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# BLIND TRUSTS AS A MODEL FOR CAMPAIGN FINANCE REFORM

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**BLIND TRUSTS AS A MODEL FOR CAMPAIGN FINANCE REFORM**

**by**

**Perry A. Pirsch**

**A Thesis**

**Presented to the Faculty of**

**The Graduate College of the University of Nebraska**

**In Partial Fulfillment of the Requirements**

**For the Degree of Master of Arts**

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**Under the Supervision of Professor John Bender**

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# BLIND TRUSTS AS A MODEL FOR CAMPAIGN FINANCE REFORM

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University of Nebraska, 2012

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In this thesis, I explore whether blind trusts present a viable option for campaign finance reform. More specifically, would either permitting (voluntary) or requiring (mandatory) anonymous donations for political campaigns allow for fully funded, yet privately funded, campaigns while preventing problems, whether real or perceived, such as buying influence (*quid pro quo*) or buying access, which are traditionally associated with large campaign donations?

To study this question, I have examined the constitutional origins of the need to fund federal campaigns, Congress' power to regulate campaigns under the Constitution's Elections Clause, the constitutional protection of speech, and the concern of large donations corrupting the political system. Further, I have also reviewed and summarized the history of campaign finance law and salient court decisions regarding the history of campaign finance regulation. Finally, I have reviewed the current use of blind trusts by government officials as well as existing relevant literature suggesting blind trusts may be a viable option for campaign reform.

Having reviewed the salient constitutional history, law, and discourse, voluntary blind trusts could offer a great deal of protection to candidates from the appearance of impropriety, while possibly working complementary to existing campaign finance restrictions. There are conflicting principles at play between making campaign finance trusts completely anonymous to avoid even the appearance of impropriety and republican principles of disclosure, the First Amendment, and the ability to police non-disclosure of donations. This analysis is important because there is a legitimate public interest in preventing not only the *quid pro quo* of trading campaign donations for votes or access to politicians, but protecting against even the appearance of impropriety. Voluntary blind trusts may prove part of the solution of campaign finance reform while offering candidates additional protection from even the appearance of impropriety.

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## Chapter I: Introduction

When it comes to campaign finance, is “sunlight the best disinfectant and electric light the best policeman,” as Justice Louis Brandies once remarked?<sup>1</sup> In contrast, what if society’s interests were best served by keeping candidates in the dark?

Would blind trusts<sup>2</sup> for campaign finance reform have protected Nebraska Attorney General Jon Bruning, who attempted to forgive Nelnet, Inc., a Nebraska corporation, from a \$1-million-dollar settlement with the state after he received over \$16,000 in campaign funds from Nelnet executives for a Senate race?<sup>3</sup> Bruning’s proffered reason for abandoning the settlement was Nelnet had also agreed to pay the State of New York a \$2 million settlement for the same offense, essentially a double-jeopardy argument.<sup>4</sup> Regardless of Bruning’s reasons for forgiving the settlement, could he have avoided the appearance of impropriety simply by not knowing who his campaign contributors were? Is there a valuable role for blind trusts in shielding candidates from public concern of *quid pro quo* political favors?

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<sup>1</sup> Louis Brandeis, *Other People's Money—and How Bankers Use It* (1<sup>st</sup> ed. 1914).

<sup>2</sup> Black’s Law Dictionary defines a blind trust as any trust in which the settlor places investments under the control of an independent trustee, usually to avoid a conflict of interest. The beneficiary has no knowledge of the trust’s holdings and no right to participate in the trust’s management. Black’s Law Dictionary 1648 (9th ed. 2009).

<sup>3</sup> Kyle Michaelis, *John Bruning Continues to Benefit from Serving Nelnet, Not Nebraskans*, New Nebraska Network (April 1, 2012 7:00 p.m.), <http://www.newnebraska.net/diary/3136/jon-bruning-continues-to-benefit-from-serving-nelnet-not-nebraskans>.

<sup>4</sup> *Id.*

## Chapter II: Free Speech, Elections, and the Perceived Need for Reform

The roots of the conflict – the need for candidates to campaign, for candidates to pay for media to get out their messages, and thus to fund campaigns; the constitutional protection of speech; and the desire of a government free from corruption – were drafted into the Constitution.

The Framers, by providing for the direct election of members of the House of Representatives in the Constitution (and later, with the Seventeenth Amendment, to include the direct election of Senators), clearly created a system by which candidates would compete and thus would need to fund their campaigns, even if modern campaign media technologies and expenses were unforeseeable.<sup>5</sup>

Preventing corruption, or even the appearance of corruption in our government, has been a consistent and important governmental interest since its founding, with the Framers' view of the Constitution as a corruption-fighting document.<sup>6</sup> Further, the Constitution also grants Congress with the power to regulate elections under the Elections

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<sup>5</sup> U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII; *see also The Campaign and Election of 1796*, Miller Center, University of Virginia (July 10, 2012 8:00 p.m.), <http://millercenter.org/president/jefferson/essays/biography/3> (“In the election of 1796, as was the aristocratic custom of the day, neither Adams nor Jefferson personally campaigned. Rather, the campaign battles were waged between the political party newspapers, a propaganda device rooted in the anti-British pamphlets of the American Revolution. These publications mercilessly criticized their respective opposing candidates”).

<sup>6</sup> Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 342 (2009) (arguing that corruption has been part of this country's constitutional dialogue since the beginning and it is not an overstatement to note the Framers of the Constitution saw the document as a structure to fight corruption).

Clause.<sup>7</sup> The Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.<sup>8</sup>

As elaborated below, the First Amendment to the United States Constitution also provides, *inter alia*, Congress shall not abridge the freedom of speech. The United States Supreme Court (“Supreme Court”) has held, “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.”<sup>9</sup>

Similarly, Nebraska’s Constitution, Article I, Section 5 provides: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense.”<sup>10</sup> The Nebraska

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<sup>7</sup> U.S. Const. art. I § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators”).

<sup>8</sup> *See also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833-34, 115 S.Ct. 1842, 1869-1870 (1995).

<sup>9</sup> *Red Lion Broadcasting Co. v. F.C.C.S*, 395 U.S. 367, 390 (1969) (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>10</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harvard L. Rev.* 489, 501 (1977) (noting the numerous state courts which have already extended to their citizens, via state constitutions, greater protections than the Supreme

Supreme Court has ruled the Nebraska Constitution offers identical protections for free speech as the U.S. Constitution.<sup>11</sup>

Elected officials often receive campaign contributions from the same entities that the officials must regulate or contract with in the officials' capacities as members of the legislative or executive branches of government. These officials can become beholden to the constituencies who contribute to them and provide these constituencies special attention because they pay for campaigns.<sup>12</sup> As the Supreme Court noted in *U.S. v. Mississippi Valley*, “[A]n impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.”<sup>13</sup>

Today many people associate the problems in government with the need for politicians to seek campaign contributions to fund their elections and re-elections.<sup>14</sup> In fact, the perception of the need for campaign finance reform can be traced back to before

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Court has held are applicable under the federal Bill of Rights).

<sup>11</sup> State ex rel. Lemon v. Gale, 272 Neb. 295, 721 N.W.2d 347 (2006)

<sup>12</sup> Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform In the States*. 92 Cornell L. Rev. 733, 736-37 (2007).

<sup>13</sup> U.S. v. Mississippi Valley Generating Co., 364 U.S. 520, 549, 81 S.Ct. 294, 309, (1961).

<sup>14</sup> Brian Montopoli, *Joe Sestak: In Politics, Money Is the Problem*, CBSNews (October 12, 2011 7:30 p.m.), <http://www.cbsnews.com/stories/2010/05/23/ftn/main6511758.shtml>.

the Civil War.<sup>15</sup> More recently, Rep. Joe Sestak, who defeated Sen. Arlen Specter to become the Democratic Party's nominee for Senate in Pennsylvania in 2010, and who supports the public financing of campaigns, said on Face the Nation, "If you took money out of politics, you'd solve 80 percent of all the problems."<sup>16</sup> Host Bob Scheiffer agreed, opining candidates have to raise so much money and secure the backing of so many interest groups it becomes impossible to compromise.<sup>17</sup>

Similarly, Bob Stern, who wrote "Public Campaign Financing in California: A Model Law for 21st Century Reform for the Center for Governmental Studies," has stated, "People who want to run for office just can't afford to do so unless they're wealthy or they have connections to special interests."<sup>18</sup> Among his report's suggestions were lowering contribution limits, banning fund raising in non-election years, and establishing a public financing system for candidates.<sup>19</sup>

Reuters recently reported the 2012 U.S. elections will be the most expensive ever, with a total price tag of \$6 billion or even more, fueled by millions of dollars in unrestricted donations as Republicans and Democrats vie for control of the White House,

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<sup>15</sup> Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *New Campaign Finance Sourcebook* 7, 7 (2005).

<sup>16</sup> Montopoli, *supra* note 14.

<sup>17</sup> Montopoli, *supra* note 14.

<sup>18</sup> Will Evans, *State Needs Campaign Finance Reform, Good Gov't Group Says*, CaliforniaWatch.org (October 12, 2011 7:00 p.m.), <http://californiawatch.org/dailyreport/state-needs-campaign-finance-reform-good-govt-group-says-11966>.

<sup>19</sup> Evans, *supra* note 18.

Congress, and state governments.<sup>20</sup> The cost of U.S. elections has risen steadily, but this will be the first presidential race since the landmark *Citizens United v. FEC*<sup>21</sup> 2010 Supreme Court ruling, which ended most restrictions on donations by corporations and unions, and fostering the creation of “Super” Political Action Committees (PACs) that can spend money to support a candidate but cannot officially coordinate with campaigns.<sup>22</sup>

Further, in “Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform,” Senator Tom Udall<sup>23</sup> stated, “In a recent poll, nearly 80 percent of Americans agreed that members of Congress are controlled by special interest money to the exclusion of their constituents,” and, “Although I believe that members of Congress are honest and highly dedicated public servants, I agree that our campaign finance system unacceptably allows special

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<sup>20</sup> Patricia Zengerle, *U.S. Vote in 2012 Will Be Record, \$6 Billion Election*, Reuters (October 12, 2011 6:30 p.m.), <http://www.reuters.com/article/2011/08/30/us-usa-campaign-spending-idUSTRE77T3ZX20110830>.

