Background Environment

Chapter One

A Need, A “Norm,” and An Adjusted Law

Money and Politics? Whether money is a part of a policy debate or the campaign process, money is clearly important. Does a political contribution “buy” access? Does a political contribution “buy” votes? How much money is too much in the American political process?

This chapter briefly examines the need for a federal campaign finance law in the United States, the establishment of an ideal policy “norm" by the Congress and President, and the adjustment of this law by the federal courts, such that it now deviates from the “norm” enacted into law.

The Need for a Balanced Law:

The basis of the original enactment of federal campaign finance legislation was to reduce the bags of cash that were impacting the political process. Campaign disclosure requirements, contribution limits, spending limits, the public funding of Presidential campaigns, and the creation of the Federal Election Commission were all designed to bring accountability and disclosure into the campaign fundraising process. Reforms were designed to protect the health of the American democracy from the "corrupting" influence of money.

In truth, money can provide points of access to lawmakers and others within the political process. And, money can make one competitive in a campaign, even if it does not assure victory. Money also provides a powerful

means by which “special interests” present their policy positions to lawmakers. Every interest, other than one’s own interests, is generally perceived as being a “special interest.” Individuals representing these “special interests” are free to present to lawmakers their positions on reforming education, making changes in the federal tax code, or some other parochial issue. Because these individuals seek influence with lawmakers, and lawmakers seek campaign funds in order to further their re-election efforts, a symbiotic relationship is formed. But, this is not to say that campaign contributions act as a stronger influence upon the lawmaker than political party and the elected official’s electoral constituency.

Concerns over the ill effects of money on the political process must rightly be balanced against the rights of the individual, as protected by the First Amendment to the United States Constitution. When does a contribution constitute free speech? And, is there a distinction between a direct and an indirect expression of one’s First Amendment right to free speech? According to the federal courts, political campaign contributions do constitute a form of free speech. The federal courts also have found, however, that there is a difference in the amount of protection that is afforded direct and indirect free speech. For instance, an individual may make a political contribution to a political campaign committee. Contributions to political campaign committees constitute an indirect expression of one’s right to free speech. The reason is simple: the campaign presents a message that the contributor has indirectly funded. Therefore, the government views that it can legally place restrictions on the amounts of contributions that individuals can make to

campaign committees. By way of contrast, an individual is currently free to directly advocate their political views through independent expenditures. Independent expenditures are independent funds that are spent as a means of advocating one's political position.

The debate over the role of money in American federal elections elicits a wide range of reactions. To some individuals, money is a corrosive that is slowly eating away at the fabric that binds the American democracy. These individuals see money as biasing and buying elections. One need only review some of the literature by Jacobson and others to find exceptional documentation on the power of money, and its impact when possessed by incumbent lawmakers.

Concerns over the ill effects of money on the political process must be balanced against the rights of individuals, as protected by the First Amendment to the United States Constitution. This is the point that Senator Mitch McConnell (R-KY) and the National Chapter of the American Civil Liberties Union have been actively advocating during recent debates over campaign finance reform held before the United States Congress. This contrasts with the positions of Senators John McCain (R-AZ) and Russell Feingold (D-WY) who advocate reforming the existing campaign finance system by enacting new restrictions on the right of the individual to make political contributions through soft money contributions to political parties.

Each fight over campaign finance reform represents a new scrimmage in the fight between the God given rights of the individual and the collective rights of the society within which our national government was instituted. And,

each change in the law represents an altering of the political playing field that determines who will set the political agenda within our national government. It is this same tension between the rights of the individual and the collective rights of the society that is debated legislative day after legislative day on issues from abortion rights to the right to bear arms.

The next section of this chapter moves beyond the need for a law and examines the establishment of an ideal policy "norm" in the area of federal campaign finance law by the United States Congress and the President.

