February 28, 1992

# BACK TO THE CONGRESS: CAMPAIGN FINANCE REFORM IN 1992

## INTRODUCTION

In reaction to Congressional scandals and anti-incumbent sentiment, Congress is considering a complex revision of the campaign finance system. Billed as an effort to make elections fairer, the Congressional proposals will actually only further entrench incumbent members and hinder challengers. Meanwhile, real reforms that would produce a more competitive electoral system are ignored. Late last year, the House passed H.R. 3750, a Rube Goldberg-style combination of new regulations, subsidies, spending limits, public election financing and unspecified tax increases. The House bill was initially sponsored by Connecticut Democratic Representative Sam Gejdenson, and was substantially revised by North Carolina Democratic Representative Charles Rose before passage. In the Senate, Democrat David Boren of Oklahoma, sponsored similar legislation, S. 3, which passed May 23, 1991. A House-Senate conference committee is expected to complete a compromise version as early as March.

Both bills would impose a purportedly voluntary system of campaign spending limits. Candidates who comply with the limits would receive government subsidies in the form of vouchers, cash grants, and government-mandated discounts on postal rates and on purchases of advertising from private radio and TV stations. Candidates who refuse to abide by the spending limits would both forego these subsidies and trigger a windfall of new benefits for their opponents. The House bill institutes a spending limit of $600,000, with several exceptions, for House primary and general elections. Candidates would also be limited in how they could raise funds within this overall cap. No more than one-third of the limit (generally $200,000) could be raised from each of three sources: political action committees (PACs), large individual donations (over $200) and government matching funds. Individual donations below $200 would be limited only by the overall spending cap, and would serve as a way to make up for a candidate's failure to raise the allowed maximum limits in other categories. Exceptions to the spending limits include provisions for run-off elections, closely contested primaries and spending

for accounting and legal fees to comply with the complex new law. Advertised spending limits in the Senate bill vary from $950,000 to $5.5 million, depending on state population, though effective limits would be 2 to 3 times these amounts due to a series of exceptions and subsidies. Funds for Senate races could be raised only through individual donations of $1,000 or less, but no sub-limits such as those in the House bill would apply. The source of revenues for federal matching funds and vouchers is not specified in either bill, but is likely to include new taxes on businesses, unions, and political organizations.

H.R. 3750 and S. 3 would maintain most existing features of federal campaign finance law, including limits on the amounts individuals and organizations may give to campaigns, and reporting and disclosure requirements. However, the bills would expand vastly the scope and detail of federal regulation of campaigns, political parties, non-partisan organizations, and other groups associated with the political process. This represents an intensification of the Watergate-era theory: that political activity must be regulated, and as far as possible funded, by the government. But the Watergate reforms only increased the power of monied interests and incumbents. Overall campaign spending, PAC spending and incumbent re-election rates have risen steadily since the 1974 reforms. The new bills would make the critical task of raising money for non-incumbents even more difficult. For instance, most incumbents raise the $200,000 in PAC funds allowed by the House bill; challengers average only about $25,000. Yet a challenger can offset $5,000 PAC gifts only through donations of $200 or less. At least 875 individual contributions would be needed to offset the average incumbent PAC advantage.

President Bush has vowed to veto legislation which includes either campaign spending limits or public financing – and he should. But the startling increases in regulation of political activity contained in both bills are at least as alarming. Such regulations will inevitably favor those who write them – in this case incumbent politicians – and will only serve to stifle the free and vigorous political debate essential to a democracy. Cementing the impression that the campaign reform bills are incumbent-protection plans is the fact that the House bill applies only to the House and the Senate bill only to the Senate. This allows incumbents to tailor subsidy and fundraising provisions to their differing needs, rather than to objective standards of fairness. Rather than a greater government role in elections, true campaign reform should eliminate existing overwhelming government support for incumbents. Steps needed to level the playing field for challengers include:

- **eliminating tax-funded ("franked") campaign mailings by incumbents;**
- **restricting the use of Congressional staff in campaigns;**
- **ending incumbents' ability to transfer campaign funds from one election to the next;**
- **easing fundraising restrictions on non-incumbent candidates;**
- **prohibiting unions from using mandatory dues for political activity, and;**

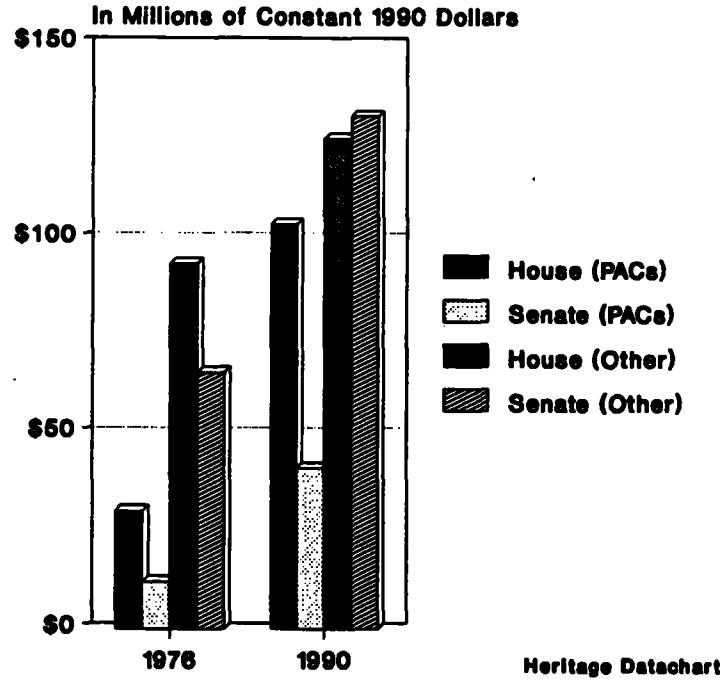
- **eliminating favored treatment of PACs by equalizing PAC and individual donation limits.**

