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HAS THE U.S. CAMPAIGN FINANCE SYSTEM COLLAPSED?

Financing the 2008 Congressional Elections: A Prospective Guide

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Financing the 2008 Congressional Elections: A Prospective Guide

Jennifer A. Steen

Abstract

Every two years the financing of federal elections changes, sometimes subtly and other times more dramatically, sometimes necessarily in response to new rules and other times innovatively in response to old ones. This essay discusses changes in place or afoot for the 2008 congressional elections. In the coming cycle, the new congressional majority will enjoy a significant fundraising edge, social-welfare organizations will be more engaged in political interventions, unions and corporations will re-enter the pre-election advertising scene, and lobbyist contributions will come into the sunlight. Vacancies on the Federal Election Commission will likely stifle the creativity of candidates and campaign financiers, as innovations cannot be sanctioned until a quorum is available to approve advisory opinions. The non-profit education program of the IRS may also temper the anticipated rush to shift political activity to social-welfare organizations.

KEYWORDS: campaign finance, congressional elections, nonprofit, bundling, Federal Election Commission, electioneering communication

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The passage of the Federal Election Campaign Act of 1971 (FECA) along with its first set of amendments in 1974 marked the beginning of the modern era of campaign finance regulation. The regime established by FECA survives today, largely intact, but not without significant modifications by the Supreme Court, the Federal Election Commission (FEC) and the Congress. Those modifications have both caused and responded to a remarkable series of adaptations by all classes of participant in the financing of federal elections: the parties, interest groups, individual contributors, elected officials, lobbyists, candidates, and unelected activists. This essay discusses changes in place or afoot for the 2008 congressional elections:

- Some of these changes impose new restrictions on campaign financiers, while others appear to loosen the reins. The Honest Leadership and Open Government Act of 2007 (P.L. 110-81, enacted September 14) requires that campaign contributions "bundled" by a registered lobbyist be reported separately in federal disclosure reports, enabling observers to quantify easily the degree to which any single candidate relies on a particular lobbyist for campaign funds.

- While reform advocates hailed the new bundling-disclosure rules, they were disappointed by another, potentially much more significant development in 2007, the Supreme Court's June decision in *Federal Election Commission* v. *Wisconsin Right to Life, Inc.* (known as *WRTL II*). Regulations promulgated in response to *WRTL II* have re-opened the door to corporate and union funding of the kinds of political ads once denounced as "sham issue advocacy."

- There is also good news and bad news—which is the good and which is the bad depends, of course, on one's personal views—about enforcement in 2008. A political standoff in the Senate has left the FEC without a quorum of commissioners, thus unable to approve enforcement actions (or even advisory opinions). However, the FEC shares enforcement duties with the Internal Revenue Service, which has signaled that it will step up its efforts to keep non-profit entities playing by the rules that govern their political activity.

Of course, stark changes like a new statute or court ruling elicit immediate responses from political actors, but some significant changes in campaign behavior occur gradually, as the players continually seek new ways to achieve their goals within the relatively stable context of the larger regulatory environment. One potentially important development in 2008 will be the use of nonprofit social welfare organizations and business leagues for political purposes. Some observers expect 501(c) activity to increase dramatically in 2008, not because of some obvious recent stimulus but simply because groups are learning over time what kind of activity is and is not feasible for entities organized under various sections of the tax code.

Finally, one must consider changes in the political context, distinct from changes in the regulatory system. For the 2008 congressional elections, the most significant change in the political context is undoubtedly the return of Democratic majorities in both chambers. With Democrats occupying committee chairs and controlling the flow of legislation, they are considerably more attractive investments to campaign contributors with immediate public policy goals. As Ansolabehere and Snyder explain, "PACs pursue power. They invest in those in office, not those hoping to win....They give considerably more to those in the majority, and to those who lead the majority" (2000, 85). One should thus expect somewhat different patterns of campaign fundraising and spending in 2008 in comparison to 2006, when Republicans enjoyed majority status in both chambers of Congress.

This essay offers a brief summary of the rules in place for the 2008 congressional elections, followed by a discussion of the notable activity one might observe as the contests unfold. Because this essay is being written so early in the election year, its principle offering will be untested predictions. However, whenever feasible, I offer the (scant) data that has been generated to date as a preview of what is yet to come.