Establishing a "Norm":

Public policy is often the result of an outcry of public support for the enactment of new legislation. Following the Watergate era abuses, the Congress and the President acted to solve the problems facing our federal campaign finance system. The Congress and President sought to move the issue of federal campaign finance beyond the discussions about the need for a law and good government. The result was the enactment of landmark legislation in the area of campaign finance and the establishment of the Federal Election Commission. This section of the chapter will briefly examine the early 20th century federal campaign finance laws in the United States and sketch the basis of the more recent reforms that have occurred since the early 1970s.

Prior to the 1970s, federal campaign finance was largely regulated by the Federal Corrupt Practices Act of 1925, as amended and other measures dating back to 1907.[1] According to

[1] Joseph Cantor, "CRS: Campaign Financing in Federal Elections: A Guide to the Law and Its Operation," Washington, D.C.: Congressional Research Service, November 16, 1995, p.6.

political scientist Anthony Corrado, much of the early efforts at controlling federal campaign finance date back to the late 1800s and early 1900s. Corrado states, "[t]he first major thrust for campaign finance legislation at the national level came during the progressive era as a result of a movement to eliminate the influence of big business in federal elections... Money from corporations, banks, railroads, and other businesses had become a major source of political funds, and numerous corporations were reportedly making donations to national party committees in amounts of $50,000 or more to 'represent their share in the nation's prosperity.'"[2] Following an internal investigation of his own presidential campaign, President Theodore Roosevelt urged the Congress to enact legislation restricting large corporate contributions. The result was the Tillman Act of 1907, which prohibited corporate and national bank contributions.

The next major change in our nation's campaign finance laws occurred in 1925 with the enactment of the Federal Corrupt Practices Act. This measure was enacted into law following the Teapot Dome Scandal in which oil developers gave contributions to federal officials who were responsible for the granting of oil leases.[3] Among the requirements of the Federal Corrupt Practices Act were the reporting of campaign contributions and expenditures by House and Senate candidates, and by political committees operating in multiple states.[4] Additionally, individuals were limited in their contributions to federal candidates and national committees. Lastly, the

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[2] Campaign Finance Reform: A Sourcebook. From Chapter Two: "Money and Politics," by Anthony Corrado, p. 27.

[3] Ibid., p. 28.

[4] Joseph Cantor, "CRS: Campaign Financing in Federal Elections: A Guide to the Law and Its Operation," Washington, D.C.: Congressional Research Service, November 16, 1995, p. 6.

Act limited the spending of House and Senate candidates and political committees that operated in multiple states.[5]

The Federal Corrupt Practices Act of 1925, however, had significant shortcomings. According to Anthony Corrado, "an effective regulatory regime was never established."[6] Corrado points out that the campaign finance system lacked penalties for non-compliance.[7] Additionally, the law did not outline who would have access to those campaign finance disclosures that were actually filed. Furthermore, information was provided in many different forms and records were maintained for only a short period of time.[8] While the law on the books was fairly extensive, the lack of adequate enforcement mechanisms and established penalties for violating the act meant that there was little cost associated with non-compliance by the regulated community. The lack of a uniform disclosure system and the unclear ability of the public to access these disclosure statements only served to further hamper the situation. The result was that the law tended to be ineffective.

A number of problems were present in the federal campaign finance system during the early part of the 20th Century. Foremost among the limitations of the early campaign finance laws were their lack of scope and the manner in which the early campaign finance laws could be circumvented.[9] The

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[5] Ibid.

[6] Anthony Corrado, Thomas Mann, Daniel Ortiz, Trevor Potter, and Frank Sorauf. Campaign Finance Reform: A Sourcebook. (Washington, D.C., The Brookings Institution Press, 1998), p. 29.

[7] Ibid.

[8] Ibid.

[9] Joseph Cantor, "CRS: Campaign Financing in Federal Elections: A Guide to the Law and Its Operation," Washington, D.C.: Congressional Research Service, November 16, 1995, p. 6.

problem with the scope of the campaign finance system was that the laws did not cover candidates for President, Vice President, and candidates in primary campaigns.[10] Furthermore, political committees established in a single state were not covered by the Federal Corrupt Practices Act. In fact, it was possible for multiple political committees to be established in a single state without falling under the regulation of this law.[11] As a result of these and other shortcomings, the early campaign finance system rested on a shaky foundation even before the Federal Corrupt Practices Act was enforced.

