

COMMENTARY

THE DANGERS OF REFORM: A COMMENT ON SENATOR CHILES' POSITION ON PACS

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In a recent *Journal of Legislation* article, Senator Lawton Chiles (D-Fla.) revived Jesse Unruh's celebrated statement that money is the "mother's milk of politics."¹ Senator Chiles, however, is less sanguine than Unruh about the relationship between money and politics. In his article, Senator Chiles explores ways to reduce the corrupting influence of political money, focusing particularly upon the money raised and spent by political action committees (PACs). Like many Democrats,² Senator Chiles argues that the increased power of PACs, particularly those related to or organized by business lobbies, has seriously damaged the American political process.³ Although he discusses proposed reforms, the Senator fails to recommend any specific legislation. Instead, he proposes a bipartisan study commission to develop "concrete legislative recommendations" for reform.⁴

This commentary will examine Senator Chiles' article from three perspectives: the need for reform, the particular reform proposals which he discussed, and the proposed study commission. As will be apparent from the discussion which follows, I no longer share the Senator's views regarding campaign financing. Indeed, after studying campaign financing over the past several years, I believe that Senator Chiles' position exaggerates the need for reforms.⁵ Because of this exaggerated perception of the need for reform, proposals have been advanced which are likely to create more serious problems than the ones they seek to solve.⁶

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1. Chiles, *PAC's: Congress on the Auction Block*, 11 J. LEGIS. 193, 193 (1984) (citing Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001, 1004 (1976) (statement of Jesse Unruh, former Speaker of the California Assembly and present California State Treasurer)). For a brief synopsis of Senator Chiles article see 1984 A.B.A. J. at 212-13.
2. See, e.g., *Campaign Finance Reform Proposals of 1983: Hearings on the Federal Election Campaign Act of 1971, As Amended and on Various Measures to Amend the Act before the Senate Comm. on Rules and Admin.*, 98th Cong., 1st Sess. 46 (1983) (Statement of Sen. William Proxmire, D-Wis.); See also *Campaign Finance Hearings, supra* at 49 (statement of Sen. Thomas F. Eagleton, D-Mo.).
3. Chiles, *supra* note 1, at 208-11.
4. *Id.* at 216.
5. *Id.* at 193-95.
6. The most widely supported reform plan, H.R. 4970, 96th Cong., 1st Sess., 125 CONG. REC. 20,980 (1979) (this bill was the Campaign Contributions Reform Act of 1979, also known as the Obey-Railback Amendment) proposed a combination of primary and general election contribution ceilings and a limit of PAC contributions to \$6,000 per candidate. H.R. 4970 also placed a \$70,000 ceiling on the amount a candidate could accept from multi-candidate committees. Other proposed reform legislation included: (1) bills to reduce the influence of individual PACs; (2) bills to reduce candidate dependence on PACs; (3) bills to increase the influence of political parties and individuals; and (4) bills for public financing of all federal elections. See, CONGRESSIONAL RESEARCH SERVICE, POLITICAL ACTION COMMITTEES: THEIR EVOLUTION AND GROWTH AND THEIR IMPLICATIONS FOR THE POLITICAL SYSTEM 55 (1982) (prepared by Joseph E. Cantor). I have expressed my views more fully in a recently published article: Leatherberry, *Rethinking Regulation of Independent Expenditures by PAC's*, 35 CASE W. RES. L. REV. 13 (1984).

THE NEED FOR REFORM

In his article, Senator Chiles cites figures on PAC growth since 1974,⁷ when the Federal Election Campaign Act was amended. He expresses concern that, because of this growth "the integrity of the political process . . . may be compromised."⁸ In surveying the history of PACs, he describes how unions initially created PACs⁹ and how business and trade groups discovered the device much later.¹⁰ The Senator then observes that the campaign reform law ironically "encouraged PAC development and strengthened [the] role [of PACs] in the electoral process."¹¹ The "irony" of this result may be more apparent than real, however, since many commentators have described the 1974 legislation¹² as a deliberate attempt by Democrats to skew the financial balance in their favor by sanctioning PACs.¹³ Support for this view is provided by the observation that unions, the organizations that created PACs, historically have supported the Democratic Party. In any event, the 1974 Act was instrumental in the PAC explosion.