Overview of Campaign Finance Rules for Congressional Elections

The rules governing the flow of money in the 2008 congressional elections vary widely, depending on whose money it is and on what it is being spent. The most tightly-regulated activity is known as *express advocacy*, which includes communications that unambiguously urge the election or defeat of a specific federal candidate. (The legal definition of "express advocacy," or, more accurately, "expressly advocating," can be found at 11 CFR §100.22) For express advocacy, there are strict limits on the sources and amounts of contributions used to pay for them, no matter who does the actual spending: candidate committee, political party, interest group, or individual. There are also strong disclosure requirements, as the sources and recipients of express-advocacy expenditures must be reported. There is one notable exception to the otherwise strict rules for express advocacy pursuant to the Supreme Court's ruling in *Federal Election*

Commission v. *Massachusetts Committee for Life* (1986), about which more later.[1]

A second category of electoral activity is known as *electioneering communication* (EC), which is a broadcast communication that "refers to a clearly identified federal candidate, is publicly distributed within 30 days of a primary election or within 60 days of a general election, and is targeted to the relevant electorate" (Federal Election Commission 2008b, 1-2). Such communications are subject to slightly looser disclosure requirements than express advocacy. For example, an express-advocacy committee must report the name, address, occupation, employer, and amount contributed by any individual who donates at least $200. With electioneering communications, only contributors' names and addresses must be reported, and then only if a person (or group) donated $1,000 or more.

There is also a wide variety of electoral activity that falls into neither of these two legal definitions, including voter registration and mobilization; preparation and dissemination of voter guides; and voter education. These activities may be conducted in a nonpartisan fashion; alternatively, they can designed to benefit one party or candidate.

The distinctions among these types of political activity are significant because the rules regarding who can conduct them and how they must be funded vary. The rules depend not just on the type of activity, but on the type of actor. Here one must differentiate among candidates, individuals, political parties, and interest groups. Within the category of interest groups, there are additional distinctions based on the legal status of the group's formal organization. The usual labels for each category correspond to the section of the Internal Revenue Code under which groups in that category are regulated. For example, "527" groups, also sometimes called "political committees," are organized for an expressly electoral purpose, although not necessarily to engage in express advocacy. If a 527 engages in express advocacy, it must register with the FEC as a Political Action Committee (PAC) and conform to rules restricting the sources and amounts of funds it can raise. Herein such groups will be referred to as PACs and the term "527" will be reserved for non-PAC 527s.

In general, 527 organizations must register with the Internal Revenue Service (IRS) and file reports of their contributions and expenditures, although the reporting requirement is waived for organizations that file identical information with a state or local agency. These reports are available (and searchable) on the web site of the IRS. If a 527 engages in electioneering communications, it must

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[1] The *MCFL* ruling allows non-profit organizations organized for political purposes who have no shareholders and receive no funds from unions or businesses to make "independent expenditures," which are expenditures for express advocacy that are not coordinated with a candidate campaign. Such expenditures must be reported, but the funding sources need not.

(as noted above) also disclose certain information to the FEC. Otherwise, 527s operate with few restrictions. They may raise as much money as they want from whomever they want, with but two significant limitations: they cannot raise money from foreign nationals, and they cannot use corporate or union funds to pay for non-exempt electioneering communications.

Non-profit organizations organized under section 501(c)(4), the social-welfare organizations, and 501(c)(6), business leagues and trade associations, can do almost anything that section 527 political organizations do, as long as political activity is not their primary purpose. In fact, some 501(c)(4) entities qualify for the "MCFL exemption," noted at footnote 1, which allows them to engage in express advocacy with independent expenditures, which 527 organizations cannot do. Religious, charitable, scientific, and educational organizations are organized under section 501(c)(3), and their political activities are strictly limited to voter registration, mobilization, and education, as long as those activities are "carried out in a nonpartisan manner." Under current law 501(c) organizations are not required to disclose their donors, and the only expenditures they must report are MCFL independent expenditures and electioneering communications. This is certainly troubling to those who value transparency. 501(c) organizations are also not subject to limits on the amounts of money coming in or going out of their coffers.

Corporations (except non-profit corporations which qualify for the MCFL exemption) and labor unions may not directly or indirectly pay for express advocacy. Until the Supreme Court's *WRTL II* ruling, unions and corporations (including MCFL-exempt nonprofits) were also barred from paying for electioneering communications. However, they could support other forms of electoral activity. After *WRTL II*, union and corporate funding of ECs is permissible "unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate" (Federal Election Commission 2008, 3). ECs that do have another reasonable interpretation are exempt from the prohibition on union and corporate funding.

Developments to Watch in 2008

The Return of "Sham" Issue Advocacy"?

The Bipartisan Campaign Reform Act of 2002 (BCRA), popularly known as "McCain-Feingold," was a response to the so-called "twin evils" of party soft money and "sham" issue advocacy (Dwyre and Farrar-Myers 2001, Farrar-Myers and Dwyre 2007). "Sham" issue advocacy refers to an advertisement that portrays a federal candidate in a positive or negative light without expressly advocating that candidate's election or defeat. By avoiding express advocacy, sham issue ads escaped FECA's requirement of donor disclosure and restrictions on contribution amounts.