During the 1950s and 1960s, some efforts were undertaken to address the deficiencies of the Federal Corrupt Practices Act. The topic of reforming campaign finance was taken up both by the press and by committees in the Congress. By the late 1960s, two measures received significant support to change the then existing campaign finance system. The first was the Presidential Campaign Fund Act of 1966 (P.L. 89-809). This law provided that public subsidies be provided to national political parties for Presidential elections.[12] Implementation of this Act was made "inoperative" by the Congress in May of 1967. The second measure was the Ashmore-Goodell Bill, S. 1880. This measure would have created a bipartisan Federal Election Commission to monitor and enforce a stronger version of federal campaign finance law than presently was found to exist. The Ashmore-Goodell Bill was passed by the United States Senate, but was never passed by the United States House of Representatives. The bill subsequently died.

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[10] Ibid.

[11] Ibid.

[12] Ibid., p. 7.

The Revenue Act of 1971

The Revenue Act of 1971 (P.L. 92-178) was created to replace the inoperative Presidential Campaign Fund Act of 1966. It was designed to provide subsidy funding to United States presidential candidates as a means of reducing their dependence on private funds. The funding, which was to begin in 1976, was optional. This optional basis meant that individual presidential candidates could choose either to accept or not to accept federal campaign subsidies for the general election.

As with many federal programs, the Revenue Act of 1971 was a carrot followed by a big stick. In exchange for accepting the subsidies for the general election, Presidential candidates had to agree to certain provisions. First, the candidates had to agree to spend only the amount of funds to which they were entitled based upon the subsidy. Second, the candidate agreed not to accept any private contributions. Funding for this Presidential Election Campaign Fund would be provided by a federal income tax check off. Individuals would be allowed to check a box on their federal income tax return in which they could express their desire to have one dollar contributed to this new fund, two dollars for couples filing jointly. Lastly, the measure provided a tax credit and a tax deduction of up to fifty dollars for individuals, one hundred dollars for couples filing jointly, for political contributions.[13]

The Federal Election Campaign Act of 1971, as Amended

By 1971, it had become clear that additional reforms in the area of campaign finance were necessary. The Federal

[13] Ibid.

Election Campaign Act of 1971 (P.L. 92-225) was an attempt by the Congress to address the deficiencies of the then existing federal campaign finance system. This act was mainly designed to replace the Federal Corrupt Practices Act of 1925[14] and imposed new disclosure requirements for candidates and committees, placed new restrictions on the broadcast media, and imposed new spending limitations.

The Federal Election Campaign Act of 1971 established limitations on the size of campaign contributions that campaign committees and independent organizations could give to candidates for office and electoral committees. All contributions were made subject to strict reporting requirements. The Act required that candidates and political committees report contributions and expenditures of one hundred dollars or more. These reports were to be filed on a quarterly basis with additional reports filed disclosing contributions of five thousand dollars or more that were received in the last forty-eight hours prior to an election. Two additional pre-election reports were also required during election years. Candidates for the House were to file their reports with the Clerk of the House. Candidates for the Senate were to file their reports with the Secretary of the Senate. And, candidates for President filed their reports with the Comptroller General/Government Accounting Office.

The Federal Campaign Finance Act of 1971 also imposed media restrictions impacting candidates for federal office and spending restrictions on candidates for federal elective office and their immediate families

The Federal Election Campaign Act was amended in 1974 (P.L. 93-443). This series of amendments was designed to stem

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[14] William G. Bernhardt. Oklahoma Law Review, Winter 1986, Vol. 39, p. 730.

some of the Watergate Era abuses. The amendments to the 1971 Act established new restrictions on campaign contributions. First, individuals were limited to contributions of one thousand dollars or less to a candidate for federal office, per election. Second, individuals were limited to contributing an aggregate twenty five thousand dollars or less to federal candidates in a given federal election. Third, individuals were limited to a total of five thousand dollars or less for contributions to political action committees or political parties. Fourth, the amendments to the Act made it illegal to make cash contributions totaling over one hundred dollars.