Senator Chiles' concern about excessive participation by PACs seems ill-founded. Despite some restrictions, corporations and labor unions, the entities which typically have founded PACs, have participated in campaigns for years. Moreover, it has not been established that the percentage of interest group money spent in campaigns is greater now than before.¹⁴ PACs actually add an additional measure of accountability because financial disclosure requirements imposed on them make it easier to determine how much particular interest groups spend on campaigns.¹⁵ Previously, interest groups employed various evasive measures to circumvent the contribution restrictions.¹⁶

Senator Chiles' discussion largely ignores the growth of ideological PACs. The growth in influence of these PACs represents a striking development in this area. Ideological PACs like the National Conservative Political Action Committee (NCPAC), for example, represent only 15 percent of all PACs, but spend nearly 30 percent of total PAC funds.¹⁷ Nevertheless, Senator Chiles focuses almost exclusively upon PACs sponsored by corporations, labor unions, and trade associations.¹⁸

Senator Chiles recounts the legislative debate over whether PACs should be subject to a higher campaign contribution limit than individuals.¹⁹ The legislative

7. Chiles, *supra* note 1, at 194.

8. *Id.* at 195.

9. *Id.* at 195.

10. *Id.* at 195-98.

11. *Id.* at 201.

12. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455, 5 U.S.C. §§ 1501-1503, 18 U.S.C. §§ 591, 608, 611, 613-617, 26 U.S.C. §§ 276, 6012, 9002-9012, 9031-9042, 47 U.S.C. § 315 (1976 & Supp. 1981)).

13. Republicans pointed out in debate that the legislation was designed to help the Democrats who were in control of both houses of Congress at the time. *See, e.g.*, 120 CONG. REC. 8,469 (1974) (statement of Sen. Buckley (R-N.Y.)); *id.* at 9,540 (reprinting an article from CHRISTIAN SCIENCE MONITOR suggesting that the bill was designed to protect incumbents, most of whom were Democrats). Professor Ralph Winter described the enactment of this reform legislation as "not the cleansing of the political process but the skewing." *Id.* at 10,561. He also suggested that unions wanted to limit private contributions so that their power would be enhanced due to their ability to provide indirect contributions. *Id.*

14. *See* Malbin, *Neither a Mountain nor a Molehill*, REG. 41, 42 (May/June, 1979); Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355, 357-58 (1980); Budde, *The Practical Role of Corporate PAC's in the Political Process*, 22 ARIZ. L. REV. 555, 559-60 (1980).

15. H. ALEXANDER, FINANCING THE 1980 ELECTION 129 (1983).

16. *Id.*

17. *Id.*

18. Chiles, *supra* note 1, at 202-04.

19. *Id.* at 201-04.

history indicates that the prevailing view in Congress was that PACs simply aggregate the funds and interests of individual donors rather than represent the interests of the sponsoring organization.²⁰ The higher contribution limits enacted in 1974 (\$5,000 for the large PACs rather than the \$1,000 limit which applies to individuals and small PACs)²¹ apply to all large PACs whether they are connected (sponsored by a corporation, union, or trade association) or non-connected (sustained entirely by contributions from individuals).²²

Senator Chiles and others assert that the political process is subject to PAC domination.²³ Implicit in this concern is the assumption that PACs generally support more conservative, pro-business candidates thereby tending to enhance the Republicans' traditional financial advantage over the Democrats. In fact, however, evidence fails to support this assumption; most PAC money flows to incumbents.²⁴

Senator Chiles' assumption, however, does appear valid if restricted to open-seat elections. In those contests, the majority of PAC funds have traditionally flowed to Republican candidates.²⁵ Thus, liberal power in Congress may eventually begin to decline if the historical tendency of connected PACs to support incumbents remains unchanged.²⁶ Moreover, politically conservative individual PAC contributors, who tend to fund non-connected PACs, outnumber liberal PAC contributors by a margin of two to one.²⁷ Nevertheless, Democrats have continued to compete well for contributions made by connected PACs, largely because the Democratic Party has more incumbents than the Republican Party and because union and other connected PACs give predominantly to Democrats.²⁸ In addition, it may be true, as Elizabeth Drew asserts, that Democrats have changed their political stripes in their eagerness to get money from business and trade association PACs.²⁹ It seems more likely, though, that they are simply acquiescing to the conservative mood of the electorate.

Unlike the connected PACs, the non-connected PACs tend to be more ideological and less concerned with supporting incumbents. In 1982, of the ten largest nonconnected PACs, the conservative PACs spent nearly five times as much as

20. *Id.* at 202-03.

21. 2 U.S.C. § 441(a)(1)(A) & (2)(A) (1983) and Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 608(e)(1), 88 Stat. 1263, 1265 (1974).

22. 2 U.S.C. § 441(a)(1)(A) & (2)(A) (1983).