Farrar-Myers and Dwyre note, "Pro-reform lawmakers argued that these *sham issue ads* were a serious loophole . . . that allowed corporations and unions to spend unlimited amounts of unregulated money to influence elections just days before voters cast their ballots" (Farrar-Myers and Dwyre 2007, 157-58). Also problematic was the opacity of issue advertising. David Magleby, who studied interest-group spending in the three election cycles preceding BCRA, has noted that "With outside money, voters often cannot determine the sources of money spent in their race" (Magleby and Monson 2003, 401). Congressional scholar Norman J. Ornstein (2001) has noted, “These sham issue ads have drastically altered the landscape of campaigns, reducing candidates to bit players in their own elections and erasing a major share of accountability for voters.”

While most observers (Mitch McConnell excepted) agreed that sham issue ads were corrosive to democracy, lawmakers had to tread very carefully around legitimate First Amendment concerns as they tried to rein in outside spending. Ultimately, BCRA contained a provision defining "electioneering communication" and subjecting such communication to disclosure requirements similar to those applied to express advocacy. Furthermore, BCRA prohibited the use of corporate or union funds for ECs. This prohibition was challenged by the plaintiffs in the *WRTL* cases (see the Briffault article in this issue). The Supreme Court's decision in *WRTL II* required the Federal Election Commission to craft new regulations that would allow corporations and unions to pay for "true" issue advertising (or really, advertising that might plausibly be, but is not necessarily, "true" issue advertising) that aired during the pre-election window.

The FEC considered two alternative approaches to regulating exempt communications. Both alternatives created an exemption from the corporate and union funding restrictions for communications that were “susceptible of a reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate” (*WRTL II* at 334). Alternative 2 would also have exempted such communications from the disclosure requirements for ECs. That the FEC did <u>not</u> adopt Alternative 2 may be the most significant campaign-finance development of the 2008 season.

For some observers, the new *WRTL* rules heralded a return to the bad old days. One editorial lamented, "The decision . . . almost certainly will open up the political process to barrels more corporate and special interest money, just in time for the 2008 elections" (Oakland Tribune, 2007). Bob Bauer, a leading practitioner of election law, warned on his blog that "For those committed to aggressive enforcement of the corporate and union spending prohibition, dark times lie ahead" (More Soft Money Hard Law, comment posted December 12, 2007). Rick Hasen, a leading professor of election law, blogged that "corporate-funded sham issue advocacy will soon hit election 2008" (Election Law Blog, comment posted November 20, 2007).

Will we see a resurgence of corporate- and union-funded issue ads, in the form of exempt electioneering, in the 2008 congressional election cycle? At this date, it is difficult to read the tea leaves, since there are effectively none to read. The pre-primary window has only opened in five states; there are no competitive Senate races and only four potentially competitive House elections in those states. In other words, there have so far been almost no contests that would plausibly attract exempt electioneering communications, even if corporations and unions were gearing up to spend like crazy in 2008.[2] Indeed, at press time there has been no exempt electioneering in any of those races, but that does not convince me that we will see none in competitive general elections this fall.

Still, one gets an inkling of what may be in store by reviewing the history of the ban on corporate and union funding. If 2008 marks a return to the bad old days, we must consider how bad they actually were in comparison to the implicitly "better" old days of 2004. To do so one can rely on data presented by Boatright et al. (2006) on the number of candidate-specific broadcast television ads running in the top 75 American media markets within 60 days of a general election.[3]

Prior to BCRA's prohibition on union and corporate funding of electioneering, labor unions had been a significant purveyor of electioneering ads within the pre-election window, paying for 18 percent of candidate-specific television ads broadcast in the top 75 media markets during the 2000 election cycle (Boatright et al. 2006, see Table 6.3). Union-sponsored ads did not disappear in 2004, however. Several individual unions (though not, notably, the AFL-CIO) paid for candidate-specific ads through their PACs, or "separate segregated funds." Labor's share of candidate ads within the window dropped to just 8 percent in 2004. The raw number of labor-sponsored ads dropped by two-thirds, from 10,290 ads in 2000 to 3,629 ads in 2004.

Corporations *per se* were not big sponsors of election ads before BCRA.[4] Rather, corporate money flowed largely through soft-money donations to the national political parties. Of course, much of that money was used to fund issue ads that were candidate-specific (Herrnson and Patterson 2002, 112). BCRA's ban on soft money shut off this access point for corporate money to fund electioneering ads. However, peak associations, organized under section

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2 Issue ads were uncommon in congressional primaries before BCRA, so even if this essay were written after the last primary, union and corporate activity might still be difficult to forecast.

3 An individual "ad" in this case is an airing, not a script.

4 This discussion focuses on for-profit corporations, not non-profits organized under section 501(c).

501(c)(6), also funded electioneering ads prior to BCRA, and did so quite heavily. For example, the Chamber of Commerce and the Business Roundtable, whose members include individual companies, sponsored 21 percent of candidate-specific ads in the top 75 media markets during the 2000 election cycle.

