funds. Neither the Commission nor the Workgroup addressed this

---

75. *Id.* at 53, 98.

76. Late fees may be imposed for tardy reports. *Id.* at 53.

77. *Id.* at 53-54.

78. *Id.* at 99-100.

79. MD. ANN. CODE art. 33, § 26-20 (1986).

80. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 54.

81. *Id.* at 100.

concern, but some other enforcement entity is more appropriate as Attorney General enforcement may involve conflicts of interest.

### *B. Limits on Individual Contributions*

Under current law limits on contributions by individuals (including persons, associations, corporations, and other entities which are not political committees) apply on a per-election basis. This allows contributions of \$1000 to any one candidate and an aggregate of \$2500 to all candidates.<sup>82</sup> As the Commission has recommended, these individual limits should be raised to account for general price inflation and even sharper escalation of campaign costs during the thirty-one years since enactment of the \$2500 aggregate limit and the fourteen years since the imposition of the \$1000 individual limit.<sup>83</sup> Further rationale for raising the ceiling on individual contributions emerges from the tendency toward circumvention of restrictive limits documented above.<sup>84</sup> Accordingly, the current dollar limits should be quadrupled, with the overall effect of doubling the limits by changing their applicability from a per-election basis (two elections, primary and general, every four years) to a full four-year basis (one election cycle every four years). The Commission recommended a similar increase in limits but delineated a distinction for candidates for statewide office (\$4000) and other offices (\$3000).<sup>85</sup> As with the proposed political committee limits, tying future increases in individual limits to the Consumer Price Index would depoliticize self-regulation while automatically maintaining limits commensurate with current price levels.

Federal law provides comparative guidance in its individual limits of \$1000 per election to any one candidate<sup>86</sup> on contributions by essentially the same "individual" entities controlled under state law.<sup>87</sup> For any one candidate, the proposed \$4000 limit for a four-

---

82. MD. ANN. CODE art. 33, § 26-9(b) (1986).

83. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 60-61. *See also id.* at 25 (discussing causes of rising campaign costs).

84. *See supra* notes 51-52 and accompanying text.

85. *Id.* at 29-31, 56-58.

86. 2 U.S.C. § 441a(a)(1)(A) (1982); *see* 11 C.F.R. § 110.1(b)(1) (1987).

87. *Compare* 2 U.S.C. § 431(11) (1982) and 11 C.F.R. § 100.10 (1987) with MD. ANN. CODE art. 33, § 26-9(b) (1986). The federal and state statutes are similar in their scope of definition of entities subject to individual limits, but the federal definition is more comprehensive in broadly including all organizations and groups of persons. The major difference between the statutes, however, is that federal law does not consider a corporation an "individual" entity for purposes of campaign finance, thereby prohibiting corporate contributions to candidates for federal office. Corporations are considered individual entities, subject to individual limits, under state law.

year state election cycle may be contrasted with the federal \$2000 limit for a two-year election cycle (House races), resulting in a rough equivalency in dollar-per-year allowances. This proposed parity between the federal and state limits is premised on the notion that while federal campaigns are generally more expensive to run than state and local campaigns, state government's potential for affecting the interests of the contributing entity—whose concerns may be concentrated or isolated within the state and affected by the continuing growth in importance of state and local government as the federal government is decentralized—is significant. And in statewide elections such as the gubernatorial race, campaign costs are generally higher than those for congressional House races. In the area of aggregate limits, the proposed \$10,000 limit for four years is only one-tenth the federal dollar-limit-per-year allowance of \$25,000.<sup>88</sup>

Contrary to the generally recommended trend of expansion of individual limits, the 1988 legislation contained a provision which effectively reduced, by 40 percent, the capacity of an individual to contribute to a PAC.<sup>89</sup> Under current law, an individual may choose to devote all \$2500 of allowable per-election contributions to a PAC, amounting to \$5000 per four-year period.<sup>90</sup> The 1988 proposal called for an allowance reduction from \$5000 to \$3000. Throughout the fourteen-year duration of the \$2500 per-election aggregate limit on individuals, many corporations and other individuals have directed their monies exclusively to a PAC. In the face of fourteen years of price inflation and widespread practices, the Workgroup sought to reduce, instead of increase, individual contributions to PACs.