23. Chiles, *supra* note 1, at 208; E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 4, 38-52, 84-93 (1983); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 636-39 (1982).

24. In 1980, PACs gave three times as much to incumbents as to challengers. 1 FED. ELECTION COMM., FEC REPORTS ON FINANCIAL ACTIVITY 1981-82: INTERIM REPORT 4, PARTY AND NON-PARTY POLITICAL COMMITTEES 100-02 (1983) (hereinafter cited as 1981-82 FEC REPORT).

25. In 1980, Republicans running for open seats in the Senate received twice as much total PAC support as Democrats. Corporate PACs gave about ten times as much financial support to Republicans as they did to Democrats in those races. Union PACs gave under \$400,000 in these races, as compared to nearly \$1.35 million for corporate PACs, and only \$30,000 of union money went to Republicans. Democrats did slightly better than Republicans in total PAC support in House races for open seats because corporate PACs gave one-fourth of their more than \$2.5 million to Democrats, but union PACs gave less than 5% of their \$2.6 million total to Republicans. *Id.*

Democrats continued to do well in collecting PAC money for the 1984 election. As of May 1, 1984, 93% of PAC contributions in House races went to incumbents, and Democrats had raised a larger percentage of their total funds from PACs than did Republicans. Jackson, *House Reelection Campaigns*, WALL ST. J., May 1, 1984, at 62, col. 1.

26. See *supra* note 19 and accompanying text.

27. There are seven million potential liberal donors and about fourteen million conservatives. 39 CONG. Q. WEEKLY REP. 1905, 1906 (1981).

28. See *supra* notes 24 and 25 and accompanying text.

29. E. DREW, *supra* note 23, at 38-52.

the liberal PACs.³⁰ Such ideological PACs have successfully raised large sums of money by aggregating enormous numbers of small contributions.³¹ To take full advantage of this aggregation, many of these PACs avoid the \$5,000 campaign contribution limit by making "independent expenditures" for media advertisements, which either support their candidates or attack the opposition. These expenditures are statutorily permissible if they are not controlled by or coordinated with a candidate's campaign.³²

Under the Supreme Court's ruling in *Buckley v. Valeo*,³³ non-connected PACs may engage in independent spending on a grand scale. In *Buckley*, the Court struck down all Congressionally enacted spending limits, except the limit on spending by publicly-financed presidential candidates.³⁴ The Court held that spending, whether by a candidate or an independent person, was direct speech. Such speech could not be constitutionally limited since it did not present corruption risks similar to those arising from direct contributions to candidates.³⁵

Unlike the connected PACs, which may use funds supplied by their sponsoring organization to cover their administrative and fundraising costs,³⁶ noncon-

30. Of the ten PACs reporting the largest independent expenditures in the 1982 election, the seven largest spenders were conservative and the remaining three were liberal. Of the sums spent, about \$4.3 million was negative (*i.e.*, attacking the opposing candidate), while only about \$943,000 was supportive of a candidate. Only three of these ten largest-spending PACs were connected to another organization and all three support conservative causes: the National Rifle Association; the American Medical Association; and the Realtors. Their spending, however, totalled only about 20% of the spending done by NCPAC which was by far the largest spender in the group. FED. ELECTION COMM. REC., Dec. 1983 at 8.

Calculation of the sum of all independent expenditures in support of Democrats and against Republicans, demonstrates that Democrats benefitted from about \$941,000 in independent expenditures in 1982. A similar calculation of expenditures favoring Republicans demonstrates that they benefitted from about \$4.4 million in independent expenditures in the same year. 1 1981-82 FEC REPORT, *supra* note 24 at 110, 119.

31. See generally, H. ALEXANDER, *supra* note 15.

32. 2 U.S.C. § 431(17) (1982).

33. *Buckley v. Valeo*, 424 U.S. 1 (1976).

34. *Id.* at 43. This case involved the constitutionality of certain provisions in the Federal Election Campaign Act of 1971 (2 U.S.C. § 431) and the Internal Revenue Code of 1954 (26 U.S.C. § 9001) regulating the public financing of Presidential election campaigns. Groups of individuals including federal officeholders, candidates, and political organizations brought an action against the Federal Election Commission and other governmental officials claiming that statutes in the Act violated the first and fifth amendments.