The 1974 Amendments to the Federal Election Campaign Act also established expenditure limits for candidates for President, the Senate, and the House. The amendments established a spending limit of up to ten million dollars for candidates in presidential primary elections and up to twenty million dollars for candidates in presidential general elections. Additionally, a total of two million dollars (subject to a cost of living adjustment) would be allocated for each of the nomination conventions of the two major political parties.

Formulas for limiting the spending of candidates for the Senate and the House were also established. The amended Act also allowed national political parties to spend funds in support of candidates for the House and Senate. The 1974 amendments to the Federal Election Campaign Act also eliminated the limitations on the amount candidates could spend on broadcast media. The media limitation of fifty thousand dollars or ten cents per eligible voter established in the original Act was lifted.

Another aspect of the 1974 amendments to the Act provided a one thousand dollar limitation on independent expenditures. Independent expenditures were funds spent separate from a controlled committee. These expenditures could be made either for or against a candidate or issue. The 1974 amendments also established a system of public funding for primary elections for President.

Perhaps one of the most significant aspects of the 1974 amendments to the Federal Election Campaign Act was the establishment of a Federal Election Commission. This was to be a bi-partisan regulatory body designed to administer the federal campaign finance law in the United States. In essence, this would become the federal regulatory agency charged with interpreting, implementing, and enforcing federal campaign finance law. This new federal regulatory agency would be empowered to enforce civil violations of federal campaign finance law. Criminal violations would be referred to the United States Department of Justice for prosecution, as necessary. The new Federal Election Commission was to consist of six voting members and two non-voting members. According to the provisions of amendments to the Act, two members of the Commission each were to be appointed by the President of the United States, the President Pro Tem of the United States Senate, and the Speaker of the House of Representatives. The two non-voting ex-officio members of the Commission were to be the Clerk of the House of Representatives and the Secretary of the United States Senate.

In 1975, the Tariff Schedule Amendments[15] provided for the tax deductibility of campaign contributions of up to one hundred dollars for individuals filing tax returns and up to two hundred dollars for those filing joint tax returns.

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[15] Public Law 93-625.

Additionally, a tax credit for campaign contributions was established at twenty five dollars for individuals and fifty dollars for those filing jointly.

The Federal Election Campaign Act was next amended in 1976. The 1976 amendments reorganized the Federal Election Commission in light of the United States Supreme Court's decision in the case of Buckley v. Valeo. The 1976 amendments to the Act eliminated the ex-officio members. Appointments to the Commission were to be made by the President with the advise and consent of the Senate. The Commission would still consist of six members, but the Commission was given enhanced authority. Now the Commission was authorized to issue Advisory Opinions, promulgate new regulations, and conduct investigations. Additionally, the Commission was required by law to pursue conciliation agreements with alleged violators prior to seeking a civil prosecution.

Other changes in the law resulting from the 1976 amendments to the Act related to contribution limitations. New restrictions of five thousand dollars or less were placed on individual contributions to political action committees. Furthermore, individuals were restricted to donating twenty thousand dollars or less to a national political party. An additional restriction of fifteen thousand dollars or less was placed on the giving of funds from a political action committee to a national political party. Political action committees were also restricted to giving five thousand dollars or less to federal candidates.

Increased disclosure requirements were also a part of the 1976 amendments to the Act. Independent expenditures exceeding one hundred dollars were required to be reported. Additionally, independent expenditures exceeding one thousand dollars were required to be reported to the Federal Election

Commission within twenty-four hours if they occurred within fifteen days of a primary or general election. A number of additional clauses addressed issues such as the cutting off of public matching funds for Presidential candidates when a political party's percentage of the general election vote fell below ten percent for two straight Presidential elections and procedures for conducting investigations of potential violators.