Neither group funded candidate-specific ads in 2002, but in that year the United Seniors Association and Americans for Job Security, both funded by large companies and industrial peak associations, paid for more than half of candidate-specific ads in the top 75 markets. In the 2004 pre-election window, these two groups only sponsored 139 electioneering communications (less than one-half of one percent) in the top 75 markets, presumably because of the ban on corporate sponsorship.

Clearly, the WRTL exemption offers more potential benefit to corporations than to unions, as the post-BCRA decline in corporate-sponsored ads dwarfed the drop in labor ads. But it is not clear that for-profit corporations were particularly bereft after being banned from funding electioneering communications. A 2004 survey of the top 20 corporate contributors of soft money in the 2002 cycle found the majority of corporations were not scrambling to find new recipients of political money. The *Wall Street Journal* reported that the former soft-money donors were "resisting giving big-dollar donations to the new, independent organizations that were created after [BCRA]. The reticence illustrates an uneasiness on the part of some of the corporations to get sucked back into the world of unlimited political contributions that they thought campaign reform had left behind" (Cummings 2004).

The *Journal* analysis does suggest that part of the reluctance is specific to 527 groups: "executives say it's difficult to justify donations to shareholders because the core missions of these new political groups, at best, are only tangentially connected to the company's legislative and regulatory priorities." Such concerns would be allayed if the vehicle for political activity were a closer relative, like an industry's 501(c)(6) peak association. Still, there are other recent indicators that corporations may be backing away from electoral activity, generally.

Since 2003, a shareholder campaign to bring more transparency to corporate political spending has gathered steam, and while the primary goal of this effort is disclosure of corporate spending, including donations to 501(c)(6) and 501(c)(4) organizations, its proponents are clearly skeptical of the value of corporate political expenditures. The organization leading the campaign (a 501(c)(3), incidentally) argues, "Unless transparency and accountability are required, corporate executives will continue to be free to employ company money for policy ends not shared by—and often inimical to—shareholder owners" (Center for Political Accountability 2007). Surveys of corporate shareholders and directors reveal that both groups share this skepticism (Center for Political Accountability 2008). Thus a consequence of increased transparency may well be reduced corporate funding of political activity, as resources are focused on shareholder goals. This is consistent with the notion, discussed further below, that political activity withers in the sunlight.

Unlike congressional primaries, the presidential primaries have seen a significant amount of electioneering communications and thus may offer some clues as to what to expect from unions and corporations. A review of EC reports filed through March 7, 2008, suggests that corporations are indeed sitting on the sidelines, despite their newly regained freedom to fund candidate-specific ads. The amount of corporate funds disclosed has been nominal, and the sources are almost exclusively non-profit corporations.

In contrast, unions have committed significant resources to "exempt" electioneering. The biggest player has been the American Federation of State, County, and Municipal Employees (AFSCME), which has funded at least $1.3 million dollars worth of advertising through direct expenditures and contributions to other entities. The Alliance for a New America, a 527 group funded by a variety of labor unions, has spent $2.4 million on electioneering communications, while Working for Working Americans, which is funded by the carpenters' union, has spent approximately $500,000 on ECs. Together, labor's EC expenditures dwarf spending by all other entities participating in the 2008 presidential primaries.

Are corporations bowing out? I would not count them out yet. Their absence from the presidential battles does not mean they will stay out of the general election, for Congress or the president. But their resurgence in the EC arena is far from assured. Clearly, labor is poised to take advantage of the WRTL exemption to great effect in the 2008 cycle, and while there is no guarantee that they will be as active in congressional races as in the Democratic nomination battle, I expect that their efforts will be impressive.

501(c)(4)s

After the 2006 elections, the non-partisan Campaign Finance Institute issued a report on soft-money, or non-federal, activity by interest groups in 2006. The authors concluded, "We predict, based on what we have seen in 2006, and afterwards, that an increasingly diverse roster of nonprofit soft money vehicles is likely to ratchet up activities in the elections of 2008" (Weissman and Ryan 2007, 1). Of particular interest in 2008 is the class of entities organized under sections 501(c)(4) and (c)(6) of the Internal Revenue Code. Such organizations are permitted to engage in most forms of political activity as long as "political campaign intervention" is not their "major purpose." Unlike 527s and PACs, nonprofit groups are <u>not</u> required to disclose information about their donors. Nonprofit organizations that receive no money from unions or corporations can even make independent expenditures for express advocacy. Such expenditures must be disclosed to the Federal Election Commission, but the funding sources do not.

Some observers have warned that disclosure requirements for 527 groups (adopted in 2002 and implemented in the 2004 cycle) could push political activity into the shadows of the 501(c) world. Of course, because of the limited disclosure of 501(c) activity, it is very difficult to judge whether such a shift is actually occurring as the 2008 cycle progresses. However, there are a number of preliminary signs of increased activity among 501(c)s. For example, the *Wall Street Journal* recently reported that a "survey of the largest 501(c) political organizations found $150 million in campaign spending by the organizations in 2004, and that those entities also plan a huge increase in spending this year" (Farnam and Mullins 2008).[5] Furthermore, many longstanding political committees are establishing 501(c)s for 2008 (Mullins 2007, Weissman and Ryan 2007).