<sup>21</sup> *Citizens United v. FEC*, — U.S. —, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

<sup>22</sup> Zengerle, *supra* note 20.

<sup>23</sup> Senator Tom Udall represents New Mexico in the United States Senate and previously represented the Third District of New Mexico in the United States House of Representatives (1999-2009). He has served as Attorney General of New Mexico (1991-1999), Chief Counsel to the Department of Health and Environment, Assistant U.S. Attorney, and as a Law Clerk to Chief Judge Oliver Seth of the Tenth Circuit Court of Appeals. Senator Udall earned a law degree from the University of New Mexico Law School in 1977, a Bachelor of Laws degree from Cambridge University in 1975, and graduated from Prescott College.

interests to corrupt both our elections and legislative process.”<sup>24</sup>

Udall notes over the last century many campaign finance reforms have been implemented. What becomes clear over time is that whenever regulations are imposed on one form of special interest campaign funding, a loophole is soon identified and exploited to get the money back into the system – if not through direct donations, then through “soft money” or “issue ads.” Whether campaign spending is in the form of direct donations, soft money, issue ads, or independent expenditures, the potential for corruption remains a threat as the difference between these methods of campaign funding are more form than substance. To think that elected officials will not feel similarly indebted to special interests who make significant independent campaign expenditures on their behalf in the same way that they would if the special interest made a direct campaign contribution is, as Justice Scalia said, fanciful.<sup>25</sup>

At the same time, Udall believes a constitutional amendment giving Congress the power to regulate the raising and spending of money with respect to federal elections would be the cure.<sup>26</sup>

Finally, in “Perceptions of Corruption and Campaign Finance: When Public

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<sup>24</sup> Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform*, 29 *Yale L. & Pol’y Rev.* 235, 235-36; *see also* Jack Abramoff, *Capitol Punishment: The Hard Truth About Washington Corruption From America’s Most Notorious Lobbyist* (2011).

<sup>25</sup> Udall, *supra* note 24 at 242.

<sup>26</sup> *Id.* at 249-50.

Opinion Determines Constitutional Law,” authors Nathaniel Persily and Kelli Lammie note public perception of corruption is widespread and most Americans view campaign contributions and expenditures as corrupting. Their polling data suggested Americans believe that campaign contributions, at any level, have too much influence over legislators, and a large majority of survey respondents will support virtually any campaign finance reform proposal suggested to them.<sup>27</sup>

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<sup>27</sup> Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 138 (2004) (the authors also noted, paradoxically, while a large majority of Americans believe that the campaign finance system contributes to corruption in government, data does not suggest campaign finance reform will have a significant effect on this attitude).

### Chapter III: A History of Campaign Finance Reform

July 4, 1776, is well-celebrated as the date the American Colonies declared their independence from Great Britain; however, it was not until the Constitution's adoption on September 17, 1787, at the Constitutional Convention in Philadelphia, and ratified by eleven states that it became the supreme law of the land, more than a decade after the signing of the Declaration.<sup>28</sup> The Constitution assigns to Congress, *inter alia*, power under the Elections Clause of the Constitution to make or alter rules governing federal elections.<sup>29</sup>

On December 15, 1791, more than four years after the Constitution was ratified, three quarters of the States adopted the Bill of Rights, or first ten Amendments to the Constitution, including the First Amendment.<sup>30</sup> Specifically, it states:

Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>31</sup>

Since the founding, the need to hold elections (and therefore the need for

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<sup>28</sup> *Teaching with Documents: The Ratification of the Constitution*, The National Archives (Feb. 12, 2012, 7:00 p.m.), <http://www.archives.gov/education/lessons/constitution-day/ratification.html>.

<sup>29</sup> See U.S. Const. art. I § 4, cl. 1; *see also* *McCannell v. Federal Election Com'n*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).

<sup>30</sup> *Bill of Rights and Later Amendments*, Historic Documents (Feb. 12, 2012, 7:30 p.m.), <http://www.ushistory.org/documents/amendments.htm>.

<sup>31</sup> U.S. Const. amend. I.

candidates to finance their campaigns), Congress' ability to regulate elections, and the right to free speech were sewn into the Constitution. Congress has struggled with how to regulate campaign expenditures to minimize corruption without encroaching on an individual's right to free speech.

By the 1830s, political parties were raising money through "assessments," or the taking of a percentage of the government salary of those they placed in public offices through the spoils system.<sup>32</sup> The assessment system was soon the primary means of campaign support, leading critics to express concern it posed a threat to the freedom of elections.<sup>33</sup>

During the Reconstruction Era, political patronage and the assessments on government workers increased. To put an end to the spoils system, in 1883 Congress passed the Pendleton Civil Service Act, which created a class of government workers who had to qualify for office through competitive examinations.<sup>34</sup> Soon afterward, candidates and parties increasingly turned to business to fund their campaigns, such as corporations, banks, and railroads, with donations to national party coffers in amounts of \$50,000 or more.<sup>35</sup>

In 1904, there was a public outcry regarding corporate fund raising. Teddy

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<sup>32</sup> Corrado, *supra* note 15, at 8.

<sup>33</sup> *Id.* at 8.

<sup>34</sup> *Id.* at 9-10.

<sup>35</sup> *Id.* at 10.

Roosevelt's presidential campaign had received 73 percent of all contributions from corporate donors.<sup>36</sup> Industrialist Thomas Fortune Ryan and banker August Belmont contributed roughly three-quarters of the Democrats' 1904 presidential campaign finances, with Henry Davis, a mine owner and the party's vice presidential candidate, contributing much of the rest.<sup>37</sup> Because of this public outcry, President Roosevelt and Congress then began to push for campaign finance reform, ultimately passing the Tillman Act, in 1907, which prohibited federal campaign contributions from nationally chartered banks and corporations.<sup>38</sup> The Tillman Act, the first federal law restricting corporate involvement in the election process, marked the birth of federal campaign finance law,<sup>39</sup> however, no effective enforcement mechanism was created, so the act went largely unenforced.<sup>40</sup>

In 1910, Congress passed the Federal Corrupt Practices Act ("FCPA"), also

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<sup>36</sup> Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1049 (1996).

<sup>37</sup> Robert E. Mutch, *Campaigns, Congress, and Courts: The Makings of Federal Campaign Finance Law* 3 (1988).

<sup>38</sup> 34 U.S.C. 864 (1907); *see also* R. Sam Garrett, Cong. Research Serv., R40091, *Campaign Finance: Potential Legislative and Policy Issues for the 111<sup>th</sup> Congress* 1 (2011).

<sup>39</sup> Adam Winkler, *Other People's Money: Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 871 (2004).

<sup>40</sup> *Campaign Finance (US)*, The Center for Media and Democracy (February 12, 2012 6:30 p.m.), [http://www.sourcewatch.org/index.php?title=Campaign\\_finance\\_\(U.S.\)](http://www.sourcewatch.org/index.php?title=Campaign_finance_(U.S.)).

known as the “Publicity Act.”<sup>41</sup> It was Congress' first attempts at requiring disclosure of campaign contributions by party committees. It also established campaign spending limits for political parties in House general elections and required the national committees of political parties to file post-election reports regarding their contributions to individual candidates and their own individual expenditures. In 1911, FCPA was extended to Senate candidates and established limits on the amount of money candidates were allowed to spend on their campaigns. Yet again, active enforcement mechanisms were not created and FCPA was rarely enforced.<sup>42</sup>

In 1925, Congress amended FCPA to extend the act's coverage to multi-state parties and election committees, and required financial disclosure reports be made quarterly. It also limited an individual's campaign contributions to \$5,000 to each federal candidate's campaign committee and provided a requirement that any contribution over \$100 be reported. The amendments also raised Senate campaign spending limits to \$25,000. The revision still did not, however, create an effective enforcement mechanism and FCPA still went largely unenforced; politicians simply set up numerous campaign committees to accept cash.<sup>43</sup>

In 1943 Congress applied the Tillman Act's corporate money ban to labor unions

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<sup>41</sup> Federal Corrupt Practices Act, 2 U.S.C. § 241 (1910); *See also Campaign Finance (US)*, *supra* note 40.

<sup>42</sup> 2 U.S.C. § 241; *See also Campaign Finance (US)*, *supra* note 40; *Statutory Regulation of Political Campaign Funds*, 66 Harv. L. Rev. 1259, 1262-63 (1953).

<sup>43</sup> Dave Murray, *Reform Began in 1904*, Toledo Blade, July 19, 1992 at A13; *see also Campaign Finance (US)*, *supra* note 40.

after it was disclosed John Lewis, president of the United Mine Workers Union and Congress of Industrial Organizations, had contributed \$100,000 to the re-election campaign of Franklin Roosevelt. Unions responded to this prohibition by creating political action committees, or PACs, to raise funds to be used specifically for campaign contributions.<sup>44</sup>

In 1972, Congress passed the Federal Election Campaign Act of 1971 (“FECA”),<sup>45</sup> which repealed FCPA and set new limits on what individuals could contribute to campaigns. FECA required disclosures of contributions and spending and instituted public financing for presidential elections. It limited an individual to giving no more than \$50,000 annually to a presidential campaign, \$35,000 to a senatorial campaign, and \$25,000 to a House candidate. There was no limit, however, to a person’s total contributions.<sup>46</sup>

In 1974, under pressure from public outcry over the Watergate scandal, Congress amended FECA to lower contribution limits to \$1,000 per candidate for each election and \$25,000 a year overall per contributor. It also limited to \$20,000 a year contributions to national party committees. Corporations and labor unions were barred from making campaign contributions, but were allowed to pay overhead expenses of PACs they sponsored; however, contributions from PACs were limited to \$5,000 per candidate per

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<sup>44</sup> Murray, *supra* note 43.

<sup>45</sup> Federal Election Campaign Act, 2 U.S.C. § 431 (1972).

