Congressional Public Financing

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In the 1976 Congressional elections, the amounts of special interest money pouring into campaign coffers will break all previous records. This bears directly on the capacity of the President to govern. Even if Congress and the President are of the same party, Members of Congress will owe their first loyalty to their campaign donors--not to the President, not to the Party and not to the future of the nation. There's hardly any measure more crucial to a President's capacity to govern than the public financing of Congressional campaigns.

Public financing is a program for spreading the base of political financing to all citizens. It reflects the view that financing elections is a cost of safeguarding our democracy that all of us should share. It is basic to ending the capacity of monied special interests to dominate Congress. It is basic to making Congressional elections genuinely competitive--to ending incumbents' sinecures. It is the single most important legislation to enable Congress to deal with issues on their merits.

Public financing is not a novel idea. President Theodore Roosevelt proposed it in 1907. It is already the law for Presidential elections. Thirteen states have adopted some form of public financing since 1973.* The Senate twice passed a Congressional public financing bill during the 93rd Congress. Its principal opponent in the House has been Representative Wayne Hays, until recently, chairman of the relevant standing committee.

Reduce the Influence of Big Money

In 1972, our system of financing elections allowed 153 individuals to provide $20 million to a Presidential candidate. It was a system that winked at massive illegal contributions from the largest corporations in America, that condoned the sale of ambassadorships to the highest bidders, and that invited pledges of million dollar campaign contributions in return for direct economic benefits. It was also a system that encouraged well-heeled special interests in both major parties to believe that they had special rights in choosing our President for us. Russell Long once said that campaign contributions are "bread cast upon the waters to be returned a thousandfold."

The old corrupt system of financing Presidential elections is gone. The Presidency has been taken off the auction block. One of the biggest stories of 1976 has gone unreported--big money is not dominating Presidential politics; powerful interest groups and fatcats are not making huge contributions.

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*Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, North Carolina, Oregon, Rhode Island and Utah.

In place of the old system is a Presidential system based on limited private contributions and public funds derived from the voluntary dollar tax check-off. Tens of millions of citizens have become involved for the first time in the financing of Presidential elections through the tax check-off.

The system has not worked perfectly. It has some rough spots and can stand improvement. A review of the first round under the new law will take place after the November election with a view to identifying strengths and correcting weaknesses. But American citizens will never permit a return to the old corrupt system.

By contrast, the domination of big money in Congressional elections is growing rather than diminishing. While members of the House of Representatives were willing to clean up Presidential elections, a majority stubbornly opposed any such reform for Congressional elections. In 1974, over 40% ($35 million) of contributions to Congressional candidates came from special interest groups ($12.5 million) and in amounts of $500 or more from individuals ($22.5 million). Twenty-four individual donors gave more than $25,000 each to Congressional candidates.

The 1976 Congressional elections will see an escalation of the political financing "arms race" between business and labor. With public money underwriting the Presidential race, more special interest money will be available for Congressional elections than ever before.

Already more than twice as many special interest-giving committees are participating in the 1976 races than the 500 which contributed in 1974. For example, there are now more than 20 oil companies with political giving funds compared to only one in 1974.

This not only feeds public cynicism (Lou Harris says 74% of the people believe special interests get more from government than the people do) but makes it exceedingly hard for a President to govern.

Restore Competition

Public financing will have the additional advantage of restoring a reasonable measure of competition to Congressional elections. In an analysis covering all 1972 and 1974 Congressional elections, Common Cause found a tremendous financial imbalance (a 2:1 margin) favoring incumbents over challengers, regardless of party. It is a vicious circle -- incumbents win because they get the money and they get the money because they are incumbents. The "smart money" favors incumbents.

Public financing would give challengers of Members of Congress a chance to compete -- the opportunity to be heard by the voters without having to enslave themselves to big, special interest givers.