The United States Supreme Court held: (1) that ceilings imposed on political contributions did not violate constitutional rights but rather may help limit corruption or the appearance thereof; (2) that limits on political expenditures by individuals, groups, and candidates violated the first amendment right to free speech; (3) that limits on the amount of personal expenditures by a candidate were also unconstitutional under the first amendment; (4) that reporting and disclosure provisions did not violate constitutional rights; (5) that provisions for public financing of Presidential nominating conventions and primary campaigns were constitutional; (6) that the provisions establishing a scheme for public financing of Presidential election campaign expenses did not violate the first amendment; (7) that the method of appointing members of the Federal Election Commission violated the separation of powers principle in the appointments clause; and (8) that *de facto* validity would be accorded to the Commission's past acts, and the Court's judgment would be stayed for up to 30 days during which time the commission would function *de facto*.

35. *Id.* at 39, 45-48, 53, 55-56. The decision did not affect one expenditure limit: the \$1,000 limit applicable to spending by PACs in a publicly-financed presidential campaign. 26 U.S.C. § 9012(f) (1976). That limit was struck down in *Common Cause v. Schmitt*, 512 F. Supp. 489, 496 (D.D.C. 1980), *aff'd by an equally divided court*, 455 U.S. 129 (1982). Since the Supreme Court was split evenly in that case, it had not yet settled the issue.

A lower court decision held the limit unconstitutional. *Democratic Party v. Nat'l Conservative Political Action Comm.*, 52 U.S.L.W. 2369 (E.D. Pa. 1983). The FEC appealed to the Supreme Court. FED. ELECTION COMM. REC., Jan. 1984, at 9. The PACs were free to spend as they wished in the 1984 election as they were in 1980, however. The Court upheld the lower court, finding the limit unconstitutional, as this issue was going to press.

36. 2 U.S.C. § 441b(b)(2)(C) (1982). See also H. ALEXANDER, *supra* note 15, at 318-19. 2 U.S.C. § 441b(b)(2)(C) defines contribution or expenditure not to include "the establishment, administration,

nected PACs must cover these costs with monies collected from contributors.³⁷ In addition, much of the money the nonconnected PACs spend in direct-mail fundraising must be listed as "independent expenditures" in support of candidates.³⁸ Thus, classifying these costs as "independent expenditures" distorts the perception of nonconnected PAC contributions, making them seem more significant than they actually are. For example, in the 1980 presidential election, PACs provided \$10.6 million in independent spending for Ronald Reagan, but this amount included the cost of direct-mail fundraising.³⁹ The amount which actually went into media advertising for Mr. Reagan was probably no more than one-third of that amount.⁴⁰ In contrast, the connected PACs used about \$30 million from their connected organizations to cover their administrative and fundraising costs.⁴¹

Remarkably, the major connected PACs seem not to have discovered the independent spending device used so aggressively by NCPAC and other nonconnected PACs. PACs supporting President Carter in his 1980 re-election campaign did almost no independent spending of this sort.⁴²

President Carter, however, did substantially better than Mr. Reagan in another category of independent spending known as "communications costs."⁴³ Unions may spend money to communicate political views to their members, and corporations may do the same with their shareholders.⁴⁴ Unions, which generally supported President Carter, spent far more on "communications costs" than did corporations, which were more likely to support Mr. Reagan.⁴⁵

Communications costs differ from the other independent expenditures in several respects. First, a union or corporation may meet communications costs directly by using treasury funds from the organization. This use of treasury monies is permitted because the money to pay communications costs need not have been voluntarily contributed to a PAC.⁴⁶ Second, disclosure of expenditures is less stringent with respect to communications costs.⁴⁷ In addition, the requirement of independence from the candidate is somewhat less stringent with respect to communications costs.⁴⁸ Nonetheless, too much control by the candidate could make

and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock."

37. 2 U.S.C. § 432(h)(1) (1982).

38. 2 U.S.C. § 431(9)(B)(vi) (1982).

39. H. ALEXANDER, *supra* note 15, at 318.

40. *Id.* at 131. Even the connected PACs, which have the option to expend administrative funds from the treasury of the sponsoring organization, spend about one-third of contributed money for administration.

41. *Id.*

42. Independent spending in support of President Carter amounted to only \$18,000 before the nomination and only \$27,000 thereafter. 1 FED. ELECTION COMM., FEC REPORTS ON FINANCIAL ACTIVITY 1979-80: FINAL REPORT, PARTY AND NON-PARTY POLITICAL COMMITTEES 117.

43. In 1980, Democratic presidential candidates received \$2.2 million in reported communications costs while Republicans got just \$300,000. H. ALEXANDER, *supra* note 15, at 122-23. Communication costs are those costs incurred in communications expressly advocating the election or defeat of a clearly identified candidate. Much of this spending goes unreported because only costs exceeding \$2,000 per candidate must be disclosed. 2 U.S.C. § 431(9)(B)(iii) (1982); 11 C.F.R. § 100.8(b)(4) (1984).