## THE HISTORY OF CAMPAIGN FINANCE REFORM

The Watergate scandal inspired the first major wave of campaign finance regulation. In 1974 Congress created a system of spending and fund-raising limits,[1] in an attempt to clean up campaigns, open up the process to average citizens and reduce the influence of big special interest donors. Instead, incumbent re-election rates increased sharply and funding from monied interests exploded. Between 1974 and 1990 incumbent re-election rates rose from 85 to 97 percent in the Senate and from 80 to 96 percent in the House. In 1988 the House re-election rate was above 98 percent.[2]

Chart 1

**PAC Spending Skyrockets**
**Effects of Campaign Finance Reform**




**Sources:** *1976 House of Representatives Campaigns' Receipts and Expenditures, Sept. 1977,* pp. 4, 10, and *1976 Senatorial Campaigns' Receipts and Expenditures, April 1977,* pp. 3, 5. All 1990 data from unpublished FEC computer tapes, Apr. 1991

While the 1974 law outlawed corporate donations and severely limited individual contributions, it gave political action committees (PACs) – then used primarily by labor unions – a five-

1 The 1974 law, which was partially invalidated by the Supreme Court in *Buckley v. Valeo*, 424 US 1, 19 (1976) declared the mandatory spending limits of the 1974 campaign finance reform bill, S. 3044, unconstitutional, as a possible infringement on contributors' free speech rights in contributing to the candidate of their choice. The Supreme Court also ruled that under the First Amendment's guarantee of free speech, individual campaign contributor limits cannot be so low as to prevent "candidates from amassing the resources necessary for effective advocacy," giving rise to questions about the $1,000 individual donor limit, which has remained the same since 1974.

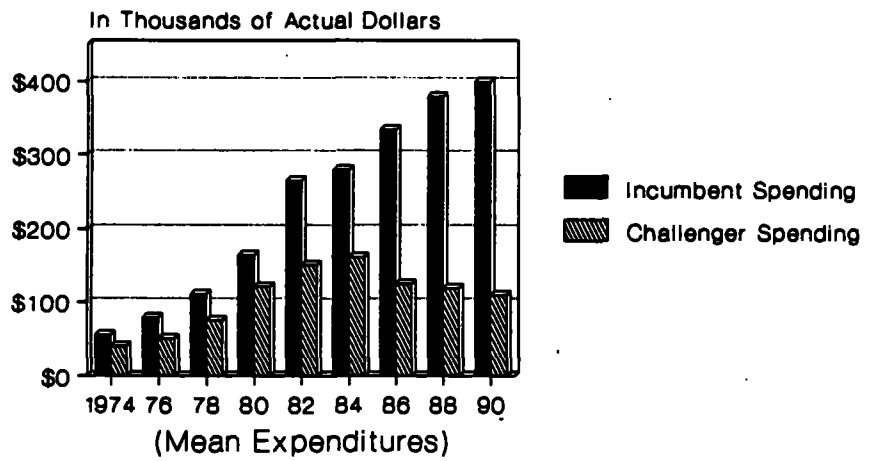
2 Norman J. Ornstein, Thomas E. Mann, Michael J. Malbin, *Vital Statistics on Congress, 1991-1992*, Washington, D.C.: American Enterprise Institute, pp. 58-59, 1992.

fold advantage over individual contributors. While individual donors can give a maximum of $1,000 to a campaign, PACs may donate up to $5,000. The predictable, if unintended, result was an explosion in the number of PACs, which grew 600 percent, from 608 in 1974 to 4,268 in 1988.[3] PAC spending in Congressional elections grew from $20 million in 1976 to $150 million in 1990, and overall campaign spending quadrupled, from $98 million to over $400 million between 1976 and 1990.[4] In short, a law designed to curb special interest money and open up elections using means similar to H.R. 3750 and S. 3, had precisely the opposite effect (See Chart 1 on previous page).

The great majority of this new money has flowed to incumbents rather than challengers. Of the $108.6 million PACs contributed to House candidates in 1990, only 6 percent went to challengers.[5] PAC contributions now account for more than 50 percent of Democratic incumbents' war chests, and 40 percent of incumbent Republicans' funding; dozens of House members receive more than three-fourths of their funds from PACs.[6]

Chart 2

## Challengers Fall Further Behind Campaign Finance Since 1974




Source: *Vital Statistics on Congress, 1991-1992*, Table 3-1, p.74.

NOTE: GNP price deflators are from the *Economic Report of the President, 1991*
Heritage Datachart

3 *Ibid.* p. 97, Table 3-11.

4 1976 House data from FEC disclosure series #9: *1976 House of Representatives Campaigns' Receipts and Expenditures, September 1977*, pp. 4, 10. 1976 Senate data from FEC disclosure series #6: *1976 Senatorial Campaigns' Receipts and Expenditures, April 1977*, pp. 3, 5. All 1990 data from unpublished FEC computer tape of U.S. Senate and House campaigns, April 1991. (NOTE: Unless otherwise indicated, all figures in nominal dollars).

5 *Vital Statistics on Congress, 1991-1992*, p. 100.

6 *Vital Statistics on Congress, 1991-1992*, p. 93; and Representative Bill Thomas, "Campaign Funds Should Be Raised Within the District" San Luis Obispo *County Telegram-Tribune*, September 15, 1989.

Seventeen years after the passage of the monumental 1974 reform bill, special interest money and the huge advantages of incumbency are even more powerful than in the pre-reform days. Incumbent re-election rates have gone up, voter participation has declined and, most strikingly, campaign spending has skyrocketed while incumbents have gained ever larger financial advantages over challengers (See Chart 2 on facing page).