<sup>46</sup> Murray, *supra* note 43.

election and \$15,000 per year to national parties.<sup>47</sup> The amendments also provided for the public financing of presidential elections, limited expenditures by candidates and associated committees (except for presidential candidates who accepted public funding), limited candidate expenditures from personal funds, and “fixed” the method of appointing members to the Federal Election Commission. Congress also passed Section 527 of the Internal Revenue Code, which allowed for issue advocacy, an alluring alternative to PACs for wealthy donors, corporations, and labor unions seeking to circumvent the \$5,000 contribution limitation.<sup>48</sup>

In 1976, in the pivotal Supreme Court case of *Buckley v. Valeo*,<sup>49</sup> the court overruled several provisions of FECA. In *Buckley*, numerous plaintiffs – including a candidate for the presidency of the United States, a United States senator seeking re-election, the Libertarian Party, the New York Civil Liberties Union, Inc., the American Conservative Union, and Human Events, Inc. – claimed: 1) FECA’s limiting the use of money for political purposes constituted a restriction on communication that violated the First Amendment because all meaningful political communications in the modern setting involve the expenditure of money; 2) the reporting and disclosure provisions of FECA unconstitutionally impinged on their right to freedom of association; and 3) federal subsidy provisions of FECA’s Subtitle H violated the General Welfare Clause, were

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<sup>47</sup> Murray, *supra* note 43; FECA, 88 U.S.C. §§ 1272, 1286 (1974).

<sup>48</sup> Cory Kalanick, *Blowing up the Pipes: the Use of (C)(4) to Dismantle Campaign Finance Reform*, 95 Minn. L. Rev. 2254, 2257 (2011).

<sup>49</sup> *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976).

inconsistent with the First and Fifth Amendments, and exceeded the Commission's composition and powers. The plaintiffs also claimed the Court of Appeals for the Federal Circuit erred in failing to give this legislation the critical scrutiny demanded under accepted First Amendment and equal protection principles.

In *Buckley*, the Supreme Court held: 1) provisions in FECA limiting individual contributions to campaigns were constitutional, despite First Amendment objections; 2) provisions limiting expenditures by candidates on their own behalf violated the candidates' rights to freedom of speech; 3) provisions limiting total expenditures in various campaigns were invalid; 4) provisions limiting the amount that any individual could spend, independently of a candidate but relative to the candidate, impermissibly abridged freedom of speech; 5) the reporting requirements under FECA were valid; and 6) that the Federal Elections Commission created by the act, insofar as it had primary responsibility for conducting civil litigation and had rule-making authority and the power to determine eligibility for funds and federal elective office, was in violation of the Appointments Clause.

Thus, in reaching its holding in *Buckley*, the Court recognized spending money to influence elections is a form of constitutionally protected free speech. As such, candidates, themselves, could donate unlimited amounts to fund their own campaigns, notwithstanding any laws to the contrary. The court also held media advertisements that avoided advocacy for or against a specific candidate could not be regulated. More specifically, the *Buckley* court found a bright line distinguishing ordinary political speech

from electioneering, or the “express advocacy” test, which permitted the government to regulate only those communications with explicit words expressly advocating for or against federal candidates' election, “such as ‘vote for.’” Any such “magic words” communications that were “unambiguously related to the campaign of a particular federal candidate.”<sup>50</sup> *Buckley* also addressed the standard by which the court would review campaign finance reform, with the court holding, because campaign expenditures were equivalent to speech, any statutes limiting them would have to withstand strict scrutiny, the highest level of scrutiny the court can require.<sup>51</sup>

Also in 1979, amendments to FECA<sup>52</sup> created a “soft money loophole,”<sup>53</sup> allowing corporations, unions, and the wealthy to give unlimited sums to the national party committees for “party-building” activities. Later, this money was used for candidate-related issue ads, which led to a substantial increase in soft money contributions and

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<sup>50</sup> James Bopp, Jr. & Richard E. Coleson, *Citizens United v. Federal Election Commission: Precisely What WRTL Sought to Avoid*, 29 *Cato Supreme Court Review* 31 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 80 (1976)).

<sup>51</sup> Michael Marcucci, *Speech or Not: Applying Election Law Strict Scrutiny to Campaign Finance*, 42 *B.C. L. Rev.* 174, 174; *see also* *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 120 S.Ct. 1878 (2000) (Strict scrutiny requires a regulation to be narrowly tailored to promote a compelling government interest, and must be through the least restrictive means in achieving the purpose the statute was created to serve).

<sup>52</sup> *See* Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980).

<sup>53</sup> “Soft money,” or money donated to the national parties to support state and local grassroots organizing or get-out-the-vote efforts, was totally unregulated by FECA; donors could contribute any amount to the national parties, who could in turn spend it on (or distribute it to) their state and local affiliates. *See* Daniel L. Mutrymowicz, *Loophole.com: How the FEC’s Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 *Colum. L. Rev.* 1708, 1715 (2009).

expenditures in elections.<sup>54</sup> The perceived problem regarding the influence of soft money was part of the catalyst for the 2002 Bipartisan Campaign Reform Act, as discussed below.<sup>55</sup>

In 2000, the Supreme Court reached its holding in *Nixon v. Shrink Missouri Government PAC*.<sup>56</sup> In this case, the plaintiffs – a political action committee and an unsuccessful candidate in the primary for Missouri state auditor – brought suit challenging provisions of Missouri's state campaign finance law limiting the amount of contributions to state candidates. The Supreme Court expanded the holding of *Buckley v. Valeo*<sup>57</sup> by upholding federal limits on campaign contributions and also finding limits to campaign contributions to state offices constitutional. The Supreme Court held: (1) the decision in *Buckley v. Valeo* was authority for state limits on campaign contributions; (2) the Missouri statute limiting campaign contributions for various state offices was not void for lack of evidence, and was sufficiently tailored to serve its purposes as required to survive First Amendment scrutiny; and (3) the statute was not invalid based on fact that, accounting for inflation, Missouri's contribution limits may have been effectively lower in real dollar value than those campaign contribution limits upheld in *Buckley*.

In his dissent, Justice Clarence Thomas interpreted Federalist No. 10 as rejecting a

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<sup>54</sup> Daniel M. Yarmish, *The Constitutional Basis for a Ban on Soft Money*, 67 Fordham L. Rev. 1257, 1265 fn. 88 (1998).

<sup>55</sup> Corrado, *supra* note 15 at 39.

<sup>56</sup> *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897 (2000).

<sup>57</sup> *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976).

ruling supporting limits on campaign contributions, opining: "The Framers preferred a political system that harnessed such faction for good, preserving liberty while also ensuring good government. Rather than adopting the repressive 'cure' for faction that the majority today endorses, the Framers armed individual citizens with a remedy."<sup>58</sup> In contrast, in his concurrence, Justice John Paul Stevens stated, "Money is property; it is not speech."<sup>59</sup>

Also in 2000, the Nebraska Supreme Court decided *Stenberg v. Moore*,<sup>60</sup> in which the court examined whether a provision of Nebraska's Campaign Finance Limitation Act – which prohibited a political group or committee from making independent expenditures exceeding \$2,000, unless it filed a statement of intent to expend a specific amount in excess thereof at least 45 days prior to an election and did not spend more than 120 percent or less than 80 percent of designated amount -- was "a time, place, and manner regulation." If so, it would be permissible; if not, it imposed direct quantity restrictions on independent political expenditures, a burden on the exercise of political speech. In

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<sup>58</sup> *Nixon v. Shrink Missouri Government PAC*, *supra* note 56. *See also* The Federalist No. 10 (James Madison) (Federalist No. 10 (1787) is an essay written in support of the Constitution by James Madison, under the pseudonym Publius. In Federalist No. 10 Madison addresses the question of how to guard against factions, which are groups of citizens, whether constituting a minority or majority, with interests contrary to the common good. Madison suggested the larger the Republic, the greater the protection against factions and parochial interests. In *California Democratic Party v. Jones*, 530 U.S. 567, (2000), Justice John Paul Stevens, citing Federalist No. 10 in footnote 2 of his dissent, noted political parties, as factions, were part of the harm the Constitution was designed to protect against).

<sup>59</sup> *Nixon v. Shrink Missouri Government PAC*, *supra* note 56.

<sup>60</sup> *State ex rel. Stenberg v. Moore*, 258 Neb. 738, 605 N.W.2d 440 (2000).

*Stenberg*, the attorney general contended §14 of Nebraska’s Campaign Finance Limitation Act was in violation of the free speech provision of Article I, §5 of the Constitution of the State of Nebraska and the Free Speech Clause of the First Amendment to the U.S. Constitution. The attorney general submitted it abridged the freedom of speech of those persons required to file a statement of intent to expend. In contrast, the secretary of state argued the statute was a legitimate exercise of legislative authority intended to ensure candidates who agreed to abide by spending limits set forth in the act received notice of independent expenditures in sufficient time to permit them to make an educated decision on whether to withdraw their agreement in order to effectively respond to such expenditures.

The court held the provision which prohibited a political group or committee from making independent expenditures exceeding \$2,000 – unless it filed a statement of intent to expend a specific amount in excess thereof at least 45 days prior to an election and did not spend more than 120 percent or less than 80 percent of designated amount – was not simply “a time, place, and manner regulation.” It imposed direct quantity restrictions on independent political expenditures and constituted a burden on the exercise of political speech. Further, the restriction was not narrowly tailored to any compelling state interest so as to justify the burden imposed on constitutional rights of those wishing to engage in political speech supporting or opposing a candidate through independent expenditures which were neither coordinated with nor controlled by a candidate's campaign.<sup>61</sup>

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<sup>61</sup> *Id.*

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), also known as McCain-Feingold.<sup>62</sup> Seeking to turn back the clock on the 1979 FECA amendments, BCRA banned soft-money advertising (corporation or union treasury spending) against clearly identified federal candidates within 60 days of a general election or 30 days of a primary election.<sup>63</sup> In “Bipartisan Campaign Reform Act,” Gregory Comeau notes:

BCRA bans the solicitation, receipt, transfer, donation and spending of soft money by political parties for elections.