44. 2 U.S.C. § 441(b)(2)(A) (1982).

45. Actual communications costs in the 1980 presidential race were estimated at \$15 million for Carter and \$1.5 million for Reagan. Alexander, *The Regulation and Funding of Presidential Elections*, 1 J. LAW & POL. 43, 54 (1983). Republicans did better in 1982 receiving 56.8% of the total of \$134,000 in communications costs reported in the 1982 election. 1 1981-82 FEC REPORT, *supra* note 24, at 54.

46. 2 U.S.C. § 441b(2)(C) (1982). See *supra* note 36.

47. See *supra* note 43.

48. 2 U.S.C. § 441b(b)(2)(A) (1982) provides that the term "contribution or expenditure" shall not include "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject."

the spending an illegal contribution or expenditure.⁴⁹ Considering all of the ways in which the parties evaded the ostensible spending limit in the 1980 presidential race, it is remarkable that neither candidate achieved a substantial spending advantage.⁵⁰

In both 1980 and 1982, conservative PACs, especially NCPAC, opposed several liberal Democrats seeking Senate re-election.⁵¹ Republican campaign spending substantially exceeded Democratic spending in only one of those races.⁵² In fact, only by counting total independent expenditures, including all fundraising costs⁵³ necessary to offset the advantage of incumbency, can one demonstrate any

49. 2 U.S.C. § 441b(b)(2)(C). See also H. ALEXANDER, *supra* note 15.

50. Alexander, *supra* note 45, at 54. Alexander states total spending for Mr. Reagan's campaign as \$64.6 million and for President Carter's campaign as \$53.93 million. *Id.* He estimated the "communications cost" spending at \$15 million, substantially more than was disclosed. See H. ALEXANDER, *supra* note 15. He did not, however, adjust the independent expenditure total which gave Reagan nearly all of his spending margin. As Alexander notes elsewhere, only about one-third of the \$10.6 million in reported independent expenditures for Reagan actually went for media advertising. H. ALEXANDER, *supra* note 15, at 318-19. Once that amount has been deducted, the spending totals would be about \$57 million for Reagan to \$54 million for Carter — hardly a significant difference and certainly not sufficient to overcome Carter's incumbency advantages.

51. See *supra* note 33.

52. DIRECT SPENDING BY CANDIDATES IN SELECTED SENATE RACES

Candidate (Party)	Spending in Dollars
'80 Church (D)	1,917,237
Symms (R)	1,780,777
'80 McGovern (D)	2,757,201
Abdnor (R)	1,801,653
'80 Bayh (D)	2,751,004
Quayle (R)	2,289,838
'80 Culver (D)	1,750,680
Grassley (R)	2,183,028
'82 Kennedy (D)	976,985
Shamie (R)	1,027,545
'82 Sarbanes (D)	399,339
Hogan (R)	210,760

The 1980 spending figures are from 1979-80 FEC REPORTS, U.S. Senate and House Campaigns, Final Report 221-22, 413-14, 239-40, 245-52. The 1982 spending figures are from 1981-82 FEC REPORTS, U.S. Senate and House Campaigns, Interim Report #1, 189-90, 183-84. Only Senator Culver spent substantially less than his opponent, and he had the advantage of incumbency.

53. Besides including fundraising costs, the independent expenditure totals include funds spent for mailings directed to persons already solidly committed to the candidate or not resident in the particular state or district and therefore not eligible to vote for the candidate. H. ALEXANDER, *supra* note 15, at 400.

dollar superiority for Republicans.⁵⁴ Most importantly, while all four targeted Democrats lost in 1980, the two targeted candidates won in 1982, despite the independent expenditure blitz.⁵⁵

Thus, PACs are not the cause of the problems faced by Democrats who have been losing elections and legislative battles:

[Although] moneyed interests swarm all over Capitol Hill . . . [that] does not mean that money rules the roost . . . PACs tend to check each other . . . [and] there are other checks on their power. One is the spotlight of public attention focused by the press, groups like Common Cause, and other politicians. Another is the obstacle course of enacting any legislation. American democracy is still working to accommodate conflicting interests and ideals.⁵⁶