## CAMPAIGN FINANCE REFORM REVISITED

Even though the Watergate reforms failed miserably, arguments about campaign finance reform today are much the same as they were in 1974. The Watergate-era legislation was intended "to reduce the influence of wealthy campaign contributors and give citizens without access to such sources equal opportunity to run for public office."[7] Massachusetts Senator Edward Kennedy contended that enactment of the public financing provisions could "end the corrosive and corrupting influence of private money in public life."[8] Seventeen years later, Connecticut Democratic Congressman Sam Gejdenson introduced H.R. 3750 noting that "Elections are not supposed to be a participatory process for only the wealthy and privileged" and claiming that his bill would benefit "...the disadvantaged, the poor, and the middle class."[9] Oklahoma Senator David Boren, author of the Senate reform bill, S. 3, complained that "special interests dominate today's elections."[10]

**The Senate Bill.** Senator Boren's bill would replace alleged special interest dominance with a reign of federal regulators by prohibiting or restricting campaign contributions and other political activity by disfavored groups. Among these provisions are an outright ban on PAC contributions to Senate candidates and restrictions on small contributors who combine their individual checks for forwarding to a candidate (a practice known as "bundling"). The bill would for the first time impose spending limits and significant federal regulation on spending not associated with a particular campaign. This so-called "soft-money" is now used by unions, businesses and state and local political parties for registration drives, get-out-the-vote efforts and similar activities.

While S. 3 includes spending caps, they are largely cosmetic. General election spending would vary from $950,000 to $5.5 million, depending on state population. In addition, candidates may spend: 67 percent of the general election limit in a primary (to a maximum of $2.75 million); another 20 percent in the case of a runoff; 15 percent for legal and accounting fees (maximum $300,000); and, another 25 percent with contributions in amounts of $100 or less. In addition, S. 3 would shift many campaign costs from candidates to taxpayers, broadcasters and the postal service. Candidates would receive government vouchers worth 50 percent dis-

7 *Congressional Quarterly Almanac*, 1974, p. 611.
8 *Congressional Quarterly Almanac*, 1974, p. 618.
9 *Congressional Record*, November 12, 1991, Extensions of Remarks, E 3795.
10 *Congressional Record*, January 14, 1991, S 480.

count on their lowest rates for ads purchased with the vouchers or with other funds. Senate candidates would get a 75 percent discount on first class mail (or 2 cents less for third class), up to 5 percent of their general election limit. Finally, candidates would receive government matching funds to totally offset "independent" expenditures (spending by non-candidates) over $10,000, and to offset spending by candidates who refuse to comply with the limits. (Non-complying candidates would also be forced to include disclaimers in their advertising.) All told, the various add-ons and subsidies could triple the advertised limits.[11]

S. 3 was approved by the Senate by a vote of 56-42 last May 23. A Republican alternative would have restricted PACs and "bundling" in ways similar to S. 3, but would have also restricted unregulated labor union spending, and enhanced the role of political parties. The Republican plan did not include spending limits or public funding.

**The House Bill.** H.R. 3750 also contains complex spending limits, new regulations, public financing, and advertising subsidies, accompanied by undefined new taxes and fees to pay for public financing. The centerpiece of H.R. 3750 is a $600,000 "voluntary" limit on total campaign spending, with restrictions on sources in three categories. One-third of a candidate's money could come from PACs, one-third in large individual donations (those between $200 and $1,000) and up to one-third in public funds matching up to $200 of individual donations.[12] The overall spending limit would be increased by $100,000 in the case of primary runoffs, and by another $150,000 if the winning primary margins was less than 10 percent. House candidates would not receive vouchers or advertising discounts as in the Senate bill, but would be eligible for generous postal discounts. Like their Senate colleagues, House candidates would get federal funds to offset independent expenditures and spending by candidates who ignore the spending limits. Also like S. 3, H.R. 3750 would extend federal regulation to many groups and activities for the first time. A Republican proposal, which would have required a majority of funds to be raised in a candidate's district, was defeated on the House floor.

**Agreeing to Disagree.** It is important to note that while the stated objective of both bills is to clean up campaigns, the House and Senate have apparently agreed to disagree on how to do it. Two years ago the House and Senate passed competing versions of campaign finance legislation, but failed to reach a compromise in conference – with each side holding out for provisions it felt were vital. The Senate has now passed a bill that applies only to Senate races, while House legislation applies only to House races. Breaking all precedent, apparently the two legislative bodies intend to pass a bill with two entirely different sets of regulations cobbled onto each other, one set tailored to the needs of House incumbents, the other set designed for Senators.

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11 Senate bill, *Congressional Record*, January 14, 1991, p. S. 465.

12 *Congressional Record*, November 12, 1991, pp. E 3795, 3796.

If the bills are both intended to keep campaigns clean, why could not the House and Senate agree on provisions at least roughly similar in principle? Why, for instance, would the Senate view PACs as evil special interests and abolish them, while the House would perpetuate the five-fold PAC advantage in donation limits? Why would one scheme emphasize discounted postal rates, and the other focus on radio and TV broadcast prices? The answer is that, given the different dynamics of their campaigns, the favored funding and expenditure sources in each bill are those most favored by House or Senate incumbents, respectively.

There is no reason to believe that these new and more complex schemes will succeed where the 1974 reforms failed. The details of the House and Senate bills may change in conference, but each of the major elements – spending limits, public financing and bureaucratic regulation of political activities – are so fundamentally flawed that any likely compromise will impede competitive elections.

## SPENDING LIMITS

Spending limits appear to be an appropriate response to concerns over soaring campaign spending. In 1976, only 31 House candidates spent over $200,000. In 1990, 428 candidates spent over $200,000, and 168 spent over $500,000.[13] The Keating Five and other fund-raising related scandals have raised concerns about widespread corruption of the political process. But in actuality spending limits only work to the incumbents' advantage. Challengers, who are not often subject to the temptations of influence-peddling or vote-selling, have a far greater need for substantial campaign treasuries than incumbents.

In fact, spending limits would cripple the ability of the few challengers capable of raising strong support to overcome the long odds. One analysis of the 1990 House elections concluded that a challenge's ability to raise money was the determining factor: "For challengers spending between $250,000 and $500,000, the odds against winning were 11-1. Those who spent $500,000 or more faced 6-1 odds, while those who spent less than $300,000 lost in every case."[14]

Particularly disastrous for challengers is the three-fold division of limits in the House bill. While an incumbent should have no trouble reaching his limit in each category, challengers may be hard pressed to raise $200,000 from incumbent-loving PACs. A challenger can make up for a dearth of PAC funds only by raising money in the least efficient and most costly way – from small individual contributions under $200. In other words, challengers may have to find 1,000 or more individual contributors to offset an incumbents' built-in PAC advantage. Further, H.R. 3750 retains the regulatory disparity between PAC and individual contributions, allowing PAC donations of $5,000, but limiting individual contributions to $1,000, while S. 3 makes the constitutionally questionable attempt to prohibit PACs from making any contributions in Senate elections.