BCRA also includes several other provisions that modify the structure of the campaign finance system. The Act increases hard money limits on permissible contributions by individual donors from \$1,000 to \$2,000 per candidate per election, from \$20,000 to \$25,000 per national party committee per year, and from \$5,000 to \$10,000 per state or local party committee per year. In addition, the Act increases aggregate limits on hard money contributions by individuals from \$25,000 per year to \$95,000 per every two years, of which only \$37,500 may be contributed to candidates or candidates’ committees. BCRA also clarifies and amends federal election law by prohibiting any government employee or official from fund raising on federal property, fraudulently soliciting funds, or receiving contributions from minors. Finally, the Act contains further provisions that strengthen the ban on foreign contributions, augment disclosure requirements, mandate studies of state “Clean Elections” policies, and increase contribution limits for those donating to candidates whose opponents spend

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<sup>62</sup> Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002) (to be codified in scattered sections of 2 U.S.C., 12 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.)

<sup>63</sup> R. Sam Garrett, Cong. Research Serv., R40091, Campaign Finance: Potential Legislative and Policy Issues for the 111<sup>th</sup> Congress 2 (2011).

large sums of their own money.<sup>64</sup>

BCRA was the most recently enacted major federal campaign finance reform.<sup>65</sup>

In 2003, in *McConnell v. FEC*,<sup>66</sup> multiple actions challenging the constitutionality of BCRA were consolidated. In issuing a verdict, the Supreme Court noted BCRA, which amended FECA and other portions of the United States Code, was the most recent of nearly a century of federal enactments designed “to purge national politics of what [is] conceived to be the pernicious influence of ‘big money’ campaign contributions.”<sup>67</sup> The Court noted, in enacting BCRA, Congress sought to address three important developments in the years since Buckley: (1) the increased importance of “soft money,” (2) the proliferation of “issue ads,” and (3) the disturbing findings of a Senate investigation into the 1996 federal elections, which revealed the soft-money loophole: candidates and parties requested donors who had reached their direct contribution limit to continue to donate to state committees with the purpose of influencing federal elections. The Supreme Court noted political parties and candidates were able to circumvent FECA's limitations by contributing soft money – money as yet unregulated under FECA –

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<sup>64</sup> Gregory Comeau, *Bipartisan Campaign Reform Act*, 40 Harv. J. on Legis 253 (2003).

<sup>65</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 12 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.)

<sup>66</sup> *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003)

<sup>67</sup> *Id.* at 115, 124 S.Ct. at 644 (citing *United States v. Automobile Workers*, 352 U.S. 567, 572, 77 S.Ct. 529 (1957))

to be used for activities intended to influence state or local elections; for mixed-purpose activities such as get-out-the-vote (GOTV) drives and generic party advertising; and for legislative advocacy advertisements, even if they mentioned a federal candidate's name, so long as the ads did not expressly advocate the candidate's election or defeat. Issue ads that were specifically intended to affect election results, but did not contain “magic words,” such as “Vote Against Jane Doe,” were not subjected to FECA's restrictions. Thus, donations were made to state committees for the purpose of influencing federal candidates and elections, with federal candidates just as indebted to these contributors as they had been to those who had formerly contributed to the national parties.

In *McConnell*, in a 5-to-4 ruling, the Supreme Court upheld the central tenants of BCRA. The Supreme Court held that: (1) political parties and candidates could be banned from using “soft money” for federal election activities; (2) a ban on party donations to tax-exempt entities was generally valid; (3) “soft money” could not be used for issue ads which clearly identified candidates; (4) statutory definition of “electioneering communications” was constitutionally valid; (5) the cost of third-party issue ads coordinated with federal candidates' campaigns could validly be considered as contributions to those campaigns; (6) labor unions and corporations were generally required to pay for issue ads from separately segregated funds; (7) prohibition on political donations by minors was invalid; and (8) requirement that broadcasters disclose records of requests for air time for political ads was valid. In essence, the court adopted a deferential view of congressional authority under the Elections Clause and allowed disproportionate influence on officeholders' judgment to stand in for corruption as a

justification for upholding campaign limitations.

In 2007, Congress passed the Honest Leadership and Open Government Act,<sup>68</sup> which amended part of the Lobbying Disclosure Act of 1995.<sup>69</sup> While not directly tied to campaign finance, it strengthened public-disclosure requirements concerning lobbying activity and funding, placed more restrictions on gifts for members of Congress and their staff, as well as provided for mandatory disclosure of earmarks in expenditure bills.<sup>70</sup> In essence, it was an attempt to reduce the appearance that gifts provided access to members of Congress and their staffs, as well as require more disclosures as to who was contributing and who was receiving.

In 2008, in *Davis v. Federal Election Com'n*,<sup>71</sup> a self-financed candidate for seat in United States House of Representatives brought facial challenge to the “Millionaires' Amendment” of BCRA, which relaxed limits on opponents of self-financed House of Representative candidates to raise money from donors and coordinate campaign spending with party committees. Arguing it violated the First Amendment and the Equal Protection Clause of the Fifth Amendment, the Supreme Court held the “Millionaires'

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<sup>68</sup> Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of 2 and 18 U.S.C.).

<sup>69</sup> Lobbying Disclosure Act of 1995 (LDA), Pub. L. No. 104-65, 109 Stat. 691 (codified as amended at 2 U.S.C. §§ 1601-1614 (2006 & Supp. I 2007)).

<sup>70</sup> Al Davis, *Genuine Reform or Just Another Meager Attempt to Regulate Lobbyists: a Critique of the Honest Leadership and Open Government Act of 2007*, 18 Kan. J.L. & Pub. Pol'y 340 (2009).

<sup>71</sup> *Davis v. Federal Election Com'n*, 554 U.S. 724, 128 S.Ct. 2759 (2008).

Amendment” of BCRA was an unlawful burden on the exercise of political speech. The court reasoned the BCRA amendment raised the limits only for non-self-financing candidates and only when the self-financing candidate's expenditure of personal funds exceeded the \$350,000 limit, so that the amendment effectively penalized the self-financed candidate's ability to use his personal funds to finance campaign speech, and produced fund-raising advantages for his opponents, without any justifiable compelling state interest.

In 2010, the Supreme Court, decided the pivotal case of *Citizens United v. FEC*.<sup>72</sup> In *Citizens United*, a nonprofit corporation brought action against the FEC for declaratory and injunctive relief, asserting that it feared it could be subject to civil and criminal penalties if it made available through video-on-demand, within 30 days of primary elections, a film regarding Hillary Clinton, who was seeking the Democratic nomination for president.

More specifically, in January 2008, Citizens United released a film entitled *Hillary: The Movie*, a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. The film mentioned Senator Clinton by name and depicted interviews with commentary critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand. In

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<sup>72</sup> *Citizens United v. Federal Election Commission*, — U.S. —, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

December 2007, a cable company offered to make Hillary available on a video-on-demand channel to viewers. To implement the proposal, Citizens United was prepared to promote the film with two 10-second ads and one 30-second ad. Each ad included a short, critical statement about Senator Clinton, followed by the name of the movie, with the ads running on television within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by BCRA's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC, arguing BCRA was unconstitutional as applied to Hillary; and (2) BCRA's disclaimer and disclosure requirements were unconstitutional as applied to Hillary and to the three ads for the movie.

In *Citizens United*, the Supreme Court expanded its holding, finding prohibitions against corporations, unions, and nonprofits to advocate expressly for or against candidates with treasury funds were unconstitutional and PACs may accept unlimited contributions from individuals, unions, and corporations (both for profit and not-for-profit) for the purpose of making independent expenditures. Justice Anthony Kennedy, writing for the 5-4 majority, articulated three holdings: 1) government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity (overruling *Austin v. Michigan Chamber of Commerce*<sup>73</sup>; 2) the federal statute barring independent corporate expenditures for electioneering communications

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<sup>73</sup> *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).

violated First Amendment, overruling *McConnell v. Federal Election Com'n*<sup>74</sup>; and 3) disclaimer-and-disclosure provisions of BCRA did not violate the First Amendment, as applied to a nonprofit corporation's film and three advertisements for the film.<sup>75</sup> In contrast, provisions of FECA were upheld, with the Court noting there was “no constitutional impediment” to requiring disclosure of those who fund independent campaign expenditures.<sup>76</sup>

Critics noted the Court’s decision in *Citizen’s United* invalidated a ban on corporate giving going back to the 1907 Tillman Act.<sup>77</sup> In “On Political Corruption,” by Samuel Issacharoff, the author noted:

Prior to *Citizens United*, the Court had struggled between two competing views of the sources of potential corruption as a result of campaign finance. A fairly consistent majority position, beginning in *Buckley v. Valeo* itself, had focused on the potential for the corruption of the candidates who aimed to ingratiate themselves to their wealthy backers. Such corruption was defined in terms of actual *quid pro quo* arrangements, while allowing more expansively for the potential dispiriting influence of the appearance of such arrangements. The alternative perspective viewed corruption as a distortion of political outcomes as a result of the undue influence of wealth. On this view, the source of corruption was large expenditures capturing the

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<sup>74</sup> *McConnell v. Federal Election Com'n*, 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003).

<sup>75</sup> *Citizens United v. Federal Election Commission*, *supra* note 72.

<sup>76</sup> Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413 (2012).

<sup>77</sup> Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 Cornell J.L. & Pub. Pol’y 469, 646 (2011).

marketplace of political ideas, and the corrupted entities were, at bottom, the voters who could only succumb to the entreaties of money. This view defines corruption poorly, and makes corruption appear as a “derivative” problem from broader societal inequalities.<sup>78</sup>

Senator Udall suggests the *Citizens United* decision is a constitutional interpretation that cannot be fully addressed through legislation. The only long-term solution is a constitutional amendment granting Congress the authority to enact comprehensive reforms to restore the voice of individual Americans in our elections.<sup>79</sup>

Finally, in 2011, in sister cases of *Arizona Free Enterprise Club Freedom Club PAC v. Bennett* and *McComish v. Bennett*,<sup>80</sup> past and future candidates for Arizona state political offices, who ran or planned to run privately-financed campaigns, and two political action committees (PACs), who funded such candidates filed lawsuits, sought to enjoin enforcement of the matching funds provision of Arizona's Citizens Clean Elections Act – which provided for state matching funds for state candidates who agreed to abide by spending limits – as violative of their rights under the First Amendment and the Equal Protection Clause.

The Supreme Court upheld a claim for an injunction. The court found the award of matching funds an “unprecedented penalty” that imposed a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech that was

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<sup>78</sup> Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 121-23 (2010).