The last major legislative revisions to the Federal Election Campaign Act occurred in 1979. First, candidates and political party committees raising less than five thousand dollars were exempted from reporting their contributions and expenditures. Second, those candidates and political party committees that were required to file disclosure statements were required to itemize contributions and expenditures only if they exceeded two hundred dollars. For independent expenditures the amounts were increased to two hundred fifty dollars. Third, state political parties were allowed to spend unlimited amounts of funds to support the "get out the vote" activities and voter registration activities of their party and their party's candidate for President. Fourth, the amendments increased to three million dollars the amount of the public subsidy for the two major political party conventions.

Other more minor changes in the FECA occur in 1984, 1986, and 1993.[16] The 1984 amendments increased the amount of public funding for national party conventions from three million dollars to four million dollars and indexed future increases to inflation. As a result, the four million four hundred thousand allotted to each of the two major political parties

[16] See: FECA reforms for 1984 (P.L. 96-187), for 1986 (P.L. 98-355), and for 1993 (P.L. 99-514).

in 1980 for nominating conventions rose to eight million one hundred thousand in 1984, nine million two hundred thousand in 1988, and eleven million in 1992.[17] Again, the Congress employed the carrot and stick. In order to receive the public subsidy for the nominating convention, the political party was required to limit convention funding to the amount of the subsidy. In 1986, FECA provisions making political campaign contributions tax deductible were repealed. Lastly, the Omnibus Budget Reconciliation Act of 1993 increased the amount of the check off in the Presidential Election Campaign Act to three dollars for individuals filing tax returns and six dollars for those filing joint tax returns.

By enacting and amending federal campaign finance law, the United States Congress and the President established an ideal policy "norm" in the area of federal campaign finance. Hearing a public outcry of support for reforms, they enacted new legislation designed to curb the social behavior of individuals participating in the political process.

The next section of this chapter will briefly examine several court cases in order to demonstrate the manner in which the policy "norm" enacted into law by the Congress and President has been impacted and modified from that which was originally intended.

The Adjusted Law:

As with all laws, campaign finance laws can be challenged in the federal courts. The federal courts do not initiate legal action. They adjudicate it. Through their constitutional powers, the federal courts can have a

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[17] Joseph Cantor, "CRS: Campaign Financing in Federal Elections: A Guide to the Law and Its Operation," Washington, D.C.: Congressional Research Service, November 16, 1995, p. 19.

significant impact on the policy “norms” that the Congress and the President enact, and the regulatory agencies charged with administering these laws. The courts can void portions of the law, alter the manner in which the regulatory agency enforces the law, and ultimately determine if the actions of the Agency or the Congress are legal. It has been through these legal challenges to questions relating to the Federal Election Campaign Act that the federal courts have left their mark on federal campaign finance, such that current federal campaign finance law deviates from the policy “norm” established by the Congress and the President when the Act was enacted or amended.

The first major challenge to the Federal Election Campaign Act occurred in 1974 with Buckley v. Valeo, (424 U.S. 1, 1976). In Buckley, former Senator James L. Buckley, former Senator Eugene McCarthy and ten other individuals challenged many of the provisions of Subtitle H of the Internal Revenue Code of 1954, as amended in 1974. These were the major provisions of the federal campaign finance law dealing with limitations on campaign funding, independent expenditures, and campaign expenditures. Their main contention was that the limitations imposed by Subtitle H of the above act violated the Constitutionally guaranteed right to free speech, invidiously discriminated against those covered by the act, and that the system was biased in favor of major party candidates.

In Buckley, the Court found that the limitations did not constitute a direct violation of free speech because the contributor was not "speaking," it was the campaign committee that did the "speaking." In essence, the speaker was once removed from the donor; therefore, this amounted only to indirect free speech. Anne V. Simonett writes, "[t]he

limitations imposed were held to be an incidental restriction on the First Amendment rights of the contributor, and were justified by the government's interest in preventing the corruption or appearance of corruption that large contributions impact the electoral process."[18] The Court explicitly states in Buckley that, "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office-holders, the integrity of our system of representative democracy is undermined."[19] The Court did, however, find that the limitations on campaign expenditures constituted an unconstitutional restraint on the speech of the spender. The Court states, "[t]he Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression 'is simultaneously an interference with the freedom of [their] adherents.'"[20] Therefore, the Court found that while contributions to campaign committees could be limited, the spending by these committees could not be limited because they amounted to "direct political expression."[21] The Court further ruled that expenditures between committees that were coordinated would be treated as "contributions." Independent expenditure contributions, however, were not deemed contributions because they were "independent" in their nature. The Court says that, "[t]he absence of pre-arrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger

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[18] Anne V. Simonett, Harvard Journal of Legislation, Summer 1981, Vol. 18, p. 681.