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13 *Vital Statistics on Congress, 1991-1992*, p. 76, Table 3-3.

14 "Challengers Fall Further Behind in 1988," July 24-30, 1989, *Roll Call*, p. 8.

The spending limits written into H.R. 3750 are far from arbitrary. Because incumbency offers tremendous advantages, a challenger has to spend a significant amount to become competitive. When the challenger reaches this level, additional spending by the incumbent is less and less effective.[15] In the 1988 campaign, the mean expenditure of challengers who beat House incumbents exceeded $600,000, the limit under H.R. 3750.[16] The limit is just below the amount challengers need to get a message across, and almost assures that even a strong challenger cannot overcome the advantages of incumbency. Clearly, legislation designed to hold down challenger spending is an incumbent reelection bill, and H.R. 3750 would cap challengers below this competitive level with scientific exactitude. Should a challenger choose to give up the incentives in the House bill for an opportunity to raise more funds, he is equally disadvantaged. As soon as a non-complying candidate raises $250,000, his opponent has his $600,000 limit removed and becomes eligible for unlimited federal matching funds. The punitive nature of these provisions is evident from the fact that the advantages kick in at a point at which the publicly-funded candidate may have a two-to-one spending advantage. The trigger point is also the level at which challengers have any chance of defeating an incumbent.

Spending limits have also run afoul of the First Amendment. According to the Supreme Court ruling in *Buckley v. Valeo*,[17] mandatory spending limits can prevent citizens from meaningfully supporting a candidate. Any spending limit amounts to a contribution restriction on citizens, negating their right to influence an election for the candidate of their choice. While the spending limits in S. 3 and H.R. 3750 are advertised as "voluntary," they are for all practical purposes mandatory to challengers, because exceeding the limits would trigger a windfall of public money for their opponents. In fact, the structure of offsetting funding to counteract challenger or independent campaign spending is so coercive that it may well be disallowed by the Supreme Court. The Federal subsidies triggered to offset independent efforts, in particular, may run afoul of the *Buckley* decision, which ruled that restricting independent campaign expenditures was an unconstitutional encroachment on free speech.

Spending limits are simply unworkable. Those written into S. 3 and H.R. 3750 are so porous to anyone familiar with the legislative arcana of the bills that they amount to little more than a rhetorical ploy. To the initiated (incumbents and their legislative assistants who wrote the rules) the exemption of PAC donations for "accounting" purposes, exceptions for primaries and runoff elections, and other loopholes virtually negate the limits.

One example of how incumbents have avoided mandatory spending limits was provided by Representative Dick Gephardt (D-MO). The 1988 Gephardt

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15 *Campaign Finance Reform: The Case for Deregulation*, Tallahassee, FL: The James Madison Institute of Policy Studies, p. iii.

16 *Vital Statistics on Congress*, 1991-1992, p. 82, Figure 3-2.

17 *Buckley v. Valeo*, 424 US 1, 19 (1976).

presidential campaign used a technicality in the Federal Election Commission (FEC) rules to construe campaign ads as fund-raising expenses, which were not subject to the limits. After reviewing his claim, the FEC arbitrarily assigned half of Gephardt's television buy in the Iowa primary toward fund-raising costs, admitting that it could not make an informed accounting. (The Commission did disallow Gephardt's "effort to deduct 25 percent of all his Iowa expenses as a national campaign exemption."[18]) Gephardt received nearly $3.4 million in Federal matching funds for his presidential race.

The FEC found such gamesmanship common in regard to state-by-state spending limits, which Presidential candidates must comply with in order to obtain Federal primary matching funds. One popular technique is to rent cars in one state and use them in a campaign effort in high-priority neighboring states such as Iowa or New Hampshire.[19] Similarly, candidates frequently cross state lines to find lodging so that expenses can be shifted from one state to another.

Aside from the tricks used to evade limits, the bureaucratic burden of tracking campaigns often makes enforcement irrelevant. Four years after the fact, the Federal Election Commission is still tracking spending for the 1988 Presidential race. New Hampshire's 1990 Congressional elections, which were the first with a system of voluntary spending limits, were plagued by problems of enforcement and accounting of independent expenditures, leading to dissatisfaction among many of the participants. Former Representative Chuck Douglas (R-NH) has charged that the New Hampshire law "enables somebody to overspend in the election" by waiting to report expenditures until the final weeks of the campaign.[20]

Congress has repeatedly turned a deaf ear to the FEC's longstanding request to eliminate the state-by-state limitations on expenditures for publicly financed Presidential primary candidates. The 1990 annual report of the FEC states that abolishing state-by-state limits would:

> eliminate some rather cumbersome requirements of the Federal Election Campaign Act that have become a burden for all campaigns to follow, as well as for the Commission to track and enforce; yet the limitations could be removed with no significant impact on the process.

Instead, Congress now proposes to impose restrictions on all 535 House and Senate races as well. If the restrictions for the few presidential primary candidates have become a burden, Congress' proposals are a guaranteed bureaucratic nightmare. And at the glacial pace the FEC is able to investigate violations now, accounting for 1992 campaigns might be completed by the turn of the century.

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18 "Auditors Still Tracking '88 Trail for Signs of Errant Spending," *Washington Post*, July 15, 1991, p. A9.

19 *Ibid.*

20 "The Great N.H. Campaign Spending-Limit Experiment Proves Less Than a Big Success," *Roll Call*, January 14, 1991, p. 8.

The spending limits in the new campaign reform bills are begging to be broken. By signing up for the limits, candidates receive vouchers for broadcasting, reduced mail rates, and matching funds, while repercussions for breaking the limits will be slight. The systems implemented by both bills call for random audits of about one-tenth of the candidates, so each candidate has a 90 percent chance of going completely unmonitored. Should a candidate be audited, the audit will be completed long after the election. With candidates secure in office, FEC penalties for violations will be toothless. A candidate found guilty of breaking spending limits will merely be fined, a small price for the prize, and incumbents will find it easy to recoup such losses. There are not even penalties for refusing to cooperate with the audit process, which encourages stonewalling.