### C. *In-kind Contributions and Loans*

The enforcement of any statutory limit necessarily entails provisions expressly defining what does and does not apply toward the limit. Current law requires that all in-kind and monetary contributions be fully reported and accounted for,<sup>91</sup> but past experience has shown "that compliance with these requirements is haphazard at best, and enforcement is virtually nonexistent."<sup>92</sup> Similarly, nonrepayment of loans to political campaigns has been documented

---

88. 2 U.S.C. § 441a(a)(3) (1982); *see* 11 C.F.R. § 110.5(a)-(b)(1) (1987).

89. H.B. 1253, Md. Gen. Assembly, 394th Sess. (1988).

90. MD. ANN. CODE art. 33, § 26-9(b) (1986).

91. *Id.* §§ 26-11 to -13 (1986 & Supp. 1987); GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 35.

92. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 35.

as a circumvention of contribution limits.<sup>93</sup> The current statute<sup>94</sup> does not treat loans as contributions except, by implication, to the extent that interest is not charged.<sup>95</sup> Also, the statute is generally vague on what actually constitutes a loan and what aspects of a loan count toward limits for the purposes of campaign finance regulation.

1. *In-kind Contributions*.—Therefore, the first step toward reform is to codify, as the Commission recommended,<sup>96</sup> the 1978 Maryland Attorney General Opinion holding that the statutory definition of “contribution” shall include in-kind contributions.<sup>97</sup> The definitions section of article 33 should be expanded to include an exhaustive and clear definition of an in-kind contribution, utilizing the federal code language to encompass all things of value contributed for anything less than fair consideration.<sup>98</sup> Section 26-9 of article 33, in which requirements upon contributors are imposed, should contain provisions for the determination of reportable value of in-kind contributions. Because a receiving campaign may not be aware of the presence or value of an in-kind contribution, the contributor should be required to notify the campaign and quantify the in-kind contribution, as the contributor is arguably better able to determine value than the recipient.

The frequency and growth of in-kind contribution activity in Maryland political campaigns demands statutory provisions specifying how, if at all, such activity should be reported. As the Commission recommended, reform should be targeted toward ensuring disclosure of the common forms of in-kind contribution activities. These include offering transportation or office space, holding fundraising receptions in the contributor’s home, and paying compensation to employees serving on advisory or fundraising boards as part of their compensated employment.<sup>99</sup> Furthermore, a *de minimis* provision, exempting these and other in-kind contributions where they do not exceed certain threshold amounts, would be appropriate both to avoid disclosure of a potentially overwhelming volume of activity and to include the value of activity above the threshold on the basis that it constitutes meaningful influence upon an election.

---

93. *Id.* at 36.

94. MD. ANN. CODE art. 33, § 26-8 (1986) (effective Jan. 1, 1987).

95. GOVERNOR’S COMMISSION REPORT, *supra* note 3, at 67-70.

96. *Id.* at 67.

97. 63 Op. Att’y Gen. 263, 267-68 (1978).

98. 2 U.S.C. § 431(8)(A)(i) (1982); *see* 11 C.F.R. § 100.7(a)(1) (1987).

99. GOVERNOR’S COMMISSION REPORT, *supra* note 3, at 35, 67-69.

Recognizing that certain groups or organizations may be able to provide disproportionately larger amounts of in-kind contributions than others, such thresholds should be set so as to exempt only minor and non-recurring in-kind contribution activity.

An important precaution to the regulation of in-kind contributions would be to provide for full allowance and nondisclosure of volunteer services using the analogous federal statute.<sup>100</sup> This is perhaps most compelling in the area of persons donating time to assist in fulfilling financial disclosure requirements imposed by the state regulatory scheme itself, and would afford an important incentive for improved compliance by candidates.<sup>101</sup>

A vital distinction not addressed by the Commission is the frequency of "volunteer" services provided due to unseen pressures applied on so-called "volunteers" by employers, unions, and other groups. Reform should ensure that only purely voluntary activity, which is not conditioned on retaining employment or membership in any organization, shall be exempted from the realm of reportable activity subject to limits.