The Congressional Public Financing Act of 1974 (H.R. 9100)

While the details of a Congressional public financing plan are subject to negotiation, a plan co-sponsored by 221 Representatives in 1975 includes the following major provisions:

(1) coverage of Congressional general elections;

(2) funding from the voluntary dollar check-off on the income tax;

(3) to be eligible for matching funds, a House candidate would have to raise $5,000 and a Senate candidate 10% of the spending limit, in amounts of $100 or less;

(4) contributions of $100 or less to eligible candidates would be matched on a one to one basis by public funds;

(5) public funds would be limited to qualified general election expenditures.

The maximum cost of this proposal, if all general election candidates participated and raised their maximum amount in matching funds would be approximately $60 million for a general election. But in fact all candidates would not participate, nor would all of those who do participate raise the maximum in matching funds. A more realistic estimate is that it would cost between $25-$30 million for the first time it operated in a Congressional general election.

Common Cause also favors a system of funding primary elections. A system similar to the Presidential matching system could cost an additional amount ranging from $25-$40 million depending on how tightly the eligibility threshold was drawn.

There are other approaches than those in the House bill. For example, Senators Kennedy, Clark, and Scott have proposed public financing legislation for Congressional elections based on the same system that exists for the Presidential races -- matching funds in the primary and grants in the general election.

This proposal passed the Senate in 1974 only to see a Congressional public financing amendment similar to the one outlined above defeated in the House by a 187-221 vote.

Arguments for and Against

(1) Opponents of public financing argue that it is an unwarranted expenditure of public funds. The Supreme Court rejected this argument:

> Congress was legislating for the "general welfare" -- to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fund raising. [Slip op. at 85.]

Some opponents base their opposition to public financing on the argument that citizens do not want their money to go toward electing candidates they do not agree with. This argument ignores two obvious facts: First, the public funding comes from voluntary check-offs on the income tax. The public has demonstrated its support of public financing by checking off at increasingly high rates (now over 25%). Second, the public already pays -- indirectly -- for election campaigns. When a donor gives huge sums to elect someone, that someone generally repays if elected. But the return favor is generally paid for by the citizens, either in taxes or higher prices. Public financing would be the best bargain the consumer-citizen-taxpayer ever got.

Some opponents argue that enactment of public financing would be a self-serving act by greedy incumbents. If that were so the proposals for public financing would have been whipped through Congress with enthusiam. Instead, they were strongly resisted because Congressional incumbents knew they would encourage competition.

(2) Opponents of public financing often cite the possibility of frivolous candidates lining up at the public trough. The Supreme Court upheld the ability of Congress to establish reasonable thresholds to deny public funds to frivolous candidates:

> Congress' interest in not funding hopeless candidacies with large sums of public money necessarily justifies the withholding of public assistance from candidates without significant public support ... the Constitution does not require Congress to treat all declared candidates the same for public financing purposes. [Slip op. at 90-91.]

While it can be argued that the threshold for Presidential public financing should be increased, it seems fair to say that a reasonable number of Presidential candidates were given exposure to the voters and that those who did not earn public support were soon eliminated.

(3) Opponents of public financing argue that public financing will have undesirable effects on our political parties. But the weakness of this position is revealed by the fact that

opponents cite contradictory arguments. Some say public financing will weaken the parties while others say it will make them too powerful. The first charge is ridiculous. The second charge centers on the question of third parties and cannot be conclusively answered at this time. But as the Supreme Court pointed out:

> Any risk of harm to minority interests is speculative due to our present lack of knowledge of the practical effects of public financing and cannot overcome the force of the governmental interests against use of public money to foster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism. [Slip op. at 95.]

(4) Some opponents of public financing have even argued that public financing will reduce public participation in the election process. This ignores the fact that small contributors (whose contributions can be matched) are much more important under public financing than in the past. Also, expenditure limitations put a premium on volunteers.