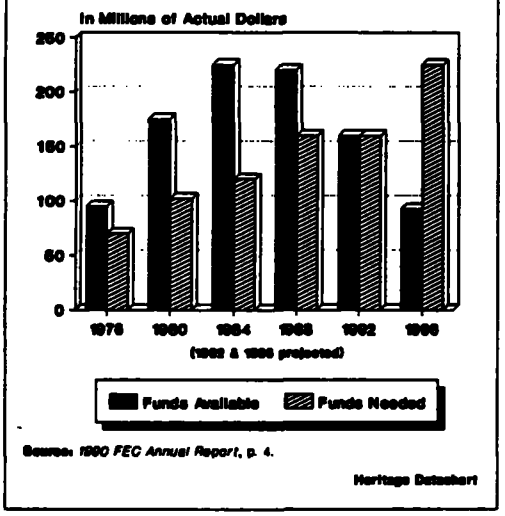
## PUBLIC FINANCING: TAXPAYER FUNDING, GOVERNMENT CONTROL

In making the case for S. 3's public financing provisions, Senate Majority Leader George Mitchell stated:

> I recognize there will be those who will be concerned that taxpayers could be asked to help pay for cleaner more competitive campaigns. But this isn't a novel idea; we have been doing it in Presidential elections since 1976. The cost of this is quite minor and like the presidential system would be financed by the voluntary checkoff system on the tax return.[21]

Apparently Senator Mitchell has not looked closely at the FEC reports to Congress. The Commission projects that the Presidential campaign fund will begin running a deficit beginning in February or March of this year.[22] By 1996, that deficit will be in excess of $150 million. (See Chart 3.) Thus, the FEC has recommended that this "voluntary checkoff system" be changed to an appropriated account. In other words, an election tax, paid out of the federal government's operating revenues. Of course, this is true of the current checkoff system for the Presidential campaign fund. Because it does not affect a taxpayer's bill, dollars are diverted from general tax revenues which would otherwise be available for other government programs.

Chart 3
**Funding Shortfall**
**Presidential Campaign Fund**




Source: 1990 FEC Annual Report, p. 4.
Heritage Datasheet

21 *Congressional Record*, January 14, 1991, p. S 479.
22 *Federal Election Commission Annual Report 1990*, Washington, D.C.: p. 3, 1991.

Americans clearly do not want government financing of campaigns. The number of contributors to the Presidential election fund has declined by nearly 10 million since 1981, and the Federal Election Commission expects a $100 million shortfall in the Presidential Fund by 1996.[23] When put to popular vote, Proposition 70, a public financing proposal for state legislative races, was defeated in California last year.[24] The public financing provisions in both the House and Senate bills promise to be extremely costly. The Senate version covering only the costs of Senate races was estimated by the Congressional Budget Office (CBO) to cost the federal government alone $91 million in one Senate election cycle. This figure does not include the hundreds of millions of dollars that mandatory discounted air time will cost the broadcast industry, and consequently, American consumers. One estimate has placed the cost of S. 3 at over a billion dollars.[25]

### Make Democracy Work for Incumbents: When Is a Tax Not a Tax

CBO estimates that H.R. 3750 could cost over $115 million every two years.[26] This figure, too, excludes the cost of postage and broadcast subsidies. Yet the bill contains no revenue-raising provisions. "We're working on a mechanism to put off the delicate question of how to fund the public matching portion of the package," said House Administration Committee Chairman Charles Rose on the eve of the bill's passage.[27] Proposals include fees on FEC filings, limiting tax deductions for businesses and unions and voluntary donations to a "Make Democracy Work" fund. As mentioned, however, the prospects for substantial voluntary funding are poor. The other funding options amount to further government expenses, which will ultimately be borne by individual taxpayers and consumers, even if the direct taxes are levied on businesses. In addition, using taxes to pay indiscriminately for "campaigns" compels associations or individuals to pay to support views that may run completely contrary to their own, thereby adding to the bills' First Amendment problems.

### The David Duke Party?

Another danger of public financing is illustrated by the Presidential primary financing scheme. The first candidate to qualify for 1992 matching funds was not George Bush or a major Democratic hopeful, but third-party candidate Lenora Fulani. Fulani, of the leftist New Alliance Party, qualified for nearly $1 million in matching funds in the 1988 campaign. Former Ku Klux Klan member David Duke may soon qualify for Federal subsidies for his 1992 presidential campaign. Political extremists of all stripes find the lure of free tax dollars too attractive to pass up. In order to be fair to challengers, a matching-fund threshold must be set low.

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23 Federal Election Commission *Record*, October 1991, Volume 17, No. 10, p. 2.

24 "Appeals Court Upholds Campaign Financing Law," *Los Angeles Times*, April 11, 1991, p. B1.

25 "One Billion Dollars and Counting: the Costs of S. 3," Republican Policy Committee Issue Update – Campaign Finance Reform, April 19, 1991.

26 *Washington Post*, November 26, 1991, p. A4.

27 *Congress Daily*, November 22, 1991, p. 2.

But that low threshold attracts every kook with a cause and a mailing list to run for office in order to gain a platform, free money and, under the proposed Congressional schemes, discounted postal and broadcast advertising rates. In other words, there would be David Duke and Lenora Fulani clones in hundreds of Congressional districts and dozens of Senate races, with no chance of winning a general election, but a good chance at obtaining some tax dollars and a little publicity. This would drive up public financing costs drastically, and force the Post Office and broadcasters to subsidize fringe political agendas or candidates.

Public financing is particularly objectionable when used to enforce spending limits in campaigns, because spending limits disproportionately hinder challengers. Public financing will further mire elections in the morass of government regulations that already hamper challengers. Public financing is immensely expensive and voters do not wish to be compelled to pay for election campaigns. Government financing would give control of elections to the elected, severing one of the most effective controls exercised by citizens over elected officials – the ability to refuse funding or to contribute to an opponent.

