

The Case for Campaign Finance Reform

Archibald Cox

Professor Archibald Cox, one of the leading lawyers of this century, spoke with *Green Bag* Executive Editor David Gossett on January 22, 1998. Mr. Cox served as Solicitor General to President Kennedy; was the Watergate Special Prosecutor investigating President Nixon; served as Chairman of Common Cause from 1980 to 1992; and has been on the Harvard Law School faculty since 1946. On February 26, 1998, after this interview took place, supporters of campaign finance reform failed to end a threatened filibuster of the McCain-Feingold bill and acknowledged that reform was therefore unlikely this term. They vowed to try again next year.

Since the 1996 elections, campaign finance reform has again become very much a public issue. Proposals for reform keep on getting cut back, though. For example, the McCain-Feingold bill in the Senate, which initially contained quite a number of reforms, at this point seems to only really focus on getting rid of soft money ...

And the so-called "issue ad": the ads which appeal to people who would like a higher minimum wage, and point out that a candidate for Congress has always supported higher minimum wage proposals. The ad never in so many words says, "Vote for him," but it talks about the need for a higher minimum wage, and then says "Jim Jones has always supported it." Period. It could be done more subtly than that, but that's the theme of these ads. And they've been getting by the limitations of the Federal Election Campaign Act. But you are

quite right, with that minor addition.

I've been in and following the movement for campaign finance reform since 1972 or 1973 – most of the time, though not at the very beginning, in connection with Common Cause. The cutback in the McCain-Feingold bill was necessitated by the present situation in the government – the Executive Branch in Democratic hands, Congress in Republican hands, and Republican opposition to these changes. But the best shot at making progress – and a very important one – is to strike at soft money and the accompanying evil that I mentioned.

Would these really change campaigns?

It would make a huge difference, in particular in Presidential elections. Remember that the Presidential system of public financing in the

general election – to those who volunteer to forgo private contributions and private spending in return for a modest amount compared to the totals nowadays spent – survived *Buckley v. Valeo*, and worked very well until 1988. Then soft money began, and it has reached the most outrageous figures. There were \$86 million spent in soft money in 1992. This grew to \$262 million in 1996, and it will be more in 2000. And remember these are contributions from corporations and wealthy individuals, contributions of fifty and one hundred thousand dollars, and in one notable case a million dollars from an individual. The head of Amway and his wife gave, I think, a million dollars.

Do you think that banning soft money can solve election problems, or is the real problem the escalating costs of campaigning, the fact that campaigning is becoming so much more focused on media, which costs so much?

Which is cause, which is effect? I think the media has made a difference in the style of campaigning – certainly ever since TV. As a matter of interest, in 1960 I was the head of what some people called John F. Kennedy’s “Brain Trust,” an academic group that was first advising him, and then was broadened to include writers and prepare speech material. Whenever Kennedy spoke in the same place President Roosevelt had spoken, I used to go back and read Roosevelt’s speech. (I’m talking now about prepared speeches, not the equivalent of back-of-the-train.) And it was clear that with a few exceptions – very few – Roosevelt’s speeches had far more substance than Kennedy’s. The problem wasn’t Kennedy, it was that the style of campaigning and speaking had changed. That was disappointing, but I think if you were to compare Kennedy’s to those today, you would find that the trend has if anything accelerated – and it is far worse in the case of the House and Senate. But the problem is partly all the money available, and

all the hiring of campaign advisors, and pollsters, and wordsmiths who come up with catch phrases designed for sixty-second bites. I don’t think cutting back on the amount of money spent would completely reverse the trend I’ve mentioned, but I think it would be a great improvement.

Do you think that, politicians being politicians, they’ll figure out a way around any new attempt to cut back expenditures?

Well, they’ll try, they’ll try. Their lawyers will try. It may be a little like the tax laws, except that I would hope that loopholes for a favored few wouldn’t be put in. When a loophole is devised, at least it should apply to everybody across the board evenly. But I don’t think any loophole would be as great as the soft money loophole, and I think with the experience we’ve had under the 1974 Act many of them can be closed – and would be closed by the latest version of the *full* McCain-Feingold bill.