(5) Opponents of public financing have argued that it allows Congress to reinstate otherwise unconstitutional expenditure limits. But expenditure limitations when combined with public financing tend to equalize candidate access to the voters and thereby give challengers a chance to compete with incumbents. The Supreme Court has said that Congress may not limit campaign expenditures or candidates' expenditures of

their own money unless the limits are made contingent upon acceptance of public funds. Without public financing, this allows well-financed wealthy candidates to dominate Congressional elections as in the past. The obvious remedy is to encourage the acceptance of limitations by offering the incentive of public funds. The expenditure limitations have not had the effect of locking out challengers, as some predicted. An incumbent President has faced a stiff challenge for the Republican nomination and a Washington outsider who started with limited national recognition has run away with the Democratic nomination.

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Eliminating Conflicts of Interest in the Executive Branch

Common Cause proposals for regulation of conflicts of interest in the Executive Branch cover three areas: personal financial disclosure, divestiture, and post-government employment.

The measures outlined here, which would apply only to Executive Branch officials, could all be implemented directly by the President through Executive Order. Additional legislation is required to cover Congress on these matters. Common Cause supports, for example, the financial disclosure measure which passed the Senate and is now pending before the House Judiciary Committee. Even if this legislation is passed, however,the issues of divestiture and post-government employment would not be addressed. Executive action on these issues would still be necessary, and would jar the Congress to act on them as well.

I. Personal Financial Disclosure

Current practice is based on Executive Order 11222, issued by President Johnson in 1966. This order requires agency heads and Presidential appointees to file financial statements with the Civil Service Commission. Civil Service Commission regulations require other employees in policy-making positions to file with the head of their agency. All agencies have issued regulations implementing these requirements.

But the required reports (in all but a few agencies) cover only the names of companies in which the person has a financial interest, the identity of his creditors, and interests in real property. The value of his stockholdings and other assets is not reported; nor is the amount of income received from outside activities. These are all serious omissions. All the financial statements are kept confidential, as required by EO 11222.

Proposals. Common Cause believes that:

-- The financial statements filed by executive employees in GS-15 and higher levels should be available for public inspection.

-- The financial statements should include sources and amounts of all outside income, nature and value of all assets and debts, and place(s) of employment prior to government service. Reporting of income and assets can be done in categories of amounts on value (e.g., the regulation might specify that value of stock in a given company simply be reported as "over $10,000", "over $50,000" or "over $250,000.")

Counter Arguments

A. It is argued that public disclosure is not necessary because the internal review of financial statements by agency supervisors is adequate to check possible conflicts of interest. Studies by the General Accounting Office dramatically refute this argument. Over the last two years, it has evaluated financial disclosure systems in several agencies, and has found, in one agency after another, that standards for determining conflicts had not been developed, that financial statements were reviewed superficially, that many employees failed to file statements and got away with it, and that follow-up action to resolve conflicts had not been taken. This breakdown of enforcement is due largely to the confidentiality of the reporting systems. The GAO investigators have drafted recommendations for reform, and these include the implementation of public disclosure requirements.

B. It has been argued that public disclosure violates employees' rights to privacy, and is also precluded by the Privacy Act. But state supreme courts have rejected the privacy argument. Thirty-one states require some form of public financial disclosure by public officials. Washington State has the most extensive financial disclosure law in the nation. In upholding the constitutionality of this law, the state's Supreme Court wrote:

> The right of the electorate to know most certainly is no less fundamental than the right of privacy. When the right of the people to be informed does not intrude upon intimate personal matters which are unrelated to fitness for public office, the candidate or officeholder may not complain that his own privacy is paramount to the interests of the people (517 P.2d 911, at 925).

The supreme courts in California, Illinois, and Maryland have also upheld the constitutionality of financial disclosure requirements. The U. S. Supreme Court declined to review the Washington and Illinois decisions.

The Privacy Act would not preclude public disclosure if, as would be the case, the financial statements were required of employees for the purpose of making them public. If public disclosure is the purpose, then it constitutes a "routine use" of the statements and would not be covered by the Act (see 5 USC 552a(b)).