2. *Loans.*—Specification of when and what part of a loan may count toward a contribution limit is conspicuously absent from the Code's loan regulation section.<sup>102</sup> The result of the current law, as the Commission found, "is to allow individuals to give money, in the form of a loan, that exceeds the limits on contributions."<sup>103</sup> Non-compliance with already existing requirements for all loans made to candidates<sup>104</sup> should cause borrowed monies to count as contributions and apply toward limits. Improvement is needed to ensure repayment of loans. The Commission recommended that the loan must be personally guaranteed by the candidate (as opposed to a spouse or supporter) or made by a lending institution in the ordinary course of business.<sup>105</sup> Recognizing that financial institutions actively lobby elected officials and contribute to their campaigns, a better rule would be to require candidates to make personal guaran-

---

100. 2 U.S.C. § 431(8)(B)(ii) (1982); see 11 C.F.R. § 100.7(b)(3) (1987).

101. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 69. The Commission further recommended a similar allowance for volunteers donating their time for contesting, maintaining, or defending election results for a candidate or candidates. *Id.*

102. MD. ANN. CODE art. 33, § 26-8 (1986).

103. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 75.

104. MD. ANN. CODE art. 33, § 26-8(b) (1986).

105. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 36-37, 74-76. See also 2 U.S.C. § 431(8)(B)(vii) (1982); 11 C.F.R. § 100.7(b)(11) (1987) (outlining existing federal provisions after which the recommendations for state reform are modeled).



tees or to repay loans by a specified standard post-election date. Under the post-election repayment option, any unrepaid loan amount would be construed as a contribution, subject to the applicable limits. Accordingly, the source of any loan need not be limited, and actual repayment should be permitted by the candidate or candidate's political committee only. Finally, express provisions are needed to provide that below-market-rate loans shall be equivalent to a contribution in the amount of cost reduction.<sup>106</sup> This closes the final documented loophole in loan activities and determines the contribution amount of "any loan . . . for less than fair consideration," for purposes of the definition of in-kind contribution proposed above.

#### D. Exemptions

The current exemption provisions<sup>107</sup> in effect are the source of extensive ambiguity, leading to considerable debate within the Commission and the Maryland General Assembly.

Transfers between and among candidates' treasurers and political committee treasurers are exempt from the individual limits.<sup>108</sup> These statutory provisions allow the formation of a number of campaign structures and functions, and permit the transfer of funds within these structures for campaign administration. All candidates must appoint a treasurer to handle all receipts and disbursements for either of two statutorily permitted campaign structures, the candidate campaign<sup>109</sup> or the candidate political committee.<sup>110</sup> Candidates changing their campaign structure from one to the other of these forms enjoy unlimited transferability of funds. Candidates wishing to transfer their funds to the campaign or political committee of another state or local candidate may do so in unlimited fashion. The need for transferability of funds is shared by political committees not affiliated with or devoted to the election of one or a slate of candidates (these are known as noncandidate political committees, and they include PACs). Consequently, these entities are permitted to transfer funds among themselves, to candidate campaign treasurers, or to candidate political committees' treasurers.<sup>111</sup>

First, the existing exemption on transfers among candidates'

---

106. See GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 36-37, 75.

107. MD. ANN. CODE art. 33, § 26-9(c) (Supp. 1987).

108. *Id.*

109. *Id.* § 26-3 (1986 & Supp. 1987).

110. *Id.* § 26-4 (1986).

111. *Id.* § 26-9(c) (Supp. 1987).

treasurers<sup>112</sup> constitutes a potentially significant loophole to individual or political committee limits: contributors reaching their limit with one candidate could, by prearrangement, contribute to a second candidate, whose treasurer could then transfer, in unlimited fashion, those and other funds to the first candidate's treasurer. Second, the exemption on transfers between political committee treasurers<sup>113</sup> would produce a similar result in the case of candidate political committees. Third, exemptions on transfers between candidates' treasurers and political committee treasurers<sup>114</sup> (treasurers of both candidate and noncandidate political committees) also facilitate circumvention of any existing or proposed limit. Collectively, these exemptions provide for the free transfer of contributions among candidates under all possible campaign structures, an obvious opportunity for circumvention of limits. In accordance with the recommendation of the Commission,<sup>115</sup> such exemption provisions should be repealed in full. Removal of these exemption provisions will facilitate the imposition of limits on PAC transfers to campaigns, which are now permitted in unlimited fashion.<sup>116</sup>

Since 1985 there has been very little study of the politically explosive issue of candidate-to-candidate transfers. The Commission, in its unpublished deliberations, cited such activity as an actual campaign finance abuse, whereby large amounts of funds have been transferred to other campaigns predominantly by candidates who held leadership positions or who faced generally noncompetitive races.<sup>117</sup> Candidates transferring their excess funds are generally those who, by their position in the executive or legislative branches, control the outcome of any campaign finance reform. At present there is inadequate information on the extent of concentration of campaign funds as a result of transfers by individual legislative candidates, and perhaps even less data on the potentially more significant transfer activities of county or regional delegations and extensively funded candidates for statewide office. Despite the low profile and publicity of candidate-to-candidate transfers in the past, they promise to emerge as the focal point of political contention among the decisionmakers of election law reform.

