

August 8, 2006

More Rules, More Money

By JAN WITOLD BARAN AND ROBERT F. BAUER

IN 1981, we sat down to lunch together, a lawyer for Republicans and a lawyer for Democrats, to ponder the state of our election law practices.

Though Watergate had spawned comprehensive campaign finance reform several years before, there were reports that the newly elected president might move to abolish the Federal Election Commission and cut back the overgrowth of regulations that sent clients our way. By the time coffee was served, however, we had concluded that the urge for campaign regulation would overwhelm conservative deregulatory ambitions.

How right we were! The decades since have witnessed a constant clamor for more reform and regulation, including the enactment of the McCain-Feingold campaign finance legislation in 2002.

Now, the Federal Election Commission is again a target for abolition. But only so it can be replaced by an even more powerful bureaucracy with expanded enforcement powers. In legislation designed by the irrepressible architects of McCain-Feingold, the proposed Federal Election Administration would be equipped to mete out swift justice, including hefty fines and "cease and desist" orders to wayward campaigns.

The new agency would shrink the F.E.C.'s six seats to a more nimble three, including a vastly more powerful chairman appointed by the president for a 10-year term. For good measure, nominees for the three seats would have to be unsullied by timely, real-world political experience; no recent candidates, party officials or -- ouch! -- election lawyers need apply.

Our law practices, which have grown tenfold since 1981, have certainly prospered from the seemingly unappeasable demand for reform. But it cannot be said that others -- those active in the political process, or the public at large -- have done nearly as well. The law is not only increasingly complex but, in many cases, counterintuitive, requiring ever more nuanced clarifications from regulators.

Some reformers genuinely believe that it is possible to drive money out of politics and still observe the command of the First Amendment. Others see practical advantages. Many politicians favored McCain-Feingold because it prohibited certain advertising that mentioned opponents' names, or because it authorized them to raise more money if they were challenged by wealthy, free-spending opponents. The bill also attempted to strike at "negative" political speech -- known to ordinary Americans by its other name, "criticism"-- by requiring candidates to publicly approve their ad content.

In 2004, the first election year during which McCain-Feingold was in effect, negative campaigns overwhelmed the government's efforts to discourage them, and fund-raising records fell beneath the frenzied pace of collections by candidates, parties and interest groups.

By 2005, a rash of scandals, including the Abramoff and Cunningham cases, had answered the question of whether this legal crusade would quash corruption.

The grand quest to rid politics of money never concludes; frustration with the results of reform invariably inspires

fresh calls for more reform. In 2003 the Supreme Court narrowly ruled that Congress may actively legislate against the "circumvention" of campaign rules, an eerie acknowledgment that the laws, forever failing in their aim, must be continually amended.

Now that the presidential public financing system, once described as the "crown jewel" of reform, has lost significance and credibility -- neither major party nominee in 2004 accepted public money in the primary -- reformers want repairs to that system, as well. Suggestions include more money for government-financed education of increasingly indifferent voters, to encourage them to mark off more of their tax dollars for the presidential campaign fund.

Meanwhile, there are states where campaign finance remains largely unregulated. Virginia, for example, has no contribution limits, no public financing, no prohibitions on corporate or union giving; it simply requires prompt disclosure of campaign income and spending. It does not appear that relatively laissez-faire campaign finance has left Virginia with a dysfunctional and corrupt government, certainly not of the kind alleged to be rampant in Washington.

Yet we are confident, as we meet still for the occasional lunch, that the argument for reducing regulation will not find much favor.

Partisans will continue to demand restrictions calculated to hurt their opponents or help themselves; the press will inveigh against the nefarious role of money in politics (without explaining how candidates are supposed to communicate, cost-free, with millions of voters); and "good government" groups will explain that we are just one or two reforms away from cleaner, brighter, more wholesome politics.

Perhaps, when at last the frustration and futility have proved too much, advocates of reform would consider joining us for lunch. After all they have done for us, we would be obliged to pick up the tab. But we all know who has been paying the price for three decades of misguided efforts at reform.

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