The CFI report offers one particularly compelling example, of the reorganization of the Club for Growth. After years as an informal "Political Club for Growth," The Club for Growth was incorporated as a 527, including a federal PAC, in 1999 to support pro-business candidates. After the 2006 election, during which the Club expended $8.15 million through two 527 committees and $2.76 million through a PAC, the group organized a new entity under section 501(c)(4). In an email, Club president Patrick J. Toomey assured members that "The new Club will continue the aggressive and effective pro-growth advocacy made famous by the old Club's efforts. . . [and will] have a significant new ability to run advertisements that directly call for the election or defeat of candidates for Congress. The vast majority of non-profits, including the previous Club, could not run such ads. . . Unlike in the past, your donations to the Club will not be disclosed to the public, except in very limited circumstances" (quoted in Weissman and Ryan 2007, 10).[6] Other groups shifting activity to their 501(c) arms include the League of Conservation Voters (Weissman and Ryan 2007, 10) and Planned Parenthood (Mullins 2008).

While most 501(c) political activity is not disclosed at all, the MCFL exception gives us one area in which to compare activity in 2008 to 2004. Recall that under the MCFL ruling, nonprofit, non-stock corporations organized for

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[5] According to *Journal* reporter Brody Mullins, the survey contacted approximately 35 groups who were active in the 2004 cycle; of those, 20 cited spending figures for 2004 and projections for 2008 (Mullins 2008).

[6] Notably, however, the Club for Growth has continued using its 527 in 2008, funding nearly $1 million of electioneering communications. The new (c)(4) has only spent $157,777 in reportable expenditures. CFI's Steve Weissman reports that the Club has reconsidered its plan to disband the 527 (Weissman 2008).

ideological purposes are allowed to make independent expenditures on express advocacy, as long as they do not accept funds from unions or corporations. MCFL expenditures must be reported to the FEC, but the donors who funded them do not.[7] From January 1, 2005, through March 7, 2006, a single 501(c)(4) reported independent expenditures in House primaries (and special elections): Texas Right to Life expended $441 on a voter guide endorsing six candidates. In the same time period during the 2007-08 cycle, six entities have spent a combined $594,746 on MCFL expenditures.[8] The six groups are the Club for Growth ($47,845), Defenders of Wildlife ($22,515), the League of Conservation Voters Action Fund ($426,759), NARAL Pro-Choice America ($43,468), the Pechanga Band of Mission Indians ($25,000), and Women's Voices Women's Vote Action Fund ($142,084). Notably, three of these groups were also very active in the 2006 general election, so their activity in 2007-08 appears to be an extension of an earlier tendency.

Increased 501(c) activity is also evident at the presidential level. Through Super Tuesday, 2008, only four MCFL nonprofit corporations had made independent expenditures to support or oppose a candidate in the presidential primaries. These entities were Common Sense Issues, Friends of Earth Action, NARAL Pro-Choice America, and PowerPac.org. Together, these groups' independent expenditures totaled $564,328. This, incidentally, is a very small proportion of total independent expenditures ($8.5 million), but it represents a notable shift in comparison to 2004, when there were no MCFL independent expenditures reported (for the contested Democratic nomination) prior to Super Tuesday.

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[7] Any individual or entity, including an exempt nonprofit corporation, whose aggregate annual independent expenditures total $10,000 must disclose such expenditures (or commitments to make them) within 48 hours. Within 20 days of an election, however, the threshold for rapid reporting decreases to $1,000 and the expenditure must be reported within 24 hours. Any group that makes or "has reason to expect" they will make expenditures of $50,000 or more is required to file electronic reports of their expenditures, with the exception of groups who support Senate candidates only. These reports are indexed and available on the FEC's web site.

[8] These figures are based on a tally of expenditures reported electronically on FEC Form 5. For each entity reporting an independent expenditure, I viewed at least one individual report to confirm that the filer was an exempt nonprofit corporation, as indicated on Line 2 of Form 5. This method surely underestimates IEs by 501(c)(4)'s, as it excludes any expenditures reported on paper only; however, this only excludes activity by entities whose aggregate expenditures were less than $50,000. There were no electronically-reported expenditures to support or oppose Senate candidates during the time periods compared; this may be because any committee that only participated in Senate elections is not required to file electronically.

Bundling Disclosure

The fundamental argument for campaign-finance disclosure is that it is crucial for citizens' evaluations of political messages and actors. To judge whether a claim is valid, one needs to know who is making (or paying for) it. To judge whether an official is corrupt, one needs to know his or her incentives, including fundraising incentives. The shift of political activity into the dark shadows of the nonprofit world is thus significant, and it will make it more, not less, difficult for citizens to sift through the competing messages about candidates in 2008. But there is good news in this department, too. The Honest Leadership and Open Government Act of 2007 included a provision to require explicit disclosure of contributions "bundled" by lobbyists.