---

112. *Id.* § 26-9(c)(i).

113. *Id.* § 26-9(c)(ii).

114. *Id.* § 26-9(c)(iii)-(iv).

115. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 76-77.

116. MD. ANN. CODE art. 33, § 26-9(c) (Supp. 1987).

117. Interview with Robert O.C. Worcester, Member of the Governor's Commission to Review the Election Laws, in Baltimore, Maryland (Mar. 8, 1988).

The Commission insightfully proposed that the exemptions on transfers between candidates be replaced with the same limits proposed for PAC transfers to candidates.<sup>118</sup> This comment advocates this mirror-image rule, yet maintains that the limit should be \$16,000 on transfers from one candidate to another in a full four-year period, in accordance with this comment's proposed \$16,000 limit on transfers from PACs to candidates.<sup>119</sup> Similarly, a \$20,000 limit should apply to transfers by a political committee of a statewide candidate to any other candidate. The intent is to impose limits equitably on all political committees (both candidate and noncandidate) and to provide a partial restraint on what ultimately happens to contributions and transfers received by candidates. A valid exception to this limit, as the Commission has observed, would be the unlimited transferability of funds between a candidate treasurer and a political committee of the same campaign.<sup>120</sup>

While proposing the elimination of all existing exemptions in the Maryland Code,<sup>121</sup> the current political environment in Maryland calls for a number of new, statutorily recognized exemptions on transfer limits. Recognizing the importance of a two-party system in Maryland and utilizing the federal concept of party contribution allowances,<sup>122</sup> the Maryland Attorney General's interpretation that a payment to a political party or its political committee is exempt from any limit<sup>123</sup> should be codified. As the Attorney General observed, past party practices have included attempted influence of elections.<sup>124</sup> In order to prevent political parties from emerging as conduits of unlimited contributions, the exemption should apply only in the case of a contribution used for party administration (such as facilities and equipment). Similarly, recognizing first amendment freedoms, contributions or transfers to a political committee supporting or opposing a ballot issue should be exempt from limitation, as the Commission has proposed.<sup>125</sup>

Exemptions also should be furnished for transfers among non-

---

118. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 61.

119. Under the mirror-image proposal of the Commission, candidates for statewide office would be limited to \$8000 in transfers to any other candidate, and non-statewide candidates would be subject to a \$6000 limit. The Commission further proposed a \$20,000 aggregate limit on transfers to all candidates. *Id.* at 34, 64-65.

120. *Id.* at 64.

121. MD. ANN. CODE art. 33, § 26-9(c) (Supp. 1987).

122. See 2 U.S.C. § 431(8)(B)(x) (1982); 11 C.F.R. § 100.7(b)(12) (1987).

123. 60 Op. Att'y Gen. 259 (1975). Codification is consistent with the recommendation of the Commission. See GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 60.

124. 60 Op. Att'y Gen. 259, 262 (1975).

125. H.B. 831, S.B. 652, Md. Gen. Assembly, 393d Sess. (1987).

candidate political committees, an area not addressed by the Commission. The crux of the current problem lies in the area of transfers to state political committees from political committees regulated by federal law, a common practice among numerous organizations that have formed federal and state political committees in order to support candidates in both arenas with a maximum of administrative ease. The Maryland Attorney General concluded that all transfers from federally regulated committees to state-regulated committees are subject to a \$2500 per-election limit.<sup>126</sup> Prior to these findings, political committees in the State did not recognize any such limit, and several created administrative structures in reliance on the lack of transfer limitations.<sup>127</sup>