[19] 424 U.S. at 26-27.

[20] 424 U.S. at 22.

[21] 424 U.S. at 22.s

that expenditures will be given as *quid pro quo* for improper commitments from the candidate."[22] What actually constituted "coordinated" appears to have been left open to debate. On the issue of public funding of Presidential campaigns, the Court ruled that this portion of the Act was constitutional. The Court also found that the Act did not invidiously discriminate.

The Buckley decision is significant for three reasons. First, the Court, for the first time, makes the distinction between a direct contribution given to and spent by the campaign of a particular candidate and money spent by an "independent" committee. The Court finds that the above distinction provides a basis for determining the degree of free speech protection required. In the first instance, the Court finds that the contribution to a candidate committee amounts only to an indirect expression of free speech. In the second instance, the contribution amounts to a direct expression of speech. The second major result of Buckley is the lifting of all limitations on the spending of independent committees. Independent expenditures, if they were not coordinated, were not restricted, but who was to say what was coordinated and what was not. Third, the Court's ruling in Buckley voided the then-existing structure of the Federal Election Commission, thus leading Congress and the President to change the law and reconstitute the Commission into its present form.

In Republican National Committee v. Federal Election Commission, (487 F. Supp. 280, 1980), the basic claim was that the constitutional rights of the Republican Party had been violated by the Presidential Election Campaign Fund Act. This claim was brought in the United States District Court for the

[22] 424 U.S. at 47.

Southern District of New York. The main section of the Act that was at issue in this case is 26 U.S.C., Section 9006. This section required political parties to certify that they would not incur expenses beyond the amount of the public funding that they were given and that they would not accept private contributions for their party nominee's campaign.

The district court ruled against the Republican National Committee. In doing so, the court upheld the requirement for candidates to certify that they would not spend more than they were allocated and that they would not accept private contributions. The district court's reasoning was that the act of agreeing to accept public funding of one's campaign was voluntary. A candidate did not have to accept public funding for their campaign. The court found that the voluntary acceptance of public funds for a presidential campaign did not "bind his or her supporters outside the official campaign."[23] The United States Supreme Court affirmed the district court ruling on April 14, 1980.[24] The significance of this case lies in the fact that the public funding of presidential campaigns was found to be legal and that the supporters outside the campaign were not barred from accepting or expending private funds.

The issue of independent expenditures again reached the federal courts in the cases of Common Cause v. Schmitt and Federal Election Commission v. Americans for Change. These two cases were consolidated into a single case and heard by the United States District Court for the District of Columbia (512 F. Supp. 489, 1980). At issue was whether a candidate accepting public funds binds his supporters when they act

[23] 512 F. Supp. 495 (1980).

[24] 445 U.S. 955 (1980).

independently. Specifically, the Federal Election Commission and Common Cause brought suits claiming that, by accepting public funds, Ronald Reagan's 1980 presidential campaign had bound his supporters to contribution limits of one thousand dollars toward his election. The 1980 Reagan Presidential Campaign received approximately thirty million dollars in public campaign funds.[25] The federal court ruled that the answer was no. The court found that the, "$1,000 ceiling imposed on independent expenditures of political committees was an expenditure restriction directly limiting political speech and could not be justified by [the] government's compelling interest in fighting electoral corruption; thus, [the] expenditure ceiling was facially unconstitutional."[26] Second, the court found that it lacked jurisdiction to consider whether Ronald Reagan's 1980 presidential campaign had illegally coordinated the expenditures of the independent committee. Third, the court found that it was not a violation of the Presidential Election Campaign Fund Act for the political committee to coordinate with the presidential candidate. On this point, the court states that the, "claim that defendant political committees were illegally coordinated with the presidential candidate did not violate sections of the Act applicable to presidential candidates who receive federal funding and are required to limit their own expenditures and forgo private contributions."[27] On appeal, the United States Supreme Court affirmed the judgment of the district court.[28] This case is significant not only because it

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[25] 512 F. Supp 490 (1980).