Bundling occurs when a third party solicits campaign contributions from others, then forwards those contributions to the candidate. Given the fundraising techniques and technology employed today, it is probably uncommon for a fundraiser to literally deliver a bundle of checks, although before the age of internet-fundraising and credit-card contributions, that was certainly the norm.[9] But even in the absence of a physical bundle, campaigns keep track of who raises how much from whom. Perhaps the most well-known example of bundling is President George W. Bush's multi-tiered fundraising apparatus, including "Pioneers" (who raised a minimum of $100,000 each) and "Rangers" (who raised at least $200,000 each).

Representative Chris Van Hollen (D-MD), the leading proponent of bundling disclosure in the House of Representatives, explained the problem of bundling by lobbyists: "In and of itself, there is nothing wrong with this practice of aggregating the contributions of others. However, when the bundling of contributions is done by someone who lobbies on behalf of a particular interest, this practice enables the lobbyist to enhance his or her stature with an official. This enhancement increases their opportunity to advance the cause of a special interest" (U.S. House of Representatives 2007, H9209).

Previously (and pending adoption of regulations pursuant to the new legislation), any contribution delivered or forwarded to a campaign committee by a registered lobbyist (or anyone else) was reported with information about the "conduit" attached to the record. The new law extends this in two ways: first, by requiring that contributions "credited" to a lobbyist (though not necessarily handled by him) as part of campaign fundraising operations be disclosed as bundled contributions, and, second, by requiring such information to be reported on a separate schedule of committee's disclosure filings.

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[9] In my previous life as a fundraising operative for Democratic candidates, I enjoyed opening the bundles that came regularly from EMILY's List and the National Jewish Democratic Council.

The primary goal of the bundling-disclosure provision was clearly articulated by its sponsors during congressional debate: to provide more information to the public about who butters the bread of their elected representatives. House sponsor Van Hollen emphasized that the bundling-disclosure provision "creates greater *transparency* at the intersection of campaign contributions and public policy" (U.S. House of Representatives 2007, H9209, emphasis added). On the Senate side, Sen. Barack Obama (D-Illinois) remarked that "we will ensure that our laws *shine a bright light* on how lobbyists help fill the campaign coffers of Members of Congress" (U.S. Senate 2007, S10691, emphasis added). But what might be its unintended consequences? Surely, there are those who believe that political activity is like mold – it loves the dark. This is the logic behind predictions of the surge in 501(c) activity, and it is evidenced in Pat Toomey's email lauding the privacy donors to the new Club for Growth will enjoy.

By this logic, one should expect the new disclosure requirements to exert a chilling effect on fundraising by lobbyists for federal candidates (see Hayward article on bundling in this issue). Such an effect would be difficult to demonstrate objectively, as fundraising activity *before* the disclosure rules can only be measured imperfectly. Nonetheless, a chilling effect is exactly what some insiders have predicted. For example, *National Journal* notes that "some House members fret that bundling disclosure would . . . make it harder for them to raise money" (Carney 2007a).

The mechanism by which disclosure would inhibit fundraising are varied. Some accounts imply that the only thing that will change will be the timing of lobbyists' fundraisers. *Congressional Quarterly* reports, "[Lobbyists' and lawmakers'] key concern is to avoid fundraising that appears tied to pending legislation. Timing is more sensitive now that lobbyists must report how much they bundle for candidates, given a precedent earlier this decade in which the House ethics committee admonished a powerful member for fundraising on the eve of a Senate-House conference committee" (CQ Politics 2008). Others note that lobbyists will be deterred by the new legal risk associated with fundraising. "For the first time, there is liability, both civil and criminal, for lobbyists who make gifts under this law," one lawyer-lobbyist has commented (Carney 2007b). Another Washington insider suggests that the paperwork burden will discourage lobbyists (Bolton 2007). For others the potential publicity itself is potentially a deterrent (Kaplan 2007).

The distribution of the chilling effect. Of course, if disclosure does indeed dampen lobbyist fundraising, one should expect the effect to be distributed neither evenly nor randomly across federal candidates. The "burden" of bundling-disclosure will be borne, naturally, by those candidates who previously benefited from it most. (I use quotes around the word "burden" because it is probably more accurately characterized as the reduction of a prior advantage.) One must first consider what kinds of candidates are likely to attract lobbyist contributions, either because lobbyists want to make nice or because the candidates can extort support. These are, of course, incumbents. While lobbyists, like any political actor, have personal goals they may wish to achieve, their professional goals are indubitably to advance the interests of their clients.