<sup>79</sup> *Id.*

<sup>80</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, — U.S. —, 131 S.Ct. 2806, 2818, 180 L.Ed.2d 664 (2011).

not justified by a compelling government interest. The court noted each personal dollar the privately financed candidate spent resulted in an award of almost one additional dollar to his opponent, a “special and potentially significant burden” for a candidate choosing to exercise his First Amendment right to spend funds on his own candidacy. Further, the more money spent on behalf of a privately financed candidate or in opposition to a publicly funded candidate, the more money the publicly funded candidate received from the State. The effect of matching dollars to a publicly funded candidate a group opposed was more severe than the burdens imposed on privately financed candidates. Independent groups were not eligible for public financing. As a result, those groups could only avoid matching funds by changing their message or choosing not to speak altogether. Finally, the Court noted, in *Buckley*, it held that limits on overall campaign expenditures could not be justified by a purported government “interest in equalizing the financial resources of candidates.” Equalizing campaign resources might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign. Further, “independent expenditures ... do not give rise to corruption or the appearance of corruption.”

Chief Justice Roberts, writing for the majority, held the state lacked any compelling state interest in equalizing electoral funding, and thus, such interest could not justify the substantial burden on political speech imposed by matching funds provision; and substantial burden on political speech was not justified by state's compelling anti-corruption interest.

The State of Nebraska also had a Campaign Finance Limitation Act (NCFLA)<sup>81</sup> that also provided public matching dollars to candidates who agreed to abide by spending limits when competitors would not. Because the Arizona Citizens Clean Elections Act,<sup>82</sup> as found unconstitutional by the Supreme Court, was so similar to NCFLA, on August 17, 2011, the Nebraska Attorney General opined the NCFLA also not enforceable.<sup>83</sup> Further, the Nebraska Attorney General opined, because the statute pertaining to aggregate contributions limits was interwoven with the public financing provisions, a court could find the invalid provisions are not severable and that Neb. Rev. Stat. § 32-1608 could not be enforced independently.<sup>84</sup>

In summation, the need to campaign, congressional power to regulate federal campaigns, and the right to free speech are sown into the Constitution, itself. At the same time, the perceived association of large campaign donations to corruption of elected representatives has been long suspected. Congress has attempted to curb perceived abuses through essentially three broad themes: 1) restrictions on the sources of funds; 2) limits on the dollar amounts of contributions; and 3) disclosure of information about the funds.<sup>85</sup> States have also offered matching funds to candidates who face high dollar self-

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<sup>81</sup> Neb. Rev. Stat. §§ 32-1601 - 32-1613 (2012).

<sup>82</sup> Ariz. Rev. Stat. Ann. §§ 16-901.01, 16-940- 16-961 (2006)

<sup>83</sup> Neb. Rev. Stat. § 32-1601 et seq. (2011); Neb. Op. Att’y. Gen. 11003 (2011).

<sup>84</sup> Neb. Op. Att’y. Gen. 11003 (2011).

<sup>85</sup> Tillman Act, 34 U.S.C. § 864 (1907); *see also Campaign Finance (US)*, *supra* note 40.

financing candidates. At the same time, new methods of campaign finance have evolved, such as soft money, and parties have successfully (and unsuccessfully) challenged or outmaneuvered the regulatory acts of Congress and state legislators seeking to regulate. To date, however, Congress has not employed the use of blind trusts in campaign finance reform.

Could blind trusts present a viable option for campaign finance reform? To prevent the perceived problems of either influence buying or access buying?

## Chapter IV. Current and Suggested Uses of Blind Trusts

### A. The Current Use of Blind Trusts in Government

There is precedent for the use of “blind trusts” by government officials to prevent, at the very least, the appearance of impropriety.

In 1978, Congress passed the Ethics in Government Act (“EGA”)<sup>86</sup> in the wake of the Nixon Watergate scandal.<sup>87</sup> Among other things, it created mandatory, public disclosure of financial and employment history of public officials and their immediate family;<sup>88</sup> however, government officials could create a “qualified blind trust,” which, provided it complied with the requirements of EGA and related regulations, allowed the official to be exempt from certain disclosure requirements EGA created.<sup>89</sup> The “qualified blind trust” was an optional mechanism for circumventing full disclosure of financial interests while at the same time avoiding conflicts with official duties.<sup>90</sup> In essence, the holdings of a “qualified blind trust” were not classified as financial interests of the

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<sup>86</sup> Ethics in Government Act, Pub. L. No. 95-521 (1978) (codified at 5 U.S.C.A. Appx 4 § 101, et seq.)

<sup>87</sup> Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 Colum. L. Rev. 1103 (1998).

<sup>88</sup> The EGA also created restrictions on lobbying efforts by public officials for a set period of time after leaving public office. It also created the U.S. Office of Independent Counsel, whose purpose is to investigate government officials. *See* Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified at 5 U.S.C. App. §§ 101-111, 401-408, 501-505).

<sup>89</sup> Ethics in Government Act, *supra* note 88.

<sup>90</sup> *Id.*

government official for purposes of 18 U.S.C. § 208 or for any other federal conflict of interest statutes or regulations.

Federal regulations, 5 C.F.R. § 2634.401 (2012), issued in support of the Act, provide that Congress envisioned the use of those trusts by government employees would reduce the real and apparent conflicts of interest which might arise between the financial interests held by those employees (or attributable to them) and their official responsibilities.

Federal regulation adopted in support of the statutes, 5 C.F.R. § 2634.403(b) (2012), provided the primary purpose of the blind trust was to confer on the independent trustee the sole responsibility to administer the trust and to manage trust assets without the participation by, or the knowledge of, any interested party. This included the duty to decide when and to what extent the original assets of the trust were to be sold or disposed of and in what investments the proceeds of sale were to be reinvested.

Further, the trustee should not consult or notify any interested party. None of the assets initially placed in the trust's portfolio could include assets with restriction with respect to its transfer or sale and, during the term of the trust, the interested parties could not pledge, mortgage, or otherwise encumber their interests in the property held by the trust.

Finally, the trustee or his designee would prepare the trust's income tax return. Under no circumstances would the trustee disclose publicly, or to any interested party, the trust's tax return, any information relating to that return except for a summary of trust

income in categories necessary for an interested party to complete his individual tax return, or any information which might specifically identify current trust assets, or those assets which have been sold or disposed of from trust holdings.<sup>91</sup>

In essence, the regulation provides no interested party could receive any report on trust holdings and sources of trust income, except: (1) a quarterly report on the aggregate market value of the assets representing the interested party's interest in the trust; (2) a report the net income or loss of the trust and any other information necessary to enable the interested party to complete his individual income tax return; and (3) an annual report on the aggregate amount of the trust's income attributable to the interested party's beneficial interest in the trust. Otherwise, generally there would be no direct or indirect communication with respect to the trust between an interested party and the independent trustee or any other designated fiduciary with respect to the trust.<sup>92</sup>

While the regulatory framework for blind trusts has been laid out in FEAGA, the effectiveness of blind trusts under FEAGA has also been questioned and criticized. In “The Shortsightedness of Blind Trusts,” Megan J. Ballardal discusses the problems associated with these FEAGA qualified blind trusts.<sup>93</sup>

Ballardal notes that while Senate Majority Leader Bill Frist had thirteen blind

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<sup>91</sup> 5 C.F.R. § 2634.403(b) (2012).

<sup>92</sup> *Id.*

<sup>93</sup> Megan J. Ballardal, *The Shortsightedness of Blind Trusts*, 56 U. Kan. L. Rev. 43 (2007).

trusts set up for his family, he later still instructed the trustees of all thirteen to sell all interests in the Hospital Company (HCA) – which she submits would have been impossible had his trusts been truly blind.<sup>94</sup> She explains:

The Federal Ethics in Government Act requires certain national policymakers and employees to publicly disclose their financial interests on an annual basis. Disclosing private economic matters allows the public to monitor potential financial conflicts of interest. Such disclosure need not detail specific assets when a policymaker opts to transfer his financial interests into a blind trust. The blind trust, then, operates as an exception to complete financial disclosure while, at the same time, attempting to shield a policymaker from conflicts of interest. Nonetheless, this shield functions properly only if the policymaker is actually blind to the identity and management of the assets once he has transferred them into the trust. Frist was not blind to the assets in his blind trusts. He received numerous updates from his trustees regarding the identity of certain trust assets, including the trust's hospital stock holdings. One trustee reported to the Senate that he told Frist in 2002 that HCA stock had been transferred into one of the trusts. Apparently, the trustee informed Frist on several occasions that HCA stock worth hundreds of thousands of dollars was placed into Frist's blind trusts.<sup>95</sup>

Senator Frist was not alone. Ballardal noted then presidential candidate Senator Barrack Obama also created a blind trust that also may not have been truly blind. In 2005, Senator Obama acquired stock in a biotechnology company developing an avian flu treatment and then introduced a bill urging more federal research dollars to be spent on avian flu drugs. Obama claimed that his broker purchased the stock pursuant to a blind trust agreement that had not yet been finalized, and that he did not learn of this

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 43-44.

investment until months later.<sup>96</sup>

Ballardal notes Senators Frist and Obama, while denying any intentional wrongdoing, at the very least created the appearance of impropriety, the very thing the trusts were supposed to prevent. Ballardal states, when the rules for these trusts do not include sufficient incentives to maintain blindness, they may fail to prevent conflicts of interests. Further, blind trusts, if not truly blind to a policymaker, disguise actual or apparent conflicts of interest from public oversight. In this sense, they undermine the transparency essential to democratic governance.<sup>97</sup>

Ballardal states, as a general proposition, there are two interrelated problems with using a blind trust to prevent conflicts of interest.<sup>98</sup> First, because neither the trustee nor the beneficiary has sufficient incentive to keep the blindfold on, the trust may not actually prevent conflicts of interest. A blind trustee's duty to withhold information about the trust's investments is not in the beneficiary's immediate self-interest. To the contrary, the blind trust's grantor/beneficiary is likely very interested in being kept updated on the status and management of his assets. And it is this grantor-turned-beneficiary who selects and pays the trustee, and retains the right to revoke the trust. This could potentially affect the trustee's resolve to maintain the blindfold. Furthermore, without the flow of information regarding the management of the trust from the trustee to the beneficiary, the third party trustee

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<sup>96</sup> *Id.* at 45 (In both cases, Ballardal notes the Senator was cleared of any wrongdoing, but there was still the appearance of impropriety).