## REGULATORY NIGHTMARE

The *Code of Federal Regulations* contains 262 pages crammed with regulations covering every conceivable element of campaigning and political organization, ranging from vending machine sales to volunteers using their home computers for a campaign. Anyone who organizes a group to promote any federal candidate or cause is covered, and recordkeeping begins the first time a stamp or stapler is used. These rules are constantly changing, due to legislation, regulatory adjustments and the results of litigation. S. 3 and H.R. 3750 would add dozens of new provisions, and eventually hundreds of new regulations to federal election law.

Today the Federal Election Commission tracks relatively simple contribution limits for House and Senate campaigns and hands out public funds in one quadrennial election. Even so, the workload is immense. In 1990 the FEC Reports Analysis Division processed 57,982 documents and reviewed 34,726 reports. The Public Records office processed 1,134,974 pages of campaign finance material.[28] The Commission opens reviews of over 200 possible violations a year, requiring investigations and possible litigation.[29] This occupies a full-time staff of over 250 employees, and will cost over $18 million in 1992. To date, there have been no studies on the increase in workload, personnel and expense that can be expected should S. 3 and H.R. 3750 pass. However, the FEC would have responsibility for public financing in nearly 1,000 times as many races over four years as they do under present law.[30]

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28 *Federal Election Commission Annual Report 1990*, p. 72.

29 *Federal Election Commission Annual Report 1990*, p. 15.

30 The FEC would monitor 435 House races twice, plus approximately 67 Senate races and several special elections every four years, a minimum of 937 additional races involving government subsidies or grants.

Aside from the intrinsic flaws of spending limits and public financing, the sheer complexity of the schemes in both campaign reform bills argues against their adoption. The new bills would greatly increase the reporting and regulatory of the present system, which already hinders legitimate political activities.

The present legal regime imposes on candidates, political organizations and political activists a heavy – and for campaigns in particular, a costly – burden of compliance with the increasingly complex law. Constant change in legal rules sows considerable confusion within the regulated community, increases the cost of compliance, and necessarily detracts from the efficient conduct of legitimate political activities. Moreover, the readiness to make repeated changes in the laws invites a struggle for partisan advantage which is waged in the name of sound public policy but actually serves the interest of electoral advantage. This is a dangerous trend.[31]

Regulation will always favor those who do the regulating. H.R. 3750 in particular, exemplifies this. House incumbents depend heavily on PAC money, which makes up a large portion of their funding and which supports incumbents almost exclusively. Thus, the House bill limit for PAC contributions remains five times greater than that for individuals. This insures that PACs will remain an inordinately powerful incumbent protection device. The campaign legislation would also add to the administrative costs of those involved in political campaigns. The Senate bill includes an automatic 15 percent cost increase for legal and accounting fees, and the amount could go higher. This increase in expenses would be borne by every federal campaign, but would weigh heaviest on financially-strapped challengers. While S. 3 has fewer obvious disadvantages for challengers, its provisions are daunting in their complexity. There are twenty or more factors which may figure in determining the spending limit for a Senatorial candidate.

H.R. 3750 would aggravate many of the worst features of the existing campaign financing system. PAC growth, soft money and bundling came about as responses to ill-advised efforts to regulate political activity. The overall complexity of S. 3 and H.R. 3750 would compound the problems caused by the original attempts at reform. The more intricate the election financing laws, the easier it will be for insiders to manipulate the system to their advantage, and the heavier the burden of compliance for candidates, especially inexperienced challengers. S. 3 and H.R. 3750 would only multiply the hundreds of regulations, tens of thousands of reports, and millions of pages of documents that already limit free political activity in America.

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31 *Campaign Finance Reform – A Report to the Majority and Minority Leader, United States Senate*, Campaign Finance Reform Panel, March 6, 1990, p. 3.

## TRICK OR TREAT?

In fact, so complex is the House bill that even the sponsor was confused. Shortly after Representative Sam Gejdenson proclaimed public financing was essential to 'balance politically driven money with non-politically driven money'[32] in the *New York Times,* he was emphasizing on the House floor that "We do not have public financing in this bill."[33] And in their haste to pass the bill before going out of session for Thanksgiving, it was easy for members to overlook provisions buried deep within the pages of regulations outlined by H.R. 3750.

One overlooked provision was a sense of the House resolution calling for legislation to overturn the constitutional prohibition on involuntary spending limits enunciated by the Supreme Court in *Buckley v. Valeo*. Another would require the FEC to record all donations over $50, rather than the current $200, a measure that would tremendously increase the bureaucratization of elections. And despite the anti-PAC rhetoric surrounding H.R. 3750, it actually increases by $5,000 the amount PACs can contribute to national parties. There is even a provision, Title VII, that would allow members to keep amounts raised in excess of the limit in a separate account "available for any lawful purpose" other than campaigning.[34] As has occurred frequently in the past, campaign contributions could be used for purposes such as country club dues, family travel, and meals at fancy restaurants.[35]

But perhaps most disingenuous of the sleeper provisions in H.R. 3750 is Title XI, an attempt to seize bureaucratic control of the grassroots term-limitation movement by subjecting ballot initiatives affecting federal offices to the yoke of FEC reporting requirements. This unprecedented provision will regulate any group that organizes to influence popular ballot initiatives involving "(A) interstate commerce; (B) the election of candidates for Federal office and the permissible terms of those so elected; (C) Federal taxation of individuals, corporations, or other entities; or (D) the regulation of speech or press, or any other right guaranteed under the United States Constitution." This provision sinks the talons of the federal government into almost any popular state referendum or initiative, ranging from insurance reform to abortion and nuclear waste.

Perhaps most important to the professional politicians in Washington, however, is the ability to regulate term-limit initiatives. This portion of Title XI will serve principally to bog down a populist threat to the perpetual governance of the Washington elite. Since most states already have disclosure requirements for groups supporting ballot initiatives, this provision is simply a Congressional attempt to squelch a grassroots effort to rein in the power of incumbency.