So while some lobbyists on some occasions may very well bundle contributions for an underdog candidate because they share some fundamental belief, or because they went to college together, or some other innocuous reason, most lobbyists are usually interested in helping incumbents because incumbents can help their clients. In particular, they are usually interested in supporting incumbents from the majority party, because those incumbents control the committees and the flow of legislation. Of course, some lobbyists may judge that it would be in their clients' long-term interests for a particular challenger to win, or for the out-party to gain a majority. But for matters pending in the current Congress, lobbyists need to deal with the current members of the sitting majority. Thus, *Roll Call* reported that “many top Democratic lobbyists and senior House Democrats raised strong, if quiet, objections to matching the [bundling-disclosure provision passed by the Senate], arguing it would chill the party’s fundraising efforts just as a newfound majority status was starting to pay off. They said vulnerable Democrats could get hit the hardest” (Newmyer 2007).

Incumbents without a strong fundraising base should feel relatively more "pain" than those for whom lobbyist contributions constitute a small proportion of receipts. Such concerns reportedly motivated opposition to bundling disclosure by some black and Hispanic members of Congress. As one congressional correspondent explained, "It can be difficult for lawmakers who represent poorer districts and those who are not affluent to raise money because they lack personal connections to wealthy individuals. Such members often have to spend significantly more time to raise the same amount of money as affluent lawmakers" (Kaplan 2007). One lobbyist predicted, “Some members . . . will say, ‘I’ll have my contract fundraisers work harder and pay them more money’" (Bolton 2007). But this tack works only when the candidate has plenty of his or her own prospects for those contract fundraisers to target.

Of course, these are mere predictions based on logic. Are there any precedents or early data one can examine to bolster or undermine these predictions? Not yet. Even after the cycle plays out, the best evidence will probably be anecdotal. The only statistical evidence I can imagine would involve a comparison of contributions delivered by a conduit, which does not cover all bundling, but does cover some. Data collection would be arduous, but one could examine itemized contributions, identify those delivered by a conduit, then identify the conduits who are registered lobbyists. One could then compare amounts reported in 2008 to amounts reported in 2006, with analysis that controlled for variables like political party, majority status, and committee chairs. As for precedents, a scouring of the literature turned up no previous studies of the impact of disclosure on campaign fundraising.

Enforcement

At press time, a standoff in the U.S. Senate has left the Federal Election Commission without a quorum of commissioners since the beginning of the year. Nominations for four vacancies are pending, and until at least two new commissioners are approved, the FEC cannot approve new rules, issue advisory opinions, or take any other action that requires a commission vote.[10] While the commission cannot take official action, the staff is still performing its functions and the two remaining commissioners (one Democrat and one Republican) continue to discuss pending matters and offer non-binding guidance (Mosk 2008).

The FEC is often ridiculed as the "Failure-to-Enforce Commission," so there are surely those who find a hobbled FEC little different from a fully-manned FEC. But, it is not clear—and, in my opinion, doubtful—that congressional campaigns will be significantly affected by the two-legged FEC.[11] At press time, there are only four advisory opinions outstanding, none of which touch on major campaign issues. It is impossible to determine how many enforcement actions are pending and how they might color the upcoming congressional elections, as enforcement actions remain confidential until resolved, but it would be terribly unusual for an enforcement decision to dramatically alter the landscape of congressional elections.

There are seven rulemaking projects currently stalled, including the bundling disclosure rules, but none of them strike at the core of congressional elections. If the Senate impasse drags on through the summer, candidates (and others) may be

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[10] The heart of the disagreement is the re-nomination of Hans von Spakovsky, a former official in the Civil Rights Division of the Department of Justice, who served 18 months on the FEC as a recess appointment. Senate custom has been to approve FEC nominees in a bloc, and Republicans are insisting on following this tradition; the Democratic majority so far refuses to do so, preferring instead to vote on each nomination individually. Individual votes will almost certainly result in a defeat of the von Spakovsky nomination.

[11] In fact, the most notable consequence thus far appears to be uncertainty over whether Senator John McCain can withdraw from the presidential matching-funds program. In August, 2007, McCain was certified eligible to receive public matching funds. In December his campaign acquired a bank loan of $1 million, the terms of which creatively use future matching-fund receipts as collateral, but only as a backup to raised contributions if the campaign flags. McCain's campaign argues that the terms were crafted very specifically <u>not</u> to obligate McCain to participate in the public-funding program (and abide by its spending limits), despite seemingly clear FEC rules on the matter. The quorum-less FEC is unable to give an official response to McCain's pending request to withdraw from the public funding program.

forced to operate conservatively, hewing close to practices clearly condoned by law and precedent, as their requests for advisory opinions await commission action. In other words, the vacancies on the FEC should keep campaign activity closer to the status quo than it might otherwise be.[12]

The Internal Revenue Service also has a hand in campaign-finance enforcement through its jurisdiction over exemptions from federal tax for non-profit organizations. To maintain their tax-free status, 501(c) entities must comply with rules governing their political activity. The IRS issues general guidance on political activity in the form of fact sheets, revenue rulings, and publications. It also conducts audits of individual organizations. And in 2004, the IRS launched a Political Activities Compliance Initiative (PACI), targeting 501(c)(3) charities and churches, to "intercede quickly in instances of alleged prohibited political activity, address allegations of noncompliance in a manner that was balanced and even-handed, educate the exempt organizations, and prevent future violations of the law" (Internal Revenue Service 2006, 2). In 2006, the IRS stepped up its oversight of 527 organizations, sending "compliance check letters" to 527s who claim exemption from disclosure requirements because they are state or local organizations. These organizations are now subject to IRS review of their activities to confirm their local status.