Then, of course, there are many other objections to the present system, and its really devastating impact on the Congress. As some Senators themselves have commented, money influences – directly influences – votes on legislation. It has an even greater indirect influence. You know every Senator or Congressman acknowledges pretty freely that big campaign contributors get access that others don’t get. Being a lawyer, mostly an appellate court lawyer, I can’t help thinking how great it would be if I could have a chance to be heard by the court but my opponents never did. And that is in fact what happens today in the legislative process. Then there is all the influence that comes from being able to influence the staff, the choice of people to be on the staff, or, today, to have your lobbyist actually in on the writing of a bill, or to be able to slip into the bill late at night – not without anybody knowing it, but with only very few noticing it – some little tax break or appropriation. For

example, I spoke of the president of Amway and his wife giving a million dollars in soft money. That was last year, in 1997. And in return there was in the tax bill passed in 1997 a tax break that yielded many millions to Amway and a handful of other companies.

In many ways, the worst trouble is that people have lost their confidence in the process, lost their confidence in government, in their representatives. One study put it that people have become totally unbelieving in modern representative government, for two reasons: one, because of the flood of campaign contributions, and two, because they think the lobbyists really govern the country and not Congress. That loss of sense of political power, and with it, and importantly, of individual political responsibility of a citizen as a citizen, is to me the most frightening thing for the country in the long run.

I wonder whether campaign finance reform can solve that, though. Various other proposals have been made to try to solve the same problem, ranging from term limits to cleaning up lobbying, etc. Can any of these actually solve anything?

Well, to think that campaign finance reform, even as I would like to see it, would completely eliminate the problem is foolish. It wouldn't, I'm sure, but I think it would remove one of the important contributing causes, and it is one that is within our power – if we have the will, we as citizens – to deal with. Ultimately, we can elect people who will change it. But it's part of the overall culture of the age, the overall outlook of Americans today.

I'm fond of quoting – in this case it'll have to be paraphrasing – both De Toqueville, who as you know is from the early 19th century, well, the 1840s, and Alfred North Whitehead, who was a widely known and much admired Scottish philosopher who spent quite a little

time in this country in the 1920s and 1930s. Whitehead, when asked how could one explain the greatness of growth of the American people, the American nation, said that more than any other people in the history of mankind they had the qualities of toleration and cooperation. De Toqueville emphasizes, as you know, the tremendous number of voluntary associations. Voluntary associations are strong, and are formed and grow, when people have a sense of cooperating each to help some cause outside himself. Now, he may figure it'll help him, too – just the way they cooperated on the frontier, to defeat the Indians or to raise the principal pole of a barn – but nevertheless it was in a sense outside oneself. It was community-oriented, public-spirited, and so forth.

That spirit is at a minimum today. Membership in voluntary associations is way, way down, as you doubtless know. Even the Parent-Teacher Associations are way, way down, for all this political preaching about education. The things that make for those shifts in broad social outlook, social psychology, undoubtedly have an enormous impact on the character of our politics, but I think that campaign finance is an important element, and, well, you strike at those evils you can reach. If one is an optimist, as I am, you have hope, faith that some equivalent of the old qualities will come back.

When we were talking about McCain-Feingold, you pointed out that it tries to get rid of issue ads and independent expenditures. Do you think that's the kind of reform which the courts will let happen?

That's a hard question. The Supreme Court today – the Justices are very much divided on these questions, as we know from the *Colorado Republican* case.¹ And it's awfully hard to pre-judge where they will come down. I argued

1 *Colorado Republican Federal Campaign Committee v. FEC*, 116 S. Ct. 2309 (1996).

Buckley v. Valeo for Common Cause, although I wasn't at that time in the case as counsel for it. (I became involved in the case because I filed an *amicus* brief for Senator Kennedy and Senator Hugh Scott of Pennsylvania, a prominent Republican, at that time.) When it came to the oral argument I was asked to make that part of the argument that the Supreme Court rejected. I say that because I continue to be firmly of the opinion that *Buckley* was wrong, but you should know that I'm defeated counsel. So my attitude is on the whole that Congress has the power to do these things. But there are certainly a number of votes in the Supreme Court – perhaps not enough, but a number – who I feel quite sure would uphold a restriction that was fairly broad on issue ads. Unfortunately it's a matter of degree; it's a line like so many lines in the law. It has to be drawn with each particular ad in front of you.