<sup>97</sup> *Id.* at 48.

<sup>98</sup> *Id.* at 58.

becomes less accountable. The lack of trustee oversight may also tend to erode incentives for blindness. A trustee who wants to avoid an after-the-fact claim for breach of fiduciary duty may be inclined to share proscribed information regarding trust assets. Likewise, a grantor troubled by the lack of oversight may pressure a trustee for this prohibited information.<sup>99</sup>

Second, the existence of a blind trust may appear to eliminate the possibility that a conflict of interest will arise for a policymaker, when it in fact does not. A blind trust does not automatically shield a policymaker from conflicts of interest, given that the policymaker knows the identity of the assets he initially placed in a blind trust, and may have even restricted a trustee from transferring some of these assets. Where a blind trust masks an actual or apparent conflict of interest, members of the public may think that a decision is impartial when it may in fact be tainted by a policymaker's knowledge and protection of his personal investments. Blind trusts, if not truly blind, impair the openness of the decision-making process that is key to democratic governance.<sup>100</sup>

### **B. The Suggested Use of Blind Trusts in Campaign Finance Reform**

Not only have blind trusts been in use with government officials, but several articles written or cowritten by Ian Ayres<sup>101</sup> have examined blind trusts as a potential campaign finance reform.

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<sup>99</sup> *Id.* at 58-59.

<sup>100</sup> *Id.* at 59.

<sup>101</sup> The William K. Townsend Professor of Law, at Yale University.

In February 1998, Ian Ayres and Jeremy Bulow<sup>102</sup> published “The Donation Booth; Mandating Donor Anonymity to Disrupt the Market for Political Influence.”<sup>103</sup> In summary, Ayres and Bulow propose:

We can harness similar benefits [to a voting booth] by creating a “donation booth”: a screen that forces donors to funnel campaign contributions through blind trusts. Like the voting booth, the donation booth would keep candidates from learning the identity of their supporters. Mandating anonymous donations through a system of blind trusts would make it harder for candidates to sell access or influence because they would never know which donors had paid the price.<sup>104</sup>

In essence, the donation booth would stop politicians, especially incumbents, from shaking down deep-pocket organizations because they could never be certain who contributed. Political pressure on institutional donors is removed.<sup>105</sup>

Ayres and Bulow concede donor anonymity is not new to their article; several states have already experimented with donor anonymity for judicial candidates.<sup>106</sup> At the same time, the authors note, while the voting booth is now a core feature of our democracy, the secret ballot became entrenched in American elections only toward the end of the nineteenth

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<sup>102</sup> The Richard Stepp Professor of Economics, Graduate School of Business, Stanford University.

<sup>103</sup> Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 *Stan. L. Rev.* 837 (1998).

<sup>104</sup> *Id.* at 837.

<sup>105</sup> *Id.* at 889.

<sup>106</sup> *Id.* at 838-39.

century; for approximately one hundred years in America a politician could buy a person's vote and hold that person to the benefit of the bargain by watching him vote at the polling place.<sup>107</sup>

Ayres and Bulow argue the blind trusts could be applied not only to candidates, but to political parties and PACs, with each entity establishing a blind trust account at a "qualified institution."<sup>108</sup> Forcing even all soft money contributions through blind trusts.<sup>109</sup> Campaigns would no longer be able to accept donations directly. Independent trustees would report to candidates on account totals, deliberately obscuring large donations, and would not provide details of the amounts given by donors.<sup>110</sup> Just as anyone can tell a politician they voted for him without actually voting for him, anyone could claim a large donation to a candidate without any way to verify the donation.<sup>111</sup> Representatives of the trust could not take jobs or even consult with a candidate's staff or administration.<sup>112</sup> So long as non-donors could mimic the signals of donors, the candidates would find it difficult to distinguish between the two.<sup>113</sup> Furthermore, the proposed regime of mandated donor anonymity would effectively outlaw PAC bundling, or soliciting contributions from members and turning them

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<sup>107</sup> *Id.* at 838-39.

<sup>108</sup> *Id.* at 854.

<sup>109</sup> *Id.* at 863.

<sup>110</sup> *Id.* at 855.

<sup>111</sup> *Id.* at 855.

<sup>112</sup> *Id.* at 858.

<sup>113</sup> *Id.* at 859.

over in mass while avoiding contribution limits, because checks must be sent to the blind trusts.<sup>114</sup> Finally, the donation booth would not be a substitute for – but a complement to – current monetary campaign restrictions established by FECA and also support an increase in the availability of public funding by way of a voucher program.<sup>115</sup>

Ayres and Bulow state the donation booth could also pass constitutional scrutiny because their proposal would not affect how much a donor could contribute, limit the words a donor might say, and would even allow a donor to prove she had given up to \$200. The only burden would be donors could not credibly prove they had given more than \$200. The authors concede the inability to prove a large contribution would certainly burden a donor's ability to communicate. Further, reducing the expressed value of a contribution might deter some large donors from giving.<sup>116</sup> However, in balance, by showing mandated anonymity is less burdensome and more supportive of the government's interest in preventing corruption, the balance is weighed in favor of constitutionality.<sup>117</sup> Opponents of mandated donor anonymity will be hard pressed to explain why a donation booth is unconstitutional, but a voting booth is not.<sup>118</sup> The authors note, in contrast, prohibiting all private contributions--or prohibiting candidates from spending their own money--is constitutionally suspect. This is true even if candidates "voluntarily" accept such restrictions in return for

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<sup>114</sup> *Id.* at 868-69.

<sup>115</sup> *Id.* at 883.

<sup>116</sup> *Id.* at 883.

<sup>117</sup> *Id.* at 884-85.

<sup>118</sup> *Id.* at 886.

public money.<sup>119</sup> Finally, like mandated voting anonymity, the mandated donor anonymity in judicial elections has never been successfully challenged.<sup>120</sup>

In the article, Ayres and Bulow also respond to two key objections: (1) the proposal will be ineffective in disrupting the market for political influence because donors will find credible ways to signal the size of their donations; and (2) the proposal will be too effective in disrupting the market for political influence because it will make it too hard for candidates to raise campaign donations.<sup>121</sup> Ayres and Bulow conceded the “donation booth” reform would not be a panacea. It would probably shift money toward less accountable “issue advocacy” expenditures, such as soft money expenditures discussed above, and may even greatly disrupt candidates’ ability to raise funds. Because the Supreme Court has shown greater willingness to protect political speech that it deems either “issue advocacy” or an expenditure independent of the candidate’s control, mandating donor anonymity for large gifts would undoubtedly cause more extensive use of these two end runs; however, forms of mandated anonymity might usefully complement other campaign finance restrictions, such as publicly financed campaigns.<sup>122</sup> They predict a regime of mandated anonymity would nevertheless reduce *quid pro quo* and monetary influence corruption by reducing the overall level of direct and indirect contributions – i.e., both independent expenditures and issue

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<sup>119</sup> *Id.* at 881.

<sup>120</sup> *Id.* at 886.

<sup>121</sup> *Id.* at 841.

<sup>122</sup> *Id.* at 841, 861.

advocacy.<sup>123</sup>

Following “The Donation Booth,” Professor Ayres vision for blind trusts reappears in numerous articles, including “The New Paradigm Revisited,” with Professor Bruce Ackerman<sup>124</sup> to further buttress the idea of a secret donation booth.<sup>125</sup> Ayres and Ackerman address a number of comments raised regarding the idea of a donation booth, but they claim, so long as a politician cannot identify a given donor’s gift on an individual basis, a donor cannot reasonably expect to gain a private *quid pro quo*. As a consequence, a donor will continue giving large sums only when motivated by public interest considerations because he cannot obtain special favors from the candidate. (“Why would anyone give a \$5,000 donation when she could spend the money on a weekend in Paris?”) Without hope of recognition or reward, anonymous gift giving makes the most sense when the donor believes the candidate’s positions are superior for the public good.<sup>126</sup>

Also in “The New Paradigm Revisited,” Ayres and Ackerman note their belief the secret donation booth lessens a candidate’s incentive to engage in “long personal conversations with big donors” to persuade donors he is a good political investment. Because the candidate can no longer know whether putative big givers have actually carried through on promises made to him personally, Ayres and Ackerman believe the candidate/politician

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<sup>123</sup> *Id.* at 866.

<sup>124</sup> The Sterling Professor of Law and Political Science, Yale University.

<sup>125</sup> Ian Ayres & Bruce Ackerman, *The New Paradigm Revisited*, 91 Calif. L. Rev. 743 (2003).

<sup>126</sup> *Id.*

will delegate more of the job to his fund raising staff. This will enable him to devote personal time to more rewarding pursuits, such as reaching out to mass constituencies and developing legislation. In essence, “doing their job.”<sup>127</sup>

Ayres and Ackerman also state the culture of anonymity in the voting booth which has given rise to a “don’t ask, don’t tell” norm, making it highly improper for a boss to ask an employee whether she voted for Bush or Gore, may well give rise to a similar norm in the “donation booth.” Politicians would stop asking corporations and constituents whether they have donated.<sup>128</sup>

Further, embedded in the article is the authors support for “Patriot Dollars,” or public campaign finance dollars provided, at public expense, to every voter and controlled by the voter to share with candidate campaigns of the voter’s choice.<sup>129</sup> The authors suggest the Patriot Dollars are another part of the solution, insofar as the massive influx of Patriot Dollars would mute an impact of political contributions from rich people.<sup>130</sup> The authors conclude with the assertion that both “Patriot Dollars” and secret donations create systems in which the good money will help to drive out the bad money.

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<sup>127</sup> *Id.* at 753.

<sup>128</sup> *Id.* at 760 (“Patriot Dollars” are Ackerman’s intellectual contribution to their work, with a proposed public finance campaign that would allocate \$50 in public funds to each voter to allocate between any candidate, PAC, or political party for the Presidential race (\$25), Senate races (\$15) and House races (\$10)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 751.