In 1987 Senate Bill 351 and House Bill 1111 (companion bills) contained the first, though unsuccessful, attempt before the General Assembly to address this issue. House Bill 419, introduced in 1988, unsuccessfully repeated the attempt to exempt such transfers but in a more narrow fashion, so as to exempt only trade association political committees. In agreement with the spirit of the 1987 legislation, this comment proposes to modify the unworkable conclusion of the Attorney General while retaining the Attorney General's intent to enhance the regulation of transfers between noncandidate committees. Accordingly, a full exemption is recommended for federal committee transfers to noncandidate state committees on the ground that many of these political committees (most of which are PACs) have relied on funding by affiliated federal committees for purposes of significant administrative ease and practicality. Consistent with the spirit of recent Attorney General advice of counsel letters,<sup>128</sup> however, new requirements on such transfers are proposed. First, full disclosure of all individual contributors of all monies transferred would make public the source of funds received by state political committees. This disclosure is currently required for all contributors to a state political committee,<sup>129</sup> but such information

---

126. Advice of Counsel Letters from Linda H. Lamone, Assistant Attorney General of Maryland, to Marie Garber, Administrator, SABEL (Aug. 27, 1985) and to Rebecca M. Babinec, SABEL (Feb. 26, 1986).

127. For example, state political action committees of AT&T, Baltimore Gas and Electric Company, Crown Central Petroleum, Delmarva Power Company, Maryland Life Underwriters, and approximately 20 others are funded by their respective federal political committees. These organizations are so structured to allow a single point of employee contribution collection and to direct employee contributions to federal candidates. Data Collected from 1986 Election Campaign Fund Reports Filed with SABEL (Nov. 1987).

128. See *supra* note 118.

129. See MD. ANN. CODE art. 33, § 26-7(a) (1986).

is rarely disclosed in the case of transfers from federal political committees. Second, the full exemption should apply only to monies derived from individuals who reside or are employed in Maryland and who are informed of the state-committee destination of their contributions. This limitation would preclude transfers of enormous sums of monies which some federal committees, soliciting from more than one state, could direct to Maryland<sup>130</sup> and would ensure informed contributing by Maryland donors.

Further provision should be made for at least a limited amount of transfers from political committees deriving their receipts from out-of-state sources. Doubling the proposed individual aggregate limit—or \$20,000 per four-year election cycle—represents a reasonable allowance of transfer activity by political committees of national organizations with concentrations of economic or other interests in Maryland while limiting the transfer of excessively large sums.

The ultimate intent and rationale of these transfer allowances between federal and state political committees is that where monies involving transfers with federal committees are collected, distributed, and disclosed in a manner similar to that of a state committee, mere choice of administrative structure should not create a substantive difference in the ability to transfer funds to candidates. Furthermore, in response to the narrowly drawn exemption in H.B. 419 for trade association political committees, equity considerations demand that the exemption apply to *all* noncandidate state political committees receiving transfers from their federal political committee affiliates.

#### *E. Special Loophole-Closing Provisions*

The proliferation of organizational diversification by formation of subsidiary or other commonly owned or managed organizations creates concerns for potential circumvention of the proposed individual limits. On the one hand, it must be recognized that separate but affiliated organizational entities are often formed for legitimate purposes arising out of economic and political interests that have nothing to do with contribution and transfer limits. On the other hand, allowing each diversifying entity its own individual limit creates the potential for huge accumulations of campaign contributions or transfers and a conspicuous loophole through which proposed limits may be circumvented. The Commission recommended that,

---

130. Federal committees may be formed to receive contributions from donors in all 50 states.

in the narrow case of corporations, a parent corporation and any subsidiary shall be considered as one contributor, subject to the proposed individual limits.<sup>131</sup> The Commission's proposal does not recognize the diversified interests of subsidiary corporations within a corporate organization and is limited in scope to business entities. An array of other organizations, including labor unions, trade and professional associations, political committees, and a myriad of other interest groups, would be free to diversify organizationally so as to create additional contributing or transferring entities.<sup>132</sup> An improved reform proposal would provide that two or more commonly owned, managed, organized, or administered entities may not enjoy separate, individual limits and will be subject to the individual limits proposed by this comment.<sup>133</sup> This would apply broadly and equitably to *all* types of organizations, and political committees would be similarly restricted within the confines of the proposed \$16,000 limit.<sup>134</sup> Nevertheless, determination of common ownership, management, organization, or administration of entities should be made under SABEL's proposed new rulemaking power, and all organizations and groups should be provided with the opportunity to obtain separate limits for their affiliated organizations upon a showing of a substantial disparity in political or economic interests. Reform legislation should outline specific criteria<sup>135</sup> to be used by SABEL in determining whether a diversified or branch entity shall be deemed "separate" for purposes of applicability of contribution or transfer limits.