54. TOTAL OF DIRECT AND INDEPENDENT SPENDING IN SELECTED SENATE RACES

Candidate (Party)	Spending in Dollars
'80 Church (D)	1,919,182
Symms (R)	2,200,607
'80 McGovern (D)	2,760,754
Abdnor (R)	2,037,374
'80 Bayh (D)	2,752,031
Quayle (R)	2,473,762
'80 Culver (D)	1,810,264
Grassley (R)	2,413,933
'82 Kennedy (D)	977,485
Shamie (R)	1,680,781
'82 Sarbanes (D)	419,443
Hogan (R)	709,323

The 1980 figures are taken from 1979-80 FEC REPORTS, U.S. SENATE AND HOUSE CAMPAIGNS, FINAL REPORT 221-26, 413-18, 239-44, 245-56. The 1982 figures are taken from 1981-82 FEC REPORTS, U.S. SENATE AND HOUSE CAMPAIGNS, INTERIM REPORT #1, 189-94, 183-88.

55. See *supra* note 52. In 1977, incumbency was estimated to be worth about \$500,000 in a Senate race. The advantages of an incumbent include salary, staff, the franking privilege, and office and travel allowances. H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 146, 154-55 (2d ed. 1980).

Only in the Culver-Grassley race could it be said that total spending for the Republican (Grassley) might have been sufficient to overcome the Democrat's incumbency advantage. Interestingly, Senator Kennedy overcame a larger disparity in 1982. See *supra* note 54. Neither of those races was close. See *supra* note 37.

VOTE PERCENTAGES IN
SELECTED SENATE RACES.

Candidate (Party)	Percentage
'80 Church (D)	49
Symms (R)	50
'80 McGovern (D)	42
Abdnor (R)	58
'80 Bayh (D)	46
Quayle (R)	54
'80 Culver (D)	46
Grassley (R)	54
'82 Kennedy (D)	61
Shamie (R)	39
'82 Sarbanes (D)	63
Hogan (R)	37

The percentages are from 36 CONG. Q. ALMANAC 25-B (1980) and 40 CONG. Q. WEEKLY REP. 2792, 2819 (1982).

56. Samuelson, *The Campaign Reform Failure*, THE NEW REPUBLIC, Sept. 5, 1983, at 28, 34.

REFORM PROPOSALS

Senator Chiles indicates his lack of enthusiasm for further efforts to limit PAC contributions, pointing out the constitutional difficulties of banning or even reducing the \$5,000 contribution limit.⁵⁷ He also expresses skepticism about the proposal to limit the aggregate amount a candidate could accept from PACs.⁵⁸ The Senator's skepticism is likewise based on anticipated constitutional problems and on his perception that such a limit, would favor incumbents and hurt challengers.⁵⁹ Indeed, many features of the current campaign law do favor incumbents.⁶⁰ This "favoritism" may be viewed as inevitable since incumbents wrote the current legislation and would write any reform legislation. Nevertheless, pragmatic concerns must be addressed before valid conclusions can be drawn regarding future reforms.

First, further restrictions on contributions, or even the failure to raise the existing limits, will likely result in measures to circumvent the restrictions.⁶¹ Second, recent growth of all types of independent expenditures is probably due to unreasonably low expenditure limits in the presidential elections and unreasonably low contribution limits in Senate and House races. Independent expenditures could mushroom if connected PACs decide to engage in "independent spending" as have the nonconnected PACs.⁶² Continued adherence to unreasonable limits will force interest groups in that direction. Indeed, unions spent enormous sums in the "communications costs" category during the 1984 presidential primaries.⁶³

Senator Chiles asserts that raising individual contribution limits will not offset the power of the PACs because only a few wealthy individuals are likely to contribute more money.⁶⁴ He overlooks the fact that individuals can give \$5,000 to a PAC but only \$1,000 to a candidate.⁶⁵ Would it not be preferable to have individuals give more money to a candidate for the candidate's own use rather than supporting an independent spending PAC which might use the funds to distort the issues or engage in destructive negative campaigns? A donor would presumably

57. Chiles, *supra* note 1, at 213.

58. *Id.*

59. *Id.*

60. The most obvious example of legislative favoritism for incumbents is the equal spending limit for an incumbent President and a challenger. The large independent expenditure total for then-candidate Reagan was in part a reaction to this perceived disadvantage to a challenger. In 1972, President Nixon spent \$61 million and McGovern spent \$30 million. H. ALEXANDER, *supra* note 15, at 104. Nevertheless, the spending limit applicable in 1980, after adjustment for inflation, was just over \$29 million. FED. ELECTION COMM., ANNUAL REPORT 1981 7 (1981).

61. Between 1976 and 1982 the average cost of a successful race for the House rose from \$87,240 to \$214,767 but the contribution limits remained the same. 41 CONG. Q. WEEKLY REP. 723 (1983); Chiles, *supra* note 1, at 213.