[26] 512 F. Supp. 489 (1980).

[27] 512 F. Supp. 489 (1980).

[28] 455 U.S. 1266 (1981).

made unlimited independent campaign expenditures to aid the election of a candidate for President, who was receiving public funds, legal, but because it also made it legal to coordinate these expenditures with a presidential campaign.

In June of 1995, the United States Supreme Court issued another significant opinion in Colorado Republican Federal Campaign Committee et al. v. Federal Election Commission (116 S. Ct. 2309). This case stemmed from the Colorado Republican Party's Federal Campaign Committee's buying radio advertisements attacking a prospective Democratic nominee, prior to the completion of the nomination process. The Federal Election Commission brought suit challenging the Republican effort as a violation of the party limitations imposed under the "Party Expenditure Provision" of the 1971 Federal Election Campaign Act. The Republican committee challenged the spending limitations on the basis that they amounted to a denial of First Amendment protections. A district court ruled in favor of the Republican committee, but this ruling was overturned by the Court of Appeals. The district court had taken a narrow interpretation of First Amendment protections and the FECA. The Court of Appeals took a wider interpretation of both the issues related to the expenditures and the First Amendment protections.

This case was then appealed to the United States Supreme Court. In a very divided ruling, the Court's plurality of three justices (Justices Breyer, O'Connor, and Souter) ruled that the FECA restrictions could not be applied to a political party when the party acted in a non-coordinated manner. The Court found that the Republican committee's actions amounted to an independent expenditure. As such, the expenditures could not be limited without violating the protections guaranteed in the First Amendment of the Constitution. In

effect, what the justices had done was to cut an even larger hole in the federal campaign finance law. When applied to the presidential campaigns, this meant that state party committees could spend unlimited amounts of funds, as long as these funds were not coordinated with the presidential campaigns. But again, who was to say what was and what was not coordinated, and most likely any enforcement would likely occur after the impact of the coordinated spending.

In Federal Election Commission v. Williams, (104 F.3d. 237), a federal district court and circuit court both addressed the issue of statutes of limitations. In this case, the Federal Election Commission brought an enforcement action against Williams for a violation of the FECA. Mr. Williams had participated in a Jack Kemp for President fundraising promotion in which the Philadelphia Eagles sold the Kemp for President Committee Superbowl tickets for $100 each. The tickets were then given to those individuals who contributed $1000 to the Kemp for President Committee. It was found that on twenty-two occasions, Williams had, "'advanced' $1000 to the contributor as the resale price of the tickets. Williams later resold these tickets and recovered the sums advanced."[29] An employee of Williams filed a complaint with the Federal Election Commission. The Commission investigated and found "probable cause" that Williams had violated the FECA.

The district court found against Williams, but he promptly appealed to the circuit court. At issue in this case was whether the statute of limitations on a FEC action begins when the act leading to an allegation occurs or when the violation is found by the regulating agency. The Federal Election Commission argued that the statute of limitations should begin when the violation is found. The agency's logic

[29] Federal Election Commission v. Williams. 104 F.3d 237 at 239 (9th Cir. 1996)

was that individuals attempted to conceal their violation of the campaign finance laws, thus thwarting the compliance and enforcement efforts of the agency under the law. Based upon this reasoning, the agency argued that the statute of limitations should begin when the possible violation comes to light, not when the violation occurred.

The circuit court in Williams found that the statute of limitations begins in any case when the violation occurs. In Williams, the court stated, "FECA's campaign finance reporting requirements are, as a matter of law, sufficient to give [the] FEC 'notice of facts that, if investigated, would indicate the elements of action.'"[30] In doing so, the court ruled that the Federal Election Commission had the necessary information from campaign finance statements to investigate and prosecute alleged campaign finance violations. As a result, the circuit court overruled the district court and found that the statute of limitations began when the act leading to the allegation took place.