Both seek to expand the range of accepted ideals of electoral fairness: the secret ballot and “one person, one vote.”<sup>131</sup>

Ayres is not without his critics. In “Answering Ayres,” Professor Kenneth Mayer<sup>132</sup> states he believes observers will see Ayres suggestion for a blind trust as a remarkably bad idea, reflecting some fundamental misunderstandings about the political process.<sup>133</sup> More specifically, Mayer states objections to the donation booth concept are both philosophical and practical, and can fall into three general categories. First, the comparison between the donation booth and the voting booth is flawed because the secret ballot is an individual right that a person can waive, not an affirmative obligation that requires an individual to keep his vote secret. Ayres fails to note that ballot secrecy, far from being inviolate, is compromised routinely in ways that allow people to prove how they voted. Second, the donation booth would not interfere with credible donation claims because donors would have little incentive to lie and every reason to tell the truth. However, if Ayres is correct that a cheap talk regime would work, surely one need hardly point out the irony of a political reform designed to raise the level of political debate by providing an institutionalized incentive to lie. Finally, a blind trust would require the government to prohibit the release of donation records, which would create an astonishing

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<sup>131</sup> *Id.* at 766.

<sup>132</sup> Kenneth R. Mayer is a professor of political science at the University of Wisconsin, Madison. Mayer is the author of several books, including *With the Stroke of a Pen: Executive Orders and Presidential Power* and *The Political Economy of Defense Contracting*.

<sup>133</sup> Kenneth R. Mayer, *Answering Ayres*, Cato Institute’s Regulation, Winter 2001 at 24.

and unprecedented category of state secret, with the government forced to apply sanctions to anyone who chose to reveal it.<sup>134</sup>

Mayer states, in repeatedly defending the donation booth as a close cousin to the voting booth, Ayres misses the crucial point the secret ballot is a personal right, not a state-imposed obligation. The state cannot compel one to reveal her vote, but also cannot prevent one from doing so.<sup>135</sup> Further, with millions of voters choosing to participate by absentee ballot – any of which can be reviewed and approved by anyone prior to mailing – the secret-ballot comparison is more rhetorical than analytical.<sup>136</sup> In short, while Ayres would mandate anonymity for donations under the donation booth system, no one is mandating anonymity in the voting booth. Further, the court strongly regulates the sanctity of the voting booth, while leaving the voter to determine whether candidate messages, supporters, and donations given are significant; thus the court offers a great deal more protection to voting process than it ever has to the campaign process.<sup>137</sup>

Mayer also criticizes Ayres for a reform idea based on an inability for candidates to know which donors were genuine and which donors were simply “cheap talking,” i.e., likely donors forbearing the costs of donations to free-ride on those who do. Ayres assumed there would be no reputational consequences to lying, which is contradicted by what Mayer characterizes as “the overwhelming weight of evidence,” stating virtually

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<sup>134</sup> *Id.* at 25.

<sup>135</sup> *Id.* at 26.

<sup>136</sup> *Id.* at 26.

<sup>137</sup> *Id.* at 27.

everyone involved in striking political bargains is acutely aware of the importance of reputation.<sup>138</sup>

Mayers further criticizes Ayres with the following:

In claiming that organized interests need protection against legislative arm-twisting, Ayres has flipped the legal rationale for campaign finance reform on its head. No longer is regulation justified in order to prevent wealthy donors from purchasing access or favors (the “corruption or appearance of corruption” rationale accepted by *Buckley* as the only compelling interest that justifies regulation), but reform also is necessary to protect the wealthy and highly organized. That is a very strange argument for Ayres to place alongside the broader claim that the existing system grants the wealthy disproportionate political influence. In doing so, he has constructed a model of politics in which wealthy interest groups are both so powerful that they can get whatever they want out of Congress, and so weak that they are at the mercy of Congress if they do not do what vengeful legislators ask. Although either condition could easily be considered corrupt, both cannot be true simultaneously.<sup>139</sup>

Mayer finds the most likely consequence of blind trusts would be the deprivation of information to the public. While large donors would simply make private claims to candidates, the public would be in the dark. Even if candidates were actually confused regarding the identity of their contributors, voters would be more so and forced to make choices without important cues. Knowledge of large contributions to a candidate from

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<sup>138</sup> *Id.* at 27.

<sup>139</sup> *Id.* at 28.

groups like Emily's List, the National Rifle Association, or the Conservative Action Fund are important, easily understood cues for voters.<sup>140</sup>

Finally, Mayer notes there is neither a coherent legal foundation nor any precedent for punishing people who would disclose campaign contribution data. In order to implement the donation booth, the federal government would have to create a completely new category of government secret: data on how much individuals contributed to federal candidates. Restrictions on disclosure of that top-secret information would have to be backed up with some form of penalty, whether it involved dismissing a loose-lipped trust employee or launching a criminal prosecution. This prohibition would not be likely to pass First Amendment scrutiny.<sup>141</sup>

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<sup>140</sup> *Id.* at 28.

<sup>141</sup> *Id.* at 29.

## **Chapter V. An Analysis of Whether Blinds Trusts Are a Viable Solution to Campaign Finance Reform**

As discussed, there is a valid need to fund campaigns as a legitimate exercise of the First Amendment and implicit in the constitutional need to campaign for elections. Candidates and supporters have a right to free speech, a right to assemble, and a right to combine voices and resources to support a candidate or a ballot initiative through the purchase of media. To express one's message, or counter one's opponent's message, generally requires the purchase of media.

At the same time, the Elections Clause provides for Congress to regulate elections. There is a legitimate state interest in policing campaign donations to prevent corruption, such as vote purchasing, or access purchasing. Even Mayer, a strong critic of Ayres, admits campaign contributors may feel strong pressure to ante up to political parties or influential legislators out of a fear of what might happen if they do not. Mayer concedes Ayres "cheap talk" regime might protect potential contributors from incumbent politicians who would attempt to squeeze them for large donations.<sup>142</sup>

As a result of real or perceived abuses, for over 100 years, Congress has attempted to curb campaign finance abuses through essentially three broad themes: 1) restrictions on the sources of funds; 2) limits on the dollar amounts of contributions; and 3) disclosure of information about the funds,<sup>143</sup> with varying degrees of success, depending on whom is

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<sup>142</sup> *Id.* at 27.

<sup>143</sup> Tillman Act of 1907, *supra* note 85; *Campaign Finance (US)*, *supra* note 40.

asked. For similar reasons, states have tried providing matching funds for candidates who agree to abide voluntarily to spending limits. It has prohibited gifts to Members of Congress and their staff. Yet, with the exception of some judicial elections in some states, government entities have failed to implement blind trusts to hold candidate donations.

In my thesis, I posed the question whether requiring anonymous donations for political campaigns would allow for fully funded, yet privately funded, campaigns, while preventing problems, whether real or perceived, such as buying influence or access traditionally associated with large campaign donations. I believe the answer may be yes, at least in part, although I suggest a cautionary, voluntary approach and continued study.

I note, in a speech in the House of Commons on November 11, 1947, Winston Churchill said, “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government, except all those other forms that have been tried from time to time.” Similarly, blind trusts may prove the worst form of campaign finance, except all those over forms that have been tried from time to time.

No campaign finance regulation is without its disadvantages; however, as Ayres noted, providing donor anonymity through blind trusts should curtail donations made in exchange for votes or access, or even fear of loss of access or retaliation against non-donors. Ayres is correct; it is impossible for an office holder to bestow favors or penalties when donor identity has remained a secret. Further, donors who continued to

donate anonymously would more likely be true supporters of a candidate because candidates could not know to whom to repay favors.

While I respect the sentiment behind Ayres idea, implementing mandated donor anonymity poses many practical problems, as his critics have well articulated. For example, Ayres suggests a system of mandating blind trust that poses large and numerous regulatory requirements. These include: 1) all candidates, political parties, and PACs would establish blind trusts at preexisting private trust companies with assets of over \$100 million;<sup>144</sup> 2) trustees and their representatives could not be employed in any position of influence or access to policy and could not communicate privately with campaign workers; 3) all donations would have to be made by mail to the trust company and campaigns, PACs, and parties could no longer accept donations; 4) a trust would be prevented from identifying a donor amount of over \$200; 5) blind trusts would report to candidates weekly or biweekly on total amounts available, but not individual donors and large donations would be staggered so that it would be unclear of the amount donated or when; 6) fund raisers would not collect donations, but simply provide donors with envelopes to the trust companies; 7) trust company books would be available for audit only years after a candidate left office; and 8) there would be a 10-day cooling off period for contributors to get a rebate from a trust (so even if a candidate saw a contributor stick a check in an envelope and mail it, it would be no guarantee).<sup>145</sup>

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<sup>144</sup> *Supra* note 125 at 854, fn. 63.

<sup>145</sup> Ian Ayres, *Campaign Finance*, Cato Institute's Regulation, Summer 2001 at 15.

Even after all the complicated regulatory structure imposed by Ayres, he concedes mandating anonymous donations would simply lead high dollar donors to directly purchase television and radio ads supporting a candidate, which the Supreme Court has ruled, as direct political speech, cannot be curtailed.<sup>146</sup> This is potentially a rather large loophole.

Furthermore, Ayres approach can be contrasted with requiring greater transparency, or the immediate public disclosure of the identity and contribution amount of all donors. In essence, candidates, their votes, support, and behavior could be weighed against publicly disclosed donor information, with the voters, supported by the press, determining whether there was an appearance of impropriety.

I suggest a voluntary approach utilizing some of the ideas for blind trusts found in FEGA and those submitted by Ayres may be a more practical, less formal approach. I submit perhaps the greatest error Ayres makes in regard to mandating blind trusts is he fails to appreciate just how useful a blind trust would be to protect political candidates, who would voluntarily support and utilize blind trusts. I believe this is absolutely critical if a viable voluntary program can be formulated.

For example, as I noted in my introduction, a candidate such as Attorney General Jon Bruning has cover through the use of a blind trust that he is not being influenced by his campaign supporters, such as Nelnet. For further example, a candidate who speaks at great length regarding the merits of domestic energy production, the utility of oil, and the

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<sup>146</sup> *Id.*

need to open federal lands such as the Arctic National Wildlife Refuge to drilling, could expect campaign contributions from Big Oil, regardless of needing to see the posted check. At the same time, in meeting with lobbyists or passing legislation, he also has cover from claims he has been bought by big oil when he assists in pushing a big oil agenda (which he presumably already supports).