II. Divestiture

Title 18 USC 208 forbids executive officials and employees from participating "personally and substantially" in matters in which they have a financial interest. Executive Order 11222 contains a similar prohibition. The Civil Service Commission has issued regulations spelling out specific rules and procedures for agencies to follow in enforcing this prohibition. These regulations stipulate that if an employee owns stock or has some other financial interest in a company affected by his duties, the agency head can take one of four steps:

> change the employee's assignment, require divestiture, apply disciplinary measures, or require disqualification from a decision (5 CFR 735, 107).

Various waivers and blanket exemptions can be granted if the financial interest is not "deemed likely to affect the integrity" of the employee.

In short, most executive personnel are permitted to own stock in companies affected by their agencies' activities. If and when such interest ever conflicts with his duties, he may be required to divest. That is one of the remedies that could be imposed.

Proposals. Common Cause proposes that:

1. Divestiture of conflicting financial interests should be the presumed remedy. The norm should be that executive employees in GS-15 or higher levels divest all financial interests in any company affected by their participation in rule-makings, contractual decisions, and other matters involving the exercise of their discretionary authority. In special cases, agency heads could grant an exemption to this norm, provided the facts of the case and the alternative remedy imposed are made available to the public.

2. A permanent review committee, with professional staff, should be established to decide appropriate remedial measures, other than divestiture, in special cases involving top agency executives. It would be chaired by the Director of the Civil Service Commission, and would include the Assistant Attorney General in charge of the Office of Legal Counsel, the Comptroller General, the Chairman of the Judicial Conference of the United States, and a prominent public representative appointed by the President.

3. The committee would prescribe appropriate remedies in cases involving Executive Level officials when divestiture would, due to special circumstances, impose unrealistic burdens, entail significant financial losses, or jeopardize the achievement of an overriding public interest. It would also determine appropriate post-employment restrictions for top executives (see p. 6 below). The committee would meet in public session, its decisions on the disposition of conflicting interests would be binding, and these decisions would be published in the Federal Register.

Counter Arguments

A. Opponents argue that the existing requirements are sufficient and offer the necessary flexibility.

The GAO reports cited above contain ample evidence refuting this argument. They indicate that the "flexibility" of the present provisions are actually a license for abuse. Several employees in the agencies it studied held significant shares of stock in companies affected by their duties. This resulted in part from the absence of clear, tightly-drawn prohibitions. It was indicative, GAO found, of some confusion in the agency regarding what interests created clear conflicts and what remedial measures, short of divestiture, could be used. The proposal establishes a uniform presumption in favor of divestiture, while providing some flexibility through publicly-granted exemptions in special cases.

B. It is argued that a strict divestiture rule would be unreasonable for top officials who exercise broad authority and participate in matters affecting most companies in a given industry. These officials would be prohibited from holding stock in any of these companies. Rather than abide by such a rule, many officials would turn away from government service.

The Permanent Review Committee fixes responsibility and can deal with the toughest cases. The committee would handle problematic situations and decide alternative remedial measures on a case-by-case basis, thereby building up a body of experience.

III. Post-Government Employment

Title 18 USC 207 prohibits former executive employees from representing clients before their former agency on matters in which they were involved before leaving. This prohibition is for one year with respect to matters that were under the employee's "official responsibility." If the employee participated "personally and substantially" in the matter, the prohibition is permanent.

The principal loophole in current policy is that there are no Executive Branch-wide restrictions on accepting employment with regulated companies or institutions after leaving an agency. Former employees of the Consumer Product Safety Commission are prohibited by law, for one year after leaving, from working with companies that were affected by their duties. A few agencies require departing employees to report their new place of employment. Former Defense Department employees who, during the three years after leaving, have taken employment with defense contractors are required by law to report this employment.