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32 *New York Times*, October 10, 1991, p. B16.
33 *Congressional Record*, November 25, 1991, p. H11162.
34 "The Fine Print in the Campaign Reform Bill," *Roll Call*, December 5, 1991, p. 14.
35 *Roll Call*, February 20, 1992, p. 14.

## INCUMBENCY

Inherent in all of the campaign finance reform proposals is a glaring double-standard. Congressional election reform proposals consistently fail to factor the advantages of incumbency into the campaign finance equation. Free name recognition belongs to incumbents simply by virtue of holding office. Behind from the start, a challenger has to spend money on facilities, staff, postage, computers, office equipment, research and other essentials to run a campaign. All this is on the taxpayer's tab for incumbents.

Among the biggest advantages of incumbency is the ability to send out taxpayer-financed "franked" mail. In 1990, the House exceeded its $44 million franked mail budget by between $31 and $32.8 million,[36] and an attempt to tack yet another $25 million on the tab for mailing costs onto a Fiscal Year 1990 Dire Emergency Supplemental Appropriation bill failed in a vote on May 24 of that year. Fortunately for the House, "the vote [had] no immediate effect on House mailing practices because, by law, the Postal Service must deliver franked mail regardless of whether Congress pays for it."[37]

Congress has steadily increased Federal expenditures on these advantages. The Senate increased its Fiscal Year 1990 franking allowance of $24 million to $30 million for 1991, and again to $32 million in Fiscal Year 1992, while the House appropriation has exploded, from $59 million in Fiscal Year 1991 to $80 million for 1992.[38] (These figures do not include other costs associated with mass mailings, such as labor and mailing lists, or the cost of printing, which was estimated at $60 million in 1989,[39] a non-election year.)

Public outcry against franking abuses in 1990 forced the House to introduce some accountability into its franking practices with H.R. 5399, the Legislative Branch Appropriation for Fiscal Year 1991. Prior to these reforms, there had been no disclosure of mailing costs in the House, and no limits on spending. H.R. 5399 set a maximum spending limit per member calculated at three times the first class postage rate times the number of non-business addresses in a district.

The House Administration Committee moved almost immediately to negate the effect of the new limits by arranging a secret $250,000 loan for a small company to develop computerized lists of registered voters for every Congressman. The new lists, which should be ready for the 1992 campaign season, will allow incumbents to target campaign-style mailings by age, sex and voting habits.[40] Fur-

36 H.R. 3014, Legislative Branch Appropriations for FY 1990.

37 *Roll Call*, May 28, 1990, p. 1.

38 "Arsenal of Hill Perks Leaves Incumbents Well-Armed," *Washington Times*, March 5, 1990, p. A10.

39 *Washington Times*, March 5, 1990, p. A10.

40 "With Innovations Like CD-ROM Voter Lists and Laser Printers, House Entering New Era," *Roll Call*, October 21, 1991, pp. 18-19.

ther, by excluding non-voters, incumbents can take credit for reducing costs while actually increasing the amount of election-related mail.

Even after the Committee's unorthodox plan came to light, a vote last fall proved incumbents to be more than willing to use the power of office to give themselves election advantages. On October 29, 1991, the House defeated an amendment to cancel the contract 231 to 182. Federally administered public financing will let these same incumbents abuse the rules governing financing campaigns in a similar manner.

The average franking allowance is about $200,000 per year for each House member and $590,000 for the average Senator in 1992. Only about 8 percent of this avalanche of mail goes to answer constituent inquiries.[41] The rest goes out as free PR to incumbents' districts. This advantage is compounded by the fact Congress consistently sends out much less mail in off-election years, and increases the volume during election season, especially in the months immediately preceding an election, allowing some incumbents to spend much more than the average annual allowance figure during an election year. Further, a common practice among Senators has been for those not running for office to transfer portions of their franking allotment to those facing tough election campaigns.

Transferring postage allowances from office to office and year to year allows Senate and House members to send out much more mail in a campaign season than the average allowance would suggest. Many Senators spend well over a million dollars on franked mail in an election year, and some as much as three or four million. House members, too, can pour huge amounts of mail into a district during periods just before an election.[42] One of the few positive features of S. 3 is its ban on election year mass mailings by Senators. Having admitted implicitly that such mailings are a campaign device, however, the Senate should follow its own logic and abolish political junk mail during the other five years of a Senate term.

The huge congressional staff is another taxpayer-financed resource that often contributes to incumbents' campaigns. Among frequent abuses, shuttling staff between the Washington office and campaign work is a widespread practice. In some cases, staffers take "extended leave" to work on their boss's campaign off the public payroll, but receive an inflated salary for a several months upon returning. Some incumbents keep full-time campaign workers on campaign and congressional payrolls contemporaneously. Incumbents' campaigns are often run out of the same building as their home state office, with rent paid principally by the taxpayer. The Keating Five investigation unearthed a campaign staffer who was directing the official business of a Senate office.

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41 Senator Pete Wilson, "The Congressional Frank: A Simple Case of Abuse," Heritage Foundation *Lecture* No. 221.

42 "Mail Incumbents' No. 1 Weapon," *Washington Times*, February 5, 1990, p. A1.

The cost of the overall legislative budget, covering staff, facilities, supplies, mail and other expenses for the operations of Congress has ballooned at a rate far outpacing inflation, growing an astounding 1,709 percent since 1960. The 1992 Congressional budget, including Member salaries, is about $2.4 billion,[43] or $4.5 million per Congressman per year. One reason for the expense is that the number of staff Congress employs has virtually tripled since 1960 to 19,000, making it the largest legislative staff in the world nine times over.[44] Since a large portion of Congressional budgets are used for free mail, constituent service, publicity efforts, and other campaign-related activities, incumbents have a multi-million dollar head start on challengers.

These advantages of incumbency are not included under the campaign spending limits of either bill. If supporters of spending limits and public financing are serious about reducing the cost of campaigning, these enormous incumbent expenditures on mail, which drove up the amount a challenger needs to spend, have to be considered.

