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The \$200 Campaign Finance Fix

The presidential public financing system, created in 1974 in the wake of the Watergate scandal, has served the country well for most of its existence. The system became outdated and outmoded, however, as Congress failed for more than three decades to modernize it. Today it is no longer viable.

Luckily, the pathway to the future, and to a revitalized public financing system, has been provided by President-elect Barack Obama. First, there is Obama's astonishing breakthrough in raising small contributions on the Internet. He has also recognized the need for a new presidential public financing system, stating in June that he was "firmly committed to reforming the system as president." His campaign reiterated this commitment on Oct. 31.

A recent USA Today-Gallup Poll found "wide support for public financing of presidential campaigns," noting that more than 70 percent of respondents supported public financing for presidential elections and that only one in five said the system should be eliminated.

While the number of people using the tax-form check-off to fund the public financing system has shrunk over the years, the check-off results are not a poll. They do not indicate whether citizens believe the country needs the presidential public financing system. The answer to that question lies in real polls such as the one cited above.

During his campaign, Obama raised more than \$300 million in contributions of \$200 or less through mid-October, according to the Campaign

Finance Institute, with most of those donations coming in online. (This total includes multiple small contributions made by a donor that aggregated to more than \$200.)

His remarkable success, however, was the exception in the presidential race; for other major candidates, bundlers and the larger contributions they raised were the rule.

Obama himself raised more than \$200 million in contributions of \$1,000 and more, with bundlers playing the principal role in soliciting these funds. Nevertheless, Obama's breakthrough in small-donor Internet fundraising provides the path to a future in which small donors become the main source of private contributions for presidential candidates.

Internet fundraising promotes democracy. It allows candidates to raise large amounts of small, broad-based contributions -- not those that are tied to influence-seeking -- at almost no expense and with little or no time required from the candidates. It increases citizen involvement in the political process.

We should build on this opening by implementing four measures to create a new public financing system that presidential candidates would again see as advantageous.

- **Move the small donor to center stage for all candidates.** Presidential primary candidates should receive a match of \$4 in public funds for each dollar raised, up to a maximum of \$200 per donor, with no



- matching funds provided for contributions from a single donor that aggregate to more than \$200. This would create powerful incentives for donors to give and candidates to raise small donations online. A \$200 contribution, matched 4 to 1, would become just as valuable as a \$1,000 contribution, and the importance of bundlers would significantly diminish.
- **Provide realistic spending limits.** Presidential candidates stopped using the public financing system when the spending limits failed to reflect the costs of a modern campaign. Realistic spending limits remain important, however, to prevent arms-race fundraising and to constrain the role of bundlers and influence-money in presidential elections.

The spending limits in the current system should be increased for the primary and general elections from current levels -- \$50 million and \$84 million, respectively -- to \$250 million per election. This should be accompanied by an exemption from the spending limits for aggregate contributions of \$200 or less per donor to further increase the importance of small donors and to provide candidates with greater flexibility to meet the costs of their campaigns.

- **Reduce the individual contribution limit.** A presidential candidate who participates in the primary system should have to abide by a lower contribution limit than the existing maximum, \$2,300 per individual, to take effect once the candidate has raised a threshold amount of seed money to get started. Under this approach, the relative importance of \$200 contributions would be further increased, and the importance of bundlers further reduced.

- **Close the loophole for joint fundraising committees.** This year, both major-party presidential nominees used candidate and party joint fundraising committees to skirt the limits on contributions to candidates. John McCain solicited contributions of as much as \$70,000 per individual and Obama of as much as \$30,800 per individual for these committees; they raised \$177 million and \$172 million, respectively, according to Public Citizen.

To donors, limited by law to giving \$2,300 per candidate per election, contributions to joint committees are equivalent to making the much larger contribution directly to candidates. To end this circumvention, candidates should be prohibited from setting up joint candidate-party fundraising committees.

Public financing is an optional system, and one we need to improve. Presidential candidates ought to have the choice of running competitive campaigns based on small contributions and public funds rather than having to rely on bundlers, special interests and larger contributions.

The writer is president of Democracy 21, a nonpartisan public policy organization. This column is the second in an occasional series on policy issues facing the Obama administration.



December 3, 2008

To: Mark Alexander
Bob Lenhard
From: Fred Wertheimer
Don Simon
Re: FEC, Presidential Public Financing and other Campaign Finance Issues

This memorandum follows up on our recent conversation and summarizes our positions on the issues we discussed.

1. Presidential public financing legislation. As we noted, our number one priority is repairing the presidential public financing system. A unique opportunity exists to fix the presidential system next year:

- President-elect Obama has said he is “firmly committed” to repairing the system (USA TODAY op-ed, June 20, 2008) and the Obama campaign said that Obama has made a commitment to make fixing the system a priority as president (Boston Globe, October 31, 2008);
- a USA TODAY/Gallup Poll released just before the election found “wide support for public financing of presidential campaigns,” stating that more than 70 percent of the public supports public financing for presidential elections and only one in five said the system should be eliminated;
- strong bicameral, bipartisan sponsorship exists for the reform legislation, with lead House sponsors David Price (D-NC), Chris Van Hollen (D-MD) and Mike Castle (R-DE), and lead Senate sponsors Russell Feingold (D-WI), Richard Durbin (D-IL) and Susan Collins (R-ME) [Obama and Representative Emanuel also were lead sponsors of the bill in the 110th Congress];
- there are significantly increased Democratic congressional majorities, including 58 Democratic Senators, which greatly increases the ability to break a filibuster;
- an effective reform coalition is working to enact the legislation, including a national organization of 200 business leaders and university presidents; and
- the model for a new public financing system was powerfully demonstrated by Obama’s extraordinary breakthrough in raising small donations on the Internet.