Proposals. Common Cause believes that three rules should be observed throughout the Executive Branch:

1. Executive employees in GS-15 and higher levels should be prohibited from accepting employment, for a period of 2 years after leaving their agencies, with any company which had been directly affected by their duties. (Regulations would carefully define "directly affected," limiting the term to specific proceedings such as granting of licenses and awarding of contracts.)

2. Such employees should also be prohibited, for the two-year period, from representing any party before their former agency in any legal, lobbying, or other professional capacity.

3. Finally, these employees should be required to file public reports with their former agencies on their place of employment during the two-year period.

While an Executive Order cannot be binding on former employees, it can require current employees to enter a legally-binding contract as a condition of executive employment. If a former employee then violated the terms of the contract--by taking a job with a contractor he had dealt with while in office, for example--he could be sued by his former agency and the court could order him to quit his job.

Each agency should have a top-level committee to ensure enforcement, and to pass judgment in borderline cases.

Counter Arguments

A. It is argued that accepting employment with regulated companies is not sufficiently serious or widespread to warrant broad post-employment restrictions.

Most agencies have no records on where former employees work, so it is difficult to cite hard statistical data on the number who take jobs with regulated firms. However, several studies on specific agencies have uncovered dramatic evidence. For example:

-- According to a study by the Council on Economic Priorities, over 1,400 Pentagon officials left the Department during 1971-1975 to take jobs with defense contractors.

-- A study by the Associated Press last fall shows that, over the last five years, 41 top officials in regulatory agencies left to take more lucrative jobs with companies they had regulated.

-- In response to a congressional inquiry, the Securities and Exchange Commission disclosed last summer that 5 of the 7 SEC commissioners who left since 1971 took jobs with regulated firms. The Federal Trade Commission reported that each of the 5 commissioners who left over the last 5 years have taken jobs with regulated companies.

B. It is argued that restrictions on post-government employment foreclose the use of one's expertise after leaving an agency, and therefore would deter many qualified individuals from entering government service in the first place.

But the restriction on employment would apply only to companies that were affected by specific proceedings -- rule-makings, adjudications, licensings, awarding of contracts, etc. -- in which the employee participated personally and substantially. It would not preclude employment within the regulated industry; only with certain companies in that industry.

C. It is argued that top officials who make broad policy decisions affecting the entire industry would be prohibited, unfairly and punitively, from accepting any industry job during the two-year period.

Applying a post-employment restriction to agency heads and other executive level personnel does create special problems. But these problems are not unresolvable. Insofar as top executives participate in specific agency proceedings (as they often do), they would be prohibited from employment with the companies involved. They would also be restricted, as a rule, from accepting employment with companies affected by policy decisions in which they participate, but only if the companies were directly and substantially affected by the decision.

According to this standard, many companies would fall in a grey area; it would be unclear whether employment with them was restricted. Even in cases where the restriction clearly applied, at least according to the defined norm, other circumstances could warrant an exemption or modification. In these situations, the review committee (see p. 5 above) could decide the matter. It would discuss the case with the official involved, and determine whether, or under what conditions, employment with a prospective employer in the industry is permitted. This procedure would maintain high standards of integrity with respect to the future employment of top executives, but at the same time avoid being overly rigid or punitive.

D. It is argued that the present restriction on representing clients before one's former agency is adequate (18 USC 207).

But the present ban contains a glaring loophole. It allows a former employee to represent clients before the agency on any matter in which he was not involved or which arose after he left. As Roswell Perkins has pointed out:

> The most fundamental limitation on the postemployment ban is that it creates no bar whatsoever on immediate appearance before any government agency with respect to new matters. Any transaction involving the Government that comes up after the day the former employee leaves office cannot have been subject either to his personal participation or his official responsibility and therefore, as under present law, falls outside the postemployment restriction. (76 Har L Rev 1155 (1963)).

The measure proposed by Common Cause would ban, for the two-year period, representation on <u>any</u> matter before the agency.