The practical significance of the Williams case, and similar cases relating to statutes of limitations, has been that the time period in which the Federal Election Commission can undertake enforcement actions has been limited. No matter how significant an investigation may be, the agency must act within its statutory five year limit. According to former Commissioner Trevor Potter, "the practical effect of these decisions is to make it significantly more difficult for the FEC to pursue allegations of campaign finance violations, and to cause the Commission to close a number of high-profile investigations that were past or near the five year limit."[31]

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[30] Federal Election Commission v. Williams. 104 F.3d 237 at 241 (9th Cir. 1996)

[31] Anthony Corrado, Thomas Mann, Daniel Ortiz, Trevor Potter, and Frank Sorauf. Campaign Finance Reform: A Sourcebook. (Washington, D.C., The Brookings Institution Press, 1998), p. 23.

Mr. Potter continues, "[e]specially in the case of Presidential campaigns, which undergo a multi-year audit before the Commission even authorizes the opening of an enforcement matter, the combinations of the FEC's current capabilities and the five year statute of limitations means that many investigations will as a practical matter be aborted without a resolution."[32]

The six court cases that have been analyzed in this chapter present stark realities within the American political system. First, the Congress and the President can enact ideal policy "norms" on any issue, but they can be, and often are, challenged in and altered by the federal courts. The result is that the intended policy "norm" that the Congress and President may have when the law was enacted, may change into some form of adjusted law. Second, Congress enacted campaign finance reform in 1971, and amended it six times from 1972 to 1993, but understanding these changes in the law requires more than just reading the law. A great portion of understanding the federal campaign finance law comes down to legal technicalities and the meanings of words, many of which the Congress appears to have left deliberately vague. Third, the effectiveness of the overall campaign finance system has been compromised by these and other court cases, thus leading to the question of how functional are the remaining elements of the present system. Clearly, the actions of the federal courts have made achievement of the ideal policy "norm" enacted by the President and Congress impossible because the courts have caused the law to deviate from the "norm."

It seems reasonable to conclude that the sum value of the federal campaign finance system's parts may exceed the value of its separate parts. If the objective of the federal

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[32] Ibid.

campaign finance laws is to minimize the impact of money on federal elections, then a comprehensive regulatory system appears to be what is needed. Two problems for “reform” advocates rest with the federal courts. First, the Congress and the President are free to enact a comprehensive policy “norm” in the area of federal campaign finance. But, if the federal courts start to carve holes in the law, such that there are ways around the law, then the impact of the law would be greatly compromised, and money would again flow freely through the political system. Second, fluidity in the composition of our federal courts or future appointments to the United States Supreme Court could significantly alter any future court interpretations of the federal campaign finance law.

Chapter Discussion and Conclusion

This chapter has demonstrated some of the dynamics that are present in the policy process. As the discussion has outlined, concerns over the role of money in the American political system led to the establishment of federal campaign finance laws in the United States. Seeking to remedy the short-comings contained in the Corrupt Practices Act of 1925, Congress and the President enacted the Federal Election Campaign Act of 1971. In doing so, the Congress and President established a campaign finance policy “norm." As this chapter documented, however, this Act has been subject to amendment over time. But, amending the Act is not the only manner in which our nation's campaign finance laws have been altered. Laws can be, and often are, challenged in the federal courts. In the area of federal campaign finance law, this chapter's examination of six court cases documented how legal challenges have caused federal campaign finance law to deviate from the

ideal policy “norm” enacted by the Congress and President. The conclusion: legislation alone can not dictate policy outcomes. Policy outcomes in the area of campaign finance are significantly impacted by the actions of all three branches of our federal government.

The next part of this dissertation moves the discussion forward to an examination of the Federal Election Commission, as a regulatory agency, and its decision-making processes. This part of the dissertation will outline the present statutory charge of the Federal Election Commission, detail the agency’s organizational structure, and examine the manner in the Federal Election Commission makes regulatory decisions.