In that respect, a voluntary, third option could be for campaign treasurers to simply agree to serve as a trustee and withhold the names of contributors from the candidate. This third way, based on a candidate's voluntarily opting to participate in a system of blind campaign donations, could simply provide for a candidate to select a treasurer who would accept donations without informing the candidate of the source of the donation. For candidates who have taken the pledge, if a donor or a third party were to make known to the candidate the amount of a donation, the candidate could simply refund the donation back to the donor.

Critics of this third approach would undoubtedly point out a voluntary approach would be without teeth and nothing would prevent the trustee from secretly informing the candidate the names and amounts of donors. At heart, every advocate for campaign finance reform is a skeptic; however, if mandatory blind campaign trusts are untenable, as I believe they are for the criticisms highlighted above, then a voluntary blind trust serves as the only alternative if one is to harness the potential of blind trusts. Intuitively, a truly blind trust reduces not only the appearance of impropriety, but any possibility of *quid pro quo* corruption. As a result, there is a tremendous advantage to a candidate who

voluntarily, publicly adopts a blind trust to funnel campaign donations. On weighing of interests, there may be good reason for candidates to voluntarily and publicly remain blind as to the name and amount of donors. Further, in a highly scrutinized campaign environment, a candidate who was to claim anonymity and go back on his word would leave himself incredibly politically vulnerable.

Similarly, critics of this reform might similarly suggest it could allow a politician to shake down businesses while maintaining the appearance of independence. I note, while it is possible, should a politician attempt to shake down business for contributions to an ostensibly blind trust, the politician would be leaving himself incredibly vulnerable for poison ink. Rumors of the shakedown would undoubtedly become public and the limited gains of revenue would likely become undone in the court of public opinion.

Additionally, while one of the biggest criticisms of the qualified blind trust under FEGA was, when an interested party originally places assets in trust, that party still possesses knowledge about those assets, it is completely inapplicable to my proposed campaign finance trusts because the donations are cash and have no prior track record with the candidate. The only information the trustee of a blind campaign finance trustee would shield from the candidate is the specific amount of donation and possibly name of an individual donor. There is no requirement for a professional trustee. The current campaign treasurer could serve and the parties could simply sign a blind trust agreement.

Under a third, voluntary option, blind trusts do not necessarily need to be used as an exception to financial disclosure, which may also still be required, at least in part.<sup>147</sup> If such a policy would be adopted in regard to campaign finance trusts, the trustee could still be required to make disclosures to the appropriate regulatory agency, whether the Federal Election Commission or Nebraska Accountability and Disclosure Commission, of the source and amount of donations; however, the amount donated could be confidential over \$200, as suggested by Ayres, or \$250, as provided by Nebraska law.<sup>148</sup> Thus, as a compromise, this system could be adopted with little loss of transparency for the public, as Ballardal feared.<sup>149</sup> Current contribution limits could be maintained and publicized up to the threshold dollar amount.<sup>150</sup> Thus, voters could still determine whether a candidate was supported by the NRA, Club for Growth, or the National Education Association.

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<sup>147</sup> *Supra* note 93 at 49, 64-65.

<sup>148</sup> In the State of Nebraska, the state campaign finance laws are regulated by the Nebraska Accountability and Disclosure Commission. Neb. Rev. Stat. § 49-1401, et. seq. (2012) While Nebraska does not place limits on contributions to campaigns for state office, it requires every donation over \$50 to be recorded with the name and address of the contributor and every donation over \$250 to be disclosed individually in a report, as well as total receipts. *See* Neb. Rev. Stat. § 49-1447 (2011); Neb. Rev. Stat. § 49-1455 (2011)

<sup>149</sup> *Supra* note 93 at 48.

<sup>150</sup> For example, at the national level, the federal campaign finance laws, including contributions to political campaigns and parties, are regulated by the Federal Election Commission (FEC). The FEC provides, for the 2011-2012 election cycle, individuals may donate to any political candidate campaigns up to \$2,500 per election (primary and/or general), with a limit of \$30,800 to a National Party Committee, \$10,000 to a state or local political party, \$5,000 to any other political committee, and a \$117,000 overall biennial limit. *See Contributions Brochure*, Federal Election Commission (October 23, 2011 7:30 p.m.) <http://www.fec.gov/pages/brochures/contrib.shtml>; 2 U.S.C. § 14-431 (2012), et. seq.

Further, candidates would still have incentive to seek their endorsements, regardless of knowing the amount of a donation. At the same time, even if the candidate checked the names of donors with the FEC or the NADC, anything more than nominal amounts would not be available.<sup>151</sup> While the argument could be made, if the public knows, the candidate will most certainly know, as I noted, there is value to the candidates to remain blind to campaign donors.

Finally, one reason voluntary blind trusts may be part of a practical solution is because so many other solutions have failed. Critics of my proposal might argue simple, substantive reforms may be more advantageous to a more democratic campaign process, such as simply changing election days to the weekend; however, as J. Robert Abraham noted, the history of campaign finance regulation in the United States shows political money is of a hydraulic nature, or, despite repeated attempts to limit the role of money in elections, an increasing amount of money continually finds its way into campaigns. Political money, like water, will always find an outlet.<sup>152</sup> In the last 100 years, Congress has tried restrictions on the sources of funds, limits on the dollar amounts of contributions, matching funds, and disclosure of information about the funds. In contrast to these reforms tried at federal and state levels, blind trusts do not seek to restrict money

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<sup>151</sup> The Nebraska Accountability and Disclosure Commission and the Federal Election Commission would have knowledge of the actual amount of the donation and could release names and the up to amount to the public immediately and the actual amounts after the term of office of the candidate or, in the case of an unsuccessful candidate, after the end of the campaign.

<sup>152</sup> J. Robert Abraham, *Saving Buckley: Creating a Stable Campaign Finance Framework*, 110 Colum. L. Rev. 1078 (2010).

coming into politics; only the candidate's knowledge of the source of his funds and thus his ability to reward contributors with favors or access.

I believe a voluntary system would pass strict scrutiny analysis by the Court. First, the Australian secret voting booth on which the "donation booth" is based has been adopted by American election processes in very short time – in part because someone can reveal their vote, if they choose. Second, as Ayres noted, state-imposed mandatory blind trusts for judicial elections have been upheld by the Courts. Third, the voluntary use of blind trusts is not intrusive.

Thus, blind trusts may have a role in campaign finance reform. Although the best possible model is still open for debate, a voluntary system of candidate utilization of blind trusts would likely include:

- 1) A voluntary, public trust agreement between a candidate and a campaign treasurer that provides the campaign funds would be taken into a blind trust and, while the total dollar amount of the trust would be disclosed to the candidate, the sources and individual amount of contributions would not be;
- 2) Voluntary ignorance on the part of a candidate. It would include returning donations made directly to her and explaining to potential donors she would not directly accept campaign donations;

- 3) Reformation of traditional fund raising activities, such as \$38,000 a plate White House fund raiser dinners; prospective donors could be invited, but a candidate would simply explain to guests she was not requesting a specific donation for attendance outside the cost of the meal provided, although the attendees could be provided with envelopes addressed to the campaign treasurer; and
- 4) Continued discussion and research about the viability of blind trusts in campaign finance to prohibit *quid pro quo* and even the appearance of impropriety.

## Chapter VI. Conclusion

For this thesis, I explored the use of blind trusts in campaign finance reform. More specifically, would either permitting or requiring anonymous donations to campaigns allow for fully funded, yet privately funded, campaigns while preventing problems, real or perceived, such as buying votes or access, associated with campaign donations?

In pursuit of understanding the issue, I examined the constitutional origins of the right of Congress to regulate federal campaigns through the Elections Clause, the constitutional protection of speech through the First Amendment, and the inherent tension between the need for candidates to raise funds for media buys while preventing corruption associated with buying votes or access through campaign dollars. Further, I have also reviewed and summarized the history of campaign finance law and salient court decisions regarding the history campaign finance regulation. Finally, I have reviewed the current use of blind trusts by government officials as well as existing relevant literature suggesting blind trusts may be a viable option for campaign reform.

Having reviewed the salient material, I believe a voluntary blind trust system could be appealing to candidates, offering a great deal of protection to candidates from the appearance of impropriety while working complimentary to existing campaign finance restrictions. This is important because there is a legitimate public interest in preventing not only the *quid pro quo* of trading campaign donations for votes or access to politicians, but protecting against even the appearance of impropriety.

The current system of public disclosure of donors and amounts above a certain threshold, whether directly to candidates, to parties, or to PACs, has not prevented the perceived corruption of vote or access buying. The prohibition of gifts to Members of Congress has been perceived not to cut donors influence. Public matching funds to candidates who agree to spending limits has been ruled unconstitutional.

At the same time, I concede voluntary blind trusts are not a panacea for all the perceived problems in campaign finance. For so long as a blind trust was voluntary and not accomplished under penalty, there will be many critics who will simply find them incredible. Would the public ever simply take a politician's word for it that he did not know the identity of his contributors? Perhaps not, but I think it depends on the credibility of the politician. A politician such as famous football coach Tom Osborne would not have been doubted. Voters can and do take credibility into account.

Further, Super PACs will continue to spend vast sums of money. Unlike Ayres, I do not suggest donations to issue PACs also must be anonymous and there is little advantage to an issue PAC, compared to a candidate, to receive only anonymous PAC donations. (There may be advantage to requiring political PACs like leadership PACs to receive only anonymous donations.) Whether funded by corporations and unions, as now lawful under the Supreme Court's recent *Citizens United* decision, or funded by wealthy individuals, as lawful under *Buckley v. Valeo*, the growth of PACs spending on issue advertising will likely continue. Assuming Ayres is correct, the growth of even voluntary

blind trusts would likely foster the creation and growth of PACs because there would be no advantage in donating to the candidate.

In conclusion, I believe, in the laboratory of the states, candidates should begin to experiment with blind trusts, at least at the local level. To the extent candidates credibly accept donations from a veil of ignorance, the public percent of donors buying favors or access is greatly curtailed.

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