The phenomenon of "testimonials," in which monies are given

---

131. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 62.

132. The Commission did, however, address the applicability of limits to partnerships, recommending that contributions made by a partnership should be attributed to each partner according to the partner's proportionate interest in the partnership. *Id.*

133. The proposed individual limits are \$4000 to a single candidate and \$10,000 to all candidates.

134. The Commission failed to address the obvious opportunity for a political committee formed by a statewide organization to design 23 subcommittees, one for each county in Maryland, in order to increase their contribution potential by a multiple of 23.

More troubling, however, is the Commission's overall narrow focus on the structure of business entities without similar scrutiny of the structure within other organizations subject to individual or political committee limits. It is likely that this is a simple oversight, for to conclude otherwise raises questions about the scope and impartiality of the Commission's work. The omission is most surprising in light of the Commission's study of PACs and concern with the proliferation of PACs and their potential for undue dominance in campaigns.

135. Such criteria should include: (1) the nature of the activity conducted by each entity; (2) the geographic location of the activity conducted by each entity; (3) the regulatory scheme, if any, that controls each entity's activity; and (4) all other evidence of differing political, economic, or social interests among the entities.

for the benefit of future or past campaigns or to enhance the political future of an individual, is another loophole in contribution and transfer limits. Historically, such events may have been in honor of individuals who had not formally filed for public office, thereby creating uncertainty as to what candidate and to which election cycle such monies should apply for purposes of compliance with campaign finance laws. Current law, by way of a 1986 Maryland Attorney General Opinion, holds that funds generated by a testimonial are political contributions, subject to applicable limits, if the purpose of the testimonial is to raise funds for a future or past election campaign period.<sup>136</sup> The Commission correctly recommended a codification of the opinion, accompanied by legislative guidelines for SABEL or other enforcement bodies to follow in determining under what circumstances a testimonial event is for campaign purposes and therefore subject to limits.<sup>137</sup>

Still another loophole exists in the attempt to impose and enforce the proposed individual limits in the area of family-member contributions. The Commission aptly recommended that a parent who controls a minor child's bank account may not make a contribution in the name of the minor unless the child makes a written request to have the contribution made.<sup>138</sup> This rule should apply not only to bank accounts, but to all family members' funds over which a parent or guardian has control.

## V. CONCLUSION

The array of limits, exemptions, and clarifications in this reform are carefully formulated to further the five policy goals set forth earlier in this comment.<sup>139</sup> In assessing the furtherance of these goals, it is apparent that these objectives are often inextricably intertwined with one another, providing further insight into the underlying intent of this reform proposal.

The primary objective of promoting public confidence in our

---

136. 71 Op. Att'y Gen. (1986) [Opinion No. 86-027 (Apr. 11, 1986)].

137. GOVERNOR'S COMMISSION REPORT, *supra* note 3, at 71-73. The Commission proposed examination of the following five factors in order to determine whether the purpose of a testimonial event is to raise funds for a current, future, or past campaign (and therefore is to be construed as subject to applicable limits): (1) the identity of the organizers; (2) the timing of the event; (3) the content of solicitations, advertising, and other written materials available to individuals who attend the event; (4) the extent to which the honoree's political future is mentioned in the promotions of or at the event; and (5) the use of proceeds from the event. *Id.* at 73.

138. *Id.* at 61-62.

139. See *supra* notes 4-5 and accompanying text.

electoral and governmental processes is addressed by the imposition of impropriety-controlling limits on contributions and transfers. Yet the promotion of public confidence remains equally contingent upon the enforceability of such limits, the second of the five policy objectives. This reform proposal recognizes the historical difficulty of regulation and tendencies toward circumvention. Therefore, minimally restrictive limits are recommended, relative to the current levels of contribution activity in the state. Improved regulation and enforcement are proposed to assist those trying to interpret the complexities of campaign finance law, as well as to deter these same parties from creatively circumventing the provisions and spirit of the law.