It may be that some of the Justices – certainly Justice Thomas, perhaps the Chief Justice and Justice Scalia – would say that any ban is a violation of the First Amendment. On the other side one can be fairly sure, I think, of Justice Stevens, so long as he is on the Court, and Justice Ginsburg. We don't know about those who made up the plurality in the *Colorado* case – Breyer, O'Connor, and Souter – but I think there might well be three votes there to uphold the limitation. I don't know about Justice Kennedy. Perhaps if there were a majority that way he'd go along with the majority. He's a lot more amenable to persuasion than I see the Chief or Scalia, and certainly a lot more amenable than I see Justice Thomas. But we don't really know.

I've heard it said that to a certain extent your views on campaign finance reform are actually most similar to those of Justice Thomas, in that Justice Thomas seems to be the only person on the Court who rejects the line between contributions and expenditures. Of course you and he in the end come

down differently on campaign finance reform, but that is what you argued in Buckley. Do you think this is a fair characterization?

Well, yes, but I would phrase it a little differently. I would not deny that contributions and expenditures were two very different things. I would argue that the Congress has power to limit the volume of expenditures on an election, influencing people, for much the same reason that the state has power to regulate the use of sound trucks. It is free speech *plus*, not pure speech, and therefore it is not subject to the same degree of strictest scrutiny that any regulation of speech content is, or any prohibition on speaking is. It's not simple speech. I've always taken much comfort in the fact that Paul Freund, who was not an extremist in any sense, held that view.

So, that would sweep in the limit on expenditures. I don't have to talk about whether they are the same as or different from contributions. It's true that my result would be one hundred percent opposed to that of Justice Thomas, but it would not be because I see no difference between expenditures and contributions. There still would be, under my view, a question of degree, to be treated as a question of fact – intent, largely – when it came to a so-called issue ad.

How do you draw a line between – or do you draw a line between – independent expenditures and issue ads on the one hand, and direct spending by candidates on the other, which Buckley pretty straightforwardly forbids limiting?

Well, *Buckley* – that last statement depends a little on what you apply it to. *Buckley* said you can't forbid direct expenditures, either by a candidate or by an independent person. I would argue that if a sizable amount of money was involved then the so-called independent expenditure, even if there is no proof of any form of coordination, is still closely enough

analogous to the speech-with-a-sound-truck case for Congress to limit or regulate it. I think it is a harder case than that of the candidate, and I would have to think about how much money was enough to make the analogy appropriate – enough to say that this has become free speech plus and not pure speech. And I, as a legislator, might decide the best thing to do was to define “coordinated” very broadly, but leave those expenditures which were independent even under that broad definition unregulated.

That leads into another topic I wanted to touch on – FEC enforcement. Is the FEC part of the problem?

Any thoroughgoing reform would have to include a complete change in the enforcement provisions, both the institutional arrangements and some of the prohibitory language. For example I’m not sure if the definition of what is criminal shouldn’t be broadened. Today it is “knowing violations.” Sometimes “knowing” is read to cut out an awful lot of things that perhaps should be criminal. I certainly agree that the enforcing and interpreting agency should not be constituted as the FEC is at present. Appointments should not be made as they are at present, and the agency should have much more enforcement power than the FEC has.

Is the problem that Congress is regulating itself through the FEC?

You know, achieving real reform – which has a number of elements, some of which we haven’t talked about – is a long, hard struggle. Even the full version of McCain-Feingold is not enough, because it does nothing to reform the FEC and the enforcement process. I recognize that. The political reality is that there is some hope of getting the shortened McCain-

Feingold passed today, and it is a realizable possibility within three or four or five years to get the full McCain-Feingold passed. Reform of the FEC I think lies a little farther ahead.

I’m rather inclined to wish that my late colleague Dean Sacks were right in the observation he once made, that sooner or later *Buckley* must be regarded the same way as *Lochner* and the other decisions striking down minimum wage laws, maximum hour laws, and other legislation of that kind. In other words, that a shift of the character of the current in 1937 is in order here.

A fundamental shift in how we think of political speech and the First Amendment?

Yes.

I’m reminded of something the head of a group of Political Action Committees (PACs) said. He argued that PAC speech is really the core of the First Amendment, since it is political speech. Is there an answer to that?