62. See *supra* notes 29, 42 and accompanying text.

63. Labor unions spent heavily in the "communications costs" category to help Walter Mondale win the 1984 Democratic presidential nomination. Jackson, *Old Time Politics*, WALL ST. J., July 5, 1984, at 1, col. 1; Apar, *Stunned by Mondale Defeats, Unions Face a Problem: Ally Hart is Hard to Criticize*, WALL ST. J., Mar. 7, 1984, at 52, col. 1. For discussion of "communications costs," see *supra* notes 43-48 and accompanying text.

Union PACs gave large sums to local Mondale delegate committees which then engaged in what purported to be independent spending in support of Mondale in their local areas. One reason for the tactic was Mondale's vow that he would accept no PAC contributions. Jackson, *Hart Campaign Files Protest Over Money for Mondale Groups*, WALL ST. J., Apr. 9, 1984, at 22, col. 1. The device also enabled Mondale to exceed the spending ceiling in some states. See Jackson, *Mondale Spending Exceeded Ceiling in New Hampshire*, WALL ST. J., Apr. 30, 1984, at 46, col. 1. After suffering from the attacks of his opponents and the media, Mondale decided to terminate the committees and return the funds. Weinraub, *Mondale Directs Disputed Groups to End Operation*, N.Y. TIMES, Apr. 26, 1984, at 1, col. 8.

64. Chiles, *supra* note 1, at 214.

65. 2 U.S.C. § 441a(a)(1)(C) (1982).

prefer to give political money directly to his favorite candidate rather than contribute indirectly through a PAC. Independent expenditures pose the risk that candidates will lose control of their own campaigns.

Finally, Senator Chiles addresses the issue of public financing, mentioning the "apparent success" of publicly financed presidential campaigns.⁶⁶ But the Senator failed to mention the enormous amount of money independently spent to avoid the expenditure ceilings which go with the receipt of the federal funds.⁶⁷ In addition, he fails to mention the 1979 amendments to the law to facilitate "party building activities."⁶⁸ These amendments permit state and local party committees to collect money from corporations, unions, and individuals — money which otherwise could not be contributed legally in federal elections.⁶⁹ The national parties are then free to direct this money for activities, such as advertising, in support of the party generally (or its entire slate of candidates, including federal candidates) and voter registration drives. Financial disclosure is poor because it is governed mainly by state laws.⁷⁰

Congress has recognized that the presidential campaign funding mechanism provides far less money than is required for financing a presidential campaign but has been unwilling to address the problem directly. Instead, private money has simply been permitted to flow surreptitiously into the campaigns.

Problems similar to those afflicting public financing of presidential campaigns undoubtedly will plague any scheme of publicly-financed Senate or House elections. Incumbents will seek to set low expenditure limits in order to disadvantage challengers. Moreover, independent spending practices will probably destroy whatever limits are imposed because it has become clear that PACs and lobby groups will not be denied the opportunity to assist candidates they favor.

It is clear that in our government-regulated and government-subsidized nation, interest groups will find ways to reward their friends and punish their foes. PACs are simply an efficient way to aggregate individual contributions and identify them with their contributors' interests. In their defense, one may note that contributions and independent expenditures are subject to stringent disclosure rules.⁷¹ In this way they are fundamentally unlike the contributions and expenditures which were made in the past, often in violation of the law.

At best, public financing of House and Senate races may stimulate lawful and properly-disclosed independent spending. Even that modest result, however, raises the specter of a campaign in which most media advertising is provided inde-

66. Chiles, *supra* note 1, at 214-15.

67. For a thorough summary of that activity in the 1980 election, see Alexander, *supra* note 45, at 54-59.

68. Party building activities are facilitated by the 1979 amendments to the Code. First, the term "contribution" does not include payment by a state or local committee of a political party for the costs of preparation or mailing of a printed slate or sample ballot card or the display of such an advertising, 2 U.S.C. § 431(8)(B)(v) (1982); payment by a state or local committee of a political party of the costs of campaign materials used by the committee in connection with the volunteer activities on behalf of the nominees of the party, 2 U.S.C. § 431(8)(B)(x) (1982); or the payment by a state or local committee for voter registration and get out the vote activities, 2 U.S.C. § 431(8)(B)(xii) (1982). Second, the term "expenditure" does not include: the display, preparation or mailing of a sample ballot card, 2 U.S.C. § 431(8)(B) (1982); the payment of compensation for legal or accounting services by the party, 2 U.S.C. § 431(9)(B)(vii) (1982); and the payment by a state or local committee of voter registration and get out the vote activities, 2 U.S.C. § 431(9)(B)(ix) (1982). A helpful discussion of these provisions is found in T. SCHWARTZ & A. STRAUS, FEDERAL REGULATION OF CAMPAIGN FINANCE AND POLITICAL ACTIVITY § 5.04 (1982).