For the 2008 cycle, the IRS launched a smaller-scale effort to educate 501(c)(4) entities about the rules governing their political activity, while continuing PACI and 527 monitoring. Although the IRS has specifically stated that the education effort is not a compliance initiative, the director of exempt organizations has said of 501(c)(4)s (cue ominous music), "We are prepared to be looking at these cases" (Doyle 2007). The education effort itself may prevent some organizations from inadvertently crossing into forbidden campaign territory. The knowledge that the IRS is watching may also deter intentional forays into politics, or at least forays deep enough into the political thicket to bring an entity under closer IRS scrutiny. After all, PACI was not toothless: in 2004, the IRS stripped three organizations of their tax-exempt status, levied an excise tax on one organization, and issued written advisories to 55 others, noting that they had engaged in prohibited political activity and warning them that additional violations could result in revocation of their tax-exempt status.

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[12] For example, one pending advisory opinion request (AO 07-32) seeks clarification on whether contribution limits would apply to a committee organized solely to make independent expenditures using contributions from individuals. The *Washington Post* reports that the group, SpeechNow.org, "may treat the FEC's inability to provide an opinion as a denial" (Mosk 2008, A13).

Partisanship and the Flow of Funds

The individuals and organizations that fund political activity are constrained by the law but also guided by their political goals. As the discussion of lobbyist bundling above made clear, some contributors (lobbyists among them) are motivated by their immediate interest in public policy. Such contributors have a strong incentive to curry favor with candidates who can help them achieve their legislative goals. Thus incumbents raise money more easily than challengers, and incumbents from the majority party raise money more easily than incumbents from the minority party (Ansolabehere and Snyder 2000, Cox and Magar 1999).

In 2006, Republicans held a majority of seats in both chambers of Congress. Democrats took over both the House and the Senate after the 2006 election, so as the 2008 cycle unfolds it should be no surprise that they are enjoying the perks of the majority. In fact, analyses of campaign receipts disclosed through December 31, 2007, reveal that the Democratic advantage in 2008 fundraising exceeds the Republicans' advantage in 2006. In House races, Democratic incumbents have outraised Republican incumbents by 29%, a wider margin than the 16% funding advantage enjoyed by Republican incumbents after the 2005 year-end reporting period. The Democratic fundraising advantage is particularly striking in Republican-vacated open seats. Usually, the retiring party's candidates enjoy an edge in fundraising, but in 2008 Democratic candidates are outraising Republicans in both Democratic- and Republican-held seats (Campaign Finance Institute 2008).

The fundraising advantage extends from candidates to the congressional campaign committees. The Democratic Congressional Campaign Committee (DCCC) and the Democratic Senatorial Campaign Committee (DSCC) have both outraised their Republican counterparts in 2007-08. As of January 31, 2008, the DSCC had raised $59.3 million, compared to $35.4 million for the National Republican Senatorial Committee, while the DCCC had raised $71.5 million, compared to $53.3 million for the National Republican Congressional Committee (Federal Election Commission 2008a).

Because fundraising is in some sense self-perpetuating – it take money to raise money, and those who raise money early find it easier to raise even more later – the early numbers spell serious trouble for the Republicans, especially Republican challengers. Republicans already face a number of structural disadvantages in the 2008 cycle. For example, they are defending more Senate seats (only 12 Senate seats up in 2008 are held by Democrats, compared to 23 held by Republicans) and fielding fewer incumbents (29 Republicans have announced retirement from the House, compared to six Democrats). Serving in the minority is yet another disadvantage, impeding Republicans' ability to raise money from strategic contributors.

Conclusion

Every two years the financing of federal elections changes, sometimes subtly and other times more dramatically, sometimes necessarily in response to new rules and other times innovatively in response to old ones. In the coming 2008 cycle, the new congressional majority will enjoy a significant fundraising edge, social-welfare organizations will be more engaged in political interventions, unions and corporations will re-enter the pre-election advertising scene, and lobbyist contributions will come into the sunlight. Vacancies on the Federal Election Commission will likely stifle the creativity of candidates and campaign financiers, as innovations cannot be sanctioned until a quorum is available to approve advisory opinions. The non-profit education program of the IRS may also temper the anticipated rush to shift political activity to social-welfare organizations. In sum, then, my best guess is that these changes will prove marginal but, as has been the case with each biannual round of campaign-finance developments, very interesting to watch as they unfold in real time.

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