It is true that it is political speech, but just as the government has the power to forbid driving a sound truck through a residential area at two o’clock in the morning, broadcasting the PAC’s message – broadcasting in the sense a sound truck does – because of the element of the sound truck, so I would say because of the element of money the federal government, in the case of federal elections, has the power to regulate the expenditure, to spread the speech.

There’s another thing to remember – that I haven’t mentioned before, and that I’m not prepared myself to rely on a lot – but isn’t there something in common between a town meeting and an election? The moderator may limit my talking at the Wayland² town meeting in order to give my neighbors, others in town, a chance to talk. I can’t, along with a

2 Professor Cox lives in Wayland, Massachusetts.

few friends, filibuster. Indeed, in representative bodies we allow some cutting off of speeches, and even some allocation of time to those favoring and those opposing the motion – at least in legislation before the House. I think this analogy is relevant, although I don't think I can rely on it alone. I guess the only way to summarize the rationing with respect to town meetings and with respect to representative bodies is that fairness and the opportunity to present different issues and different sides is of compelling importance, sufficient to restrict any speech just as – well the first place you think of it is in terms of genuine national security secrets. I suspect one can come up with a few other analogies. This is the one that occurs to me, and I have to underscore *genuine* – obviously I'm not forgetful of the Pentagon Papers. But I think that line of thought also helps to buttress the analogy I drew between magnifying speech via sound truck and magnifying it via the expenditure of money.

We talked earlier about the public financing system for Presidential elections. It seemed to have worked for twelve years, three or four campaigns, and then fell apart due to soft money. Similar systems are present in the full version of McCain-Feingold bill and a bill in the House, for Congress. Do you think this is a good way for reform to go?

The Senate Bill contained a provision about the Senate, the House Bill a provision about the House; of course they'd be brought together in conference. That's just a matter of congressional etiquette.

I think it is the only way at the present time. I said earlier that I thought *Buckley* in the long run ought to suffer the same fate as *Lochner* and subsequent cases of that ilk. But I don't agree with the people who want to directly attack *Buckley* today, because I just think it's a vain hope. There is not a chance that the present Court would do it, and we

need to get on as best we can. So I very much favor modeling a provision applicable to House and Senate races after the federal election provisions applicable to Presidential elections. The question is, if Congress won't go for a complete copy – that is to say for public funding of the candidates who voluntarily accept a limit on their spending – what less than that should you offer? There are various combinations of franking privileges, free television time, and sometimes some money put forward. My own view is that the best version would directly parallel the Presidential provisions, and therefore the thing next to be preferred, if I think it is enough to be effective, is whatever is the maximum that's politically practicable.

One critique of campaign finance reform is that it is pro-incumbent, that though the rhetoric of campaign finance reform speaks in terms of equalizing power what will really happen is it will help entrench the people in, because they have the advantages of being in power already.

I'm inclined directly to challenge the accuracy of that forecast. The incumbents have enormously greater power to raise money, so if you had reform they wouldn't have that advantage. I'm not sure whether I have the figures at hand, but Common Cause does have figures on it.

I guess the concern is that it is those challengers who have and raise the most money who are successful, since the incumbents have the political exposure and the name recognition of already being in Congress, and thus the only way for a challenger to really be successful is to break the mold, to raise enough money that she can get into the public eye. And so anything which reduces the amount of money spent will hurt the challengers who are successful today.

Well, this is a matter of seeking to appraise which is the greater of the advantages the in-

cumbents have today. I'm still inclined to think that with rare exceptions the incumbent does a great deal better because of the money, but one could study it. One could look into whether before 1980 the proportion of incumbents who won was greater or less than the proportion of incumbents who win under heavy spending. That wouldn't necessarily rule out other changes in our political climate, but it would give you some light. My judgment would be that the money is much more important. An incumbent Senator, to reach the average spent in a Senate race by winning Senators, has to raise \$14,000 every week of his six year term, each and every week.

I'm hard pressed to see how that can't be corrupting and problematic.