69. E. DREW, *supra* note 23, at 102-110.

70. See Alexander, *supra* note 45, at 56-57; E. DREW, *supra* note 23, at 14-19.

71. See 2 U.S.C. § 434 (1983). This code section contains strict reporting and filing requirements by the principal campaign committee other than authorized candidate committees and by every person who makes independent expenditures in excess of \$250 in a year.

pendently of candidates. At worst, the expenditure limits imposed by public financing could drive interest groups back to under-the-table campaign financing.

THE STUDY COMMISSION

Senator Chiles recognizes the difficulty of enacting legislation to deal with PACs.⁷² He proposes the creation of a study commission as a means of establishing a consensus with respect to the dangers of PACs and the means of dealing with them.⁷³ If the Senate and House continue to be controlled by different parties, legislation in this area will be very unlikely, particularly in light of President Reagan's reelection.⁷⁴ Thus far, only Democrats have shown any real enthusiasm for attempting to curb the power of PACs.⁷⁵

Senator Chiles describes his approach as "a half loaf now and a half loaf later."⁷⁶ In reality, however, enactment of the proposal would merely allow Congress to appear to be resolving the problems associated with PACs without actually doing anything significant. Unless PACs were represented on the commission, there could be no realistic hope of reaching a solution. Moreover, without a consensus that reform is needed the commission mechanism is unlikely to produce anything useful. The National Commission on Social Security Reform, which the Senator cites as a model,⁷⁷ operated under the pressure of potential insolvency of the Social Security System. The Commission was forced to take action.⁷⁸ No such urgency exists regarding the PACs' role in the electoral process.

Senator Chiles' other example, the National Commission on Federal Paperwork,⁷⁹ is only a slightly more suitable model insofar as it dealt with a less urgent issue but one for which there existed some bipartisan consensus. No such consensus exists or is likely to develop regarding the PAC issue.

Finally, Senator Chiles correctly observes that "[f]ew issues directly and personally concern members of Congress more than campaign finance."⁸⁰ For that additional reason legislative consensus seems unattainable and his proposed commission will likely accomplish little. More importantly, no effective restrictions on PACs will survive a constitutional challenge unless the Supreme Court dramatically changes its views on spending limits.⁸¹ Without such changes, independent expenditures will continue to be permissible, and this spending will likely subvert any plan which could be designed. At worst, the level of independent expenditures could eventually put effective control of a campaign in the hands of independent-spending PACs rather than candidates.

72. Chiles, *supra* note 1, at 215-16.

73. *Id.*

74. See E. DREW, *supra* note 23, at 102-103, 128-129, 155.

75. See E. DREW, *supra* note 23 at 102-103, 117, 155.

76. Chiles, *supra* note 1, at 216.

77. *Id.*

78. See *id.* at 216 n.218. "The Commission on Social Security Reform was formed by President Reagan in 1981 in order to propose a plan to insure short and long-term solvency of the Social Security System."

79. See COMMISSION OF FEDERAL PAPERWORK, A REPORT OF THE COMMISSION ON FEDERAL PAPERWORK, FINAL SUMMARY REPORT (Oct. 3, 1977).

80. Chiles, *supra* note 1, at 217.

81. See *supra* notes 33-35 and accompanying text. But see E. DREW, *supra* note 23, at 134-135. Drew suggests that in *Buckley*, 424 U.S. at 44-51, the Court opened another route by which private money could be used in Presidential campaigns when it held that the federal election law's prohibition of independent spending of more than \$1,000 on any election by individuals or groups was a violation of the first amendment guarantee of freedom of speech. In this manner, freedom of speech was equated with money.

CONCLUSION

Reform-minded legislators should limit their efforts to tinkering with the existing system. Contribution and expenditure limits should be increased. Disclosure should be improved. Steps should be taken to stimulate individual contributions to candidates rather than PACs.

Given the present balance between the parties and the present posture of the Supreme Court, benign neglect might well be the best reform strategy. Maintenance of the status quo is preferable to the problems which would likely be caused by major reform proposals. As experience with prior campaign legislation has shown, the unforeseen problems may well be worse than the evils towards which the reformers direct their attention.