## RECOMMENDATIONS

If lawmakers are serious about a level playing field, the best way to insure competition is to help credible challengers compensate for the huge advantages of incumbency. This could be done through easing measures that restrict contributions to challengers, or through measures to prevent incumbents from using their offices for reelection. Neither S. 3 nor H.R. 3750 addresses either of these concerns. Steps that should be taken toward this goal include:

**1) Cut Taxpayer-funded Congressional Mail.** Using taxpayer money to fund campaign mailings is a clear case of abuse. Use of the Congressional frank should be restricted to answering constituent mail and for legitimate legislative business, rather than for flooding a district with PR pieces.

If campaign reformers insist on spending limits, the limits for challengers should be raised to match the amount spent on printing and postage by an incumbent in an election cycle, minus a generous 10 percent for the mail sent in response to constituents. This would likely reduce one of the biggest hidden campaign costs, publicly financed incumbent mail, and would certainly raise the challengers' limit enough to insure competition. The limit for House challengers would be increased by approximately $200,000, and for Senate challengers by an average of over $700,000.

If campaign reformers insist on public financing, they could begin by offering to challengers the same public financing they already enjoy. They should give half of their allotment for mass mailings to their challengers. This would make challengers more competitive, reduce the other costs of campaigning, require no addi-

43 Congressional Quarterly Special Report, *Where the Money Goes*, December 7, 1991, Volume 49, p. 111.

44 Saenz, Luis "The Costly Congress Grows More Costly," Heritage Foundation *Backgrounder* No. 832, May 30, 1991, p. 4.

tional taxes and would not cost an extra cent. In fact, knowing that for every dollar they spent from their mail fund one dollar would go to their challengers would probably drastically reduce the amount of taxpayer money incumbents thought necessary to constituent mail.

**2) Limit Campaigning by Staff.** Tax dollars are funding Congressional reelection campaigns in many other ways. The use of Congressional staff for campaigning, which is effectively unregulated, could be prevented by reducing the bloated Congressional staffs, or by prohibiting campaign activity by Congressional staff as with Hatch Act limitations on other Federal employees. This would keep Congressional staffers from being put to work on campaigns, and prevent tax dollars from being put to work for incumbents. Other uses of public money on materials useful primarily in campaigning, such as voter registration information, should be eliminated.

**3) Stop the Carryover of "War Chests."** Incumbents make their seats impregnable by saving unused campaign money from one campaign for use in the next. By amassing huge war chests to make themselves virtually unbeatable, incumbents try to scare off potential challengers from even mounting a campaign. Prohibiting the carry-over of funds from one campaign to the next would serve to level the playing field for challengers and incumbents.

**4) Boost Challengers.** Challengers often need a boost at the beginning of a campaign just to get out of the blocks and into a race. Limits on contributions could be raised or eliminated for challengers in the early part of a Congressional race. Challengers with strong local or party support could then overcome an early handicap that plagues challengers.

**5) Enforce *Beck*.** Big Labor loves incumbents, and remains extremely potent politically. Labor funding is conscripted from the paychecks of union members, assuring a steady flow of cash that is largely used for political lobbying. The Supreme Court, in *Beck v. Communications Workers of America,*[45] mandated that unions must account to their members for the uses of dues, insisting that compulsory dues cannot be used for political purposes against the will of the dues payer. However, the burden has been left to individuals to make unions account for dues spending through the courts. The *Beck* decision needs to be enforced to assure political freedom for members of labor unions. *Beck* should be codified, and unions held accountable for the use of members' dues.

**6) Defang Special Interests by Deflating PACs.** The primary cause of disproportionate special interest influence in our existing campaign finance system is the dif-

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45 *Beck v. Communications Workers of America*, 468 F.Supp.93 (Md.1979) The Supreme Court ruled that unions can use mandatory dues and fees only for purposes directly related to collective bargaining and contract administration. (At the time the Communication Workers union at the time was spending 79 percent of its funds on political activity.) More specifically, *Beck* allows workers to be refunded their money if they object to the political use of their dues. However, the ruling is presently not administratively enforced, so workers generally must sue labor unions to obtain a refund.

fering limits on PAC and individual donations. Anyone with a large stake in the political process is forced to operate through a PAC because it is five times as effective. Simply equalizing contribution limits for PAC and individual donors would greatly reduce the special interest focus of fundraising.

## CONCLUSION

The stated purpose of H.R. 3750 is to "cap the ever escalating costs of campaigns; second, protect the ability of all individuals, and of modest means, to participate in competitive election Federal campaigns; and third, reduce the amount of time and energy spent in soliciting campaign funds."[46]

The real aim of campaign finance reform should be to make elections competitive so that voters have real alternatives at the voting booth. The spending limits, public financing, and bureaucratic complexity of H.R. 3750 and S. 3 fail to do so. The bills passed in both houses only help Congressmen keep their jobs with less effort in fund-raising.

Spending limits are unworkable, increase challengers' difficulties, and are of dubious constitutionality. Loopholes and lack of effective enforcement make the limits ineffective. Insofar as they serve to restrict contributions, they threaten free political activity and hinder challengers, who already face slender prospects of beating incumbents.

Government financing of elections would be enormously expensive, and Americans have demonstrated that they do not want to foot the bill for politicians' campaigns. Any voluntary contribution system such as the "Make Democracy Work" fund will go broke, with the alternative being a combination of expensive requirements on broadcasters and the post office and tax money to subsidize politicians.

The complexity of the present system already contributes to the expense of elections, and especially injures non-incumbent candidates, magnifying the inherent advantages of incumbency. Intricate new rules and more bureaucratization will only exacerbate present problems.

Genuine campaign reforms would allow voters a choice between competitive candidates on election day. This would best be achieved by reducing incumbent advantages rather than by increasing regulation and government control of elections. Contributions should be limited principally by public opinions. Disclosure rules allow voters to choose not to vote for a candidate if they deem certain private donations to be corrupting. That decision should remain with the voter, however, rather than with government.

The American political system requires the same freedom it is designed to protect. If elections are to be truly democratic, they must reflect the interests of in-

46 *Congressional Record*, Extensions of Remarks, p. E 3795.

dividual citizens, not those in government. With the maze of contribution limits, public matching funds, advertising subsidies and new regulations contained in S. 3 and H.R. 3750, federal lawmakers have designed a game only they can win.

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