In every sense, not only from the almost direct influence on voting. Paul Douglas used to emphasize other things, other forms of favors, saying that as a result of buying lunch, taking to football games, paying to come to make a pro forma speech at a convention in Hawaii, and so on and so forth, that almost unconsciously the people who are financing that become the Senator's friends. They are the world he lives in, they are what he knows, and that again sort of unconsciously is bound to shape his judgment, does shape his judgment. Well, all the more so in the case of his funding – although one sometimes wonders how unconscious it is, because a man who is smart enough to get elected to the Senate ought to be smart enough about human nature to know that he is bound to be affected by this.

It sounds very similar to the reasons given for lobbying reform, and for the movement towards term limits. Do the same rationales underpin all three?

On term limits, there's one consideration that weighs very heavily on the other side with me.

I'm outdated, but certainly during the time when I had experience and, what shall I say, knowledgeability, in the Senate – I knew the Senate better, but to a degree it must also be true in the House – the tremendously important people were people who had held committee assignments for a long time, and did work at it, and came to know the area, and came to care for the not dramatic, but day-to-day, solid business that is the underpinning of an awful lot of things. If you put term limits on, you force those people out. You can't be sure that within the term limits anyone will build up that kind of thing which in the corporate or academic world we'd call "expertise." That has always seemed to me a great difficulty with the term limits movement.

To play devil's advocate, though, much of the way that Senators become expert is through being on these committees, which involves a lot of contact with the industries and lobbyists. How is this really different from being bought and sold by Washington lobbyists?

Well, of course one thinks it's good or bad depending on how much the individual Senator or Representative is influenced by those contacts and considerations. There is little way of measuring this except to look at individuals that you have some basis for judging individually. I'm still more concerned about the fellow who is conscientious, where his value and the contribution he makes to get the job done is greater than the negative results from too-long association. I could easily be wrong, though, or the trend could be changing. Also, I'm a little bit turned off by a remedy – term limits – which in effect says they all become rascals, and therefore we must turn them all out as soon as we decently can.

Moving back to campaign finance reform, one of the downsides to voluntary limits in Presidential elec-

tions – and it would be the same in any other voluntary limit system – is the example of people like Steve Forbes and Ross Perot with personal fortunes to spend on their own campaigns. How much of a problem do you think that is?

Well, we haven't anything to guide us except history and projections from it. Thus far they haven't come close enough to make the danger seem very real. Is it theoretically possible? Well, certainly, but I think it is most unlikely. Could the head of Microsoft get elected President? He's the individual with the personal fortune big enough and I guess he is favorably enough regarded, too, but my reaction is "no real chance." I may be all wrong, I don't know – how does one guess – but I don't think so. In any event, there is no solution to this except overruling *Buckley*.

But you are not in favor of trying to do that directly?

Not today. I think getting the Court to change tack is just a vain effort, and therefore in effect deliberately delaying any substantial reform. I have somewhat the same feeling about seeking to overturn *Buckley* by constitutional amendment. Assuming that I could gulp and swallow playing with the First Amendment – which would be something of a gulp – I think that advising that course today is simply advising delay, and with a somewhat uncertain outcome. I don't know; getting the legislatures of three quarters of the states to ratify – maybe you could do it today.

Of course we shouldn't forget the progress that is being made state-by-state in connection with state elections. And it will be very interesting to see how Massachusetts votes. We have an initiative and referendum on a measure which applies to state elections the Presidential method upheld in *Buckley*. The campaign for signatures went very, very well. I think it got more signatures than any initiative petition in recent memory.

What kind of reforms have other states done?

Well, Maine has one much like that. Colorado enacted a major reform. California has enacted a major reform. Minnesota did have what could be regarded as a major reform, but it has now become somewhat outdated; they will have to bring it up to date in terms of the amount of money people are allowed to spend. I think the matter is before the legislature in Wisconsin – maybe it is again an initiative matter, but they are very active there – and there are others. I don't mean they are all just like the Massachusetts one. The Maine one is very like the Massachusetts one. I think the Colorado one is substantially like it, though I'm not clear, and we were very pleased with the vote in California, although I can't summarize the substance for you. The state thing is a way of building pressure on representatives in Congress.

Have all of these state reforms happened through initiatives and referenda? Because that is the one thing we cannot do on the Federal level – do it ourselves.

A number of them have. I couldn't say all, though.

What do you think of – it is off the subject, I know – of direct democracy in that sense?