Of equal importance, clear and express controls on the traditional conduits for circumvention are advocated: in-kind contributions, loans, "volunteer" services required by employers, transfers among political committees, testimonials, and all other activities which count toward the proposed limits should be brought within the realm of disclosed and regulated activity. To the extent that this crucial enforcement capacity depends on ease of regulatory administration, such provisions as the *de minimis* exception for citizen campaign involvement are included to reduce the volume of disclosed activity. Housing all future rulemaking authority with SABEL will enhance enforcement capacity. A single, expert agency will monitor future ambiguities inherent in campaign finance statutes, make necessary adjustments, and then ensure compliance as the state's front-line oversight agency.

The minimally restrictive limits proposed, while an essential component of a viable enforcement mechanism, also further the third objective of promoting an informed electorate. There is little dispute that a majority of campaign receipts are devoted to communicating with a media-blitzed and often politically apathetic public. The proposed allowances for significant contribution levels maximize the prospects for improved, informed voting. The costs of communication, often driven by developing technology, are likely to increase; to assume that candidates will return to "kerosene lamps and hand-cranked phones"<sup>140</sup> is unmindful of the interests and basic needs of a campaign. Therefore, generous contribution levels are recommended for all participants, reflecting the reality of campaign costs and the policy choice that such communication and re-

---

140. MINORITY REPORT, *supra* note 39, at 11.



sulting education, relative to other forms of public activity, are of significant importance.

The adequacy of contribution levels is tied directly to the fourth policy goal of promoting public participation in elections. Adoption of generous contribution levels reflects a recognition that not every citizen has the time or interest to engage in political volunteer activity. The expenditure of money is often the best method of participation for those who may not otherwise participate at all. Public participation is also promoted through other proposed vehicles. First, the *de minimis* exemption for common forms of in-kind contribution activity serves to preclude the burden of disclosure by the large majority of volunteer activists. Second, the political party administration exemption serves to foster the viability of the state's endangered two-party system, therefore encouraging the expression and involvement of the broadest possible spectrum of political viewpoints. Third, the suggested accommodation of the participation of those political committees or other entities, which, although possessing unusual characteristics of organizational form, administrative structure, or out-of-state contribution sources, have similar political and economic interests, is vital to maximizing participation. In this third vehicle, however, the primary objective of public confidence is not ignored, resulting in express limits on the contribution and transfer activities of such entities. Similarly, the second objective of enforceability is enhanced to the extent that adequate participation levels preempt the tendency toward circumvention of statutorily imposed limits.

The adequacy of contribution allowances is also proposed in promotion of the final goal of fair opportunity for challenger candidates. While state campaign disclosure indicates that incumbents usually enjoy a clear advantage over challengers in campaign contribution receipts, the advantage often diminishes in competitive races.<sup>141</sup> In close races where additional contributions are usually more valuable to a little-known challenger than to a well-known incumbent, restrictive limitations on contributing entities favor incumbents, whose challengers will have less chance of raising the monies necessary for a winning campaign.<sup>142</sup>

Adoption of these or similar concepts is strenuously urged of the Maryland General Assembly. Logical effective dates would be at the commencement of the state and local election cycles subsequent

---

141. L. SABATO, *supra* note 53, at 173-74.

142. *Id.*

to those currently in effect at the time of passage, because a rush of contributions and transfers, possibly in excess of proposed limits, might result just prior to any effective date imposed in the current election cycles.

Although no legislation has passed which addresses the problems with campaign finance law, the Commission and Workgroup have made considerable and commendable progress on this issue. To the extent they have recommended legislation which has brought about debate and enhanced awareness of the Code's deficiencies, they have successfully initiated movement toward reform of an issue that is most difficult to legislate. These successes have been facilitated by the House Constitutional and Administrative Law Committee, which has devoted much of its time in the past two years to hearing the voices of all affected parties and exhaustively debating the many proposals before it. As lawmakers' efforts continue, affected parties are moving to the negotiating table, and the educational process on this complex issue is expanding.

Legislative and executive branch leadership must come to the difficult realization that election law reform is a compelling house-keeping issue which must be addressed in comprehensive and immediate fashion. There may be few short-term gains for those officials who boldly take the lead in shaping an election law reform policy, but the long-term benefits accruing to the institutional integrity of elected offices and to public confidence in the electoral and lawmaking processes are substantial and worth seeking.

CARVILLE B. COLLINS