Well, in my youth initiatives and referenda were the progressive thing to do, were looked on as a real measure for increasing control by the people. Now with money – in a state like California, there may be others – the process has been used in ways that look very against the public interest. I haven't studied any of them in detail, but when you get to changing the language of statutes regulating insurance by initiative and referendum, because the insurance companies have initiated this, then my attitude becomes one of questioning whether that sort of thing really results in

knowing choices by the public. There seems to be a grave danger of manipulation by those willing to spend the money to influence areas that are necessarily regulated by government, and to make changes that people really won't have thought through, that no one will have thought through for the public interest. So it's a hard choice today.

There seems to be something slightly contradictory even about trying to do campaign finance reform – which has this sort of republican (small r) sense to it – by direct democracy, by initiative. [laughter] Is that a fair statement?

Well yes, what you call attention to is a fact. The initiative system is there, though, and I don't think it is improper to use it for this purpose. Does it increase the likelihood of its coming to be used more for the purposes that I fear, that I have misgivings about? Maybe, in a state where it hasn't been used much, but I'm doubtful. The availability of it is suggested by knowledge of the California experience, and I point out the opportunities for use in a way that is against the public interest more to indicate that the enthusiasm which was justified in the days of the Progressive movement must be considerably tempered today. Now, where I come out on balance – I don't know that I've ever reached a conclusion.

One other proposal which I've seen recently – and part of this is present in McCain-Feingold I think – is to increase greatly the requirements of reporting of campaign donations, and to make that information much more public. One version of this reform goes so far as to have just disclosure and nothing else, sort of like the SEC in securities regulation. What do you think of these ideas?

I think it desirable to have quick disclosure and to have it with the quickness that electronic methods provide, but I don't think pub-

licity alone will have very much effect in curtailing the money-raising and the expenditures, and therefore would not appreciably affect the abuses.

Even though campaign finance reform has gotten a lot more attention recently inside the Beltway, the general populace doesn't seem to care. Are they just apathetic? Is it just that people are so disillusioned with politics?

I think it is in large part the cynicism that nothing is really going to change. After all, these state votes that I've mentioned show that people are concerned. The relative ease with which signatures were collected on the Massachusetts initiative show that people are concerned. I think a poll which somehow tested what people would like, rather than limited to what they think is politically practicable, would clearly show that they disapprove of the present system. But I think the cynicism and in a sense despair – all politicians are crooks, all politicians always will be crooks, if they don't get it one way they'll get it in another – is so strong that it is very hard to stir people to action when it comes to voting. Unfortunately, pollsters tell the candidates that, and therefore no candidate really runs strongly with part of his platform campaign finance reform. I say strongly; I don't mean that it is never subject to mention, but not as a prime issue.

How much of this disillusionment goes back to Watergate?

We don't do this, I recognize – I'm a realist enough, a pragmatist enough to know we don't – but ideally one ought to think of Watergate not just as the self-destruction of President Nixon but as a period of extraordinary disclosure of abuses and consequent reforms. After all, if you look at the changes in our sunshine laws, abolishing and limiting govern-

ment secrecy; if you look at the changes in what we think of under the general heading of ethics; if you look at the Federal Election Campaign Act, they were all the result of Watergate. It was exposure, public reaction, reform. So I think to look on Watergate as the creator of cynicism, totally forgetting all of the reforms that flowed from Watergate, while very common, is not really a sound perception or description of it. The abuses did include major abuses in terms of campaign finance: Rosemary's baby, the list of unlawful corporate contributions that was kept at the White House; and the Milk Producers Fund, a huge political contribution from milk producers associations in exchange for an increase in the price of milk – almost that direct and explicit.

Those were two huge abuses, and there were others. I've named the two that come most to mind. Obviously there were abuses in the ethics area, and in government secrecy.

The general spirit of reform that Watergate unleashed was part of that phase of our political existence, and did lead to many changes. So in a way Watergate did in the long run add some to cynicism. On the other hand it did generate on the occasion – one shouldn't forget it – a wave of reform. After all, the Federal Election Campaign Act as it was passed included the provisions struck down by *Buckley*, and it was very largely a bipartisan bill. That is why I filed an *amicus* brief in *Buckley* for Senators Kennedy, a Democrat, and Scott, a Republican. *GC*