We are providing separately an op-ed written by Fred for *The Washington Post* that sets forth keys to reforming the presidential system.

We have worked in the past with Chris Lu on campaign finance issues, in his capacity as Legislative Director for Senator Obama, and have been discussing the



legislation to repair the presidential public financing system with Bob Bauer, in his capacity as the campaign finance lawyer for the Obama campaign.

History has shown that when major campaign finance reform legislation is ready for enactment, as is the presidential public financing reform legislation, it is essential to move expeditiously before congressional opponents have time to organize political and ideological opposition and block the legislation.

This is precisely what happened in 1977 and again in 1993, when substantial delays in considering major campaign finance reform legislation during those respective first years of new presidencies led to the reforms being permanently blocked by Republican-led Senate filibusters.

Our goal is to have the presidential public financing reform bill enacted in 2009, with House action completed by July 4th.

We recognize, of course, that there are a number of major Administration priorities that will be focused on during the first year, starting with the economy, and including health care and energy.

We believe, however, that the legislative effort to repair the presidential public financing system can be put together quickly in the House without much time being required in Committee or on the floor, and could be worked into the schedule to fill an opening between the major floor battles that occur. We also believe that once the bill passes the House, we would start out with the votes necessary to break a filibuster and could move the legislation relatively quickly through the Senate.

2. Appointments to the FEC. The Federal Election Commission has been a largely dysfunctional agency during much of its thirty-four year history that has too often undermined effective implementation and enforcement of the nation's campaign finance laws.

- The FEC created the soft money problem in the first instance, by its failure during the 1980's and 1990's to require the political parties to spend only hard money for their federal campaign activities. Ultimately, this resulted in a \$500 million soft money scandal and required the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA) to overcome the agency's failure to properly enforce the law. In upholding BCRA in *FEC v. McConnell*, the Supreme Court directly assigned blame to the FEC for the soft money problem, citing the agency's "allocation" system as an invitation to circumvention of the campaign finance laws.
- The FEC has repeatedly failed to properly implement BCRA, enacted to end the soft money scandal, and has had the courts strike down multiple regulations issued by the agency that improperly interpreted the law. Six and a half years after



the enactment of BCRA, the FEC still has regulations on its books that do not comply with the law, according to the federal courts.

- By abandoning in 2004 an effort to promulgate timely new regulations to address the problem of 527 groups spending soft money to influence federal elections, the FEC failed to prevent hundreds of millions of dollars of soft money from being spent illegally by 527 groups to influence the 2004 presidential elections and the 2006 congressional elections. Even though years later, the FEC ultimately took enforcement action against a number of 527 groups that had spent soft money to influence the 2004 presidential election, the fines were a relatively small fraction of the illegal spending. While these enforcement actions played an important role in substantially reducing the spending of 527 groups to influence the 2008 presidential election, the FEC has still not effectively stopped the soft money spending by 527 groups to influence federal elections.
- The agency recently deadlocked on the issue of whether an ad that included the tag line “Obama – a candidate whose word you can’t believe in,” is the functional equivalent of express advocacy. The failure of the FEC to treat this ad dealing with a federal candidate right before the election as a campaign ad subject to federal campaign finance laws is indefensible. It also demonstrates that the FEC with its current membership does not have a majority ready to find that even the most blatant campaign ads to influence a federal election are subject to federal campaign finance laws.

At the heart of the agency’s fundamental problems over the years has been its appointment process, which in practical application allows the congressional leadership of both parties, in conjunction with the national parties, to name the FEC Commissioners.

In this approach, the President becomes simply a pass through, taking the names provided by congressional leaders and passing them on to the Senate for confirmation as Commissioners.

This system has resulted over the years in many Commissioners who have approached their job from a partisan perspective, or who have been ideologically opposed to the laws they are supposed to enforce. One Republican appointee, for example, was publicly on record as saying that the campaign finance laws were unconstitutional and should be repealed, at the time he was confirmed.

This dynamic must be broken and a new system needs to be created that allows for appointments to the FEC that are free from the iron grip of congressional leaders.

The President needs to be choosing from a broader category of potential nominees that include former federal and state judges, law enforcement officials, ethics and campaign finance enforcement and oversight officials and others with the experience and qualifications to help lead an agency with a critical role to play in maintaining the honesty and fairness of our elections and political process.



An opportunity to change the long-standing, flawed appointment process will present itself early in the new Administration. There is one Commissioner whose term has expired and is in holdover status. There are two other Commissioners, whose terms will expire in April, 2009.

Thus, the new President will relatively quickly have the opportunity to change the appointment process with half of the seats on the FEC available for new appointments.

And it is the appointment process that must be changed if we are to eliminate the problems that have been endemic to the agency and begin the process of creating an effective and publicly credible campaign finance enforcement agency.

If a serious change in the appointment process is not made at this time, we will be left with a status quo agency and little hope for eliminating the fundamental problems that have dogged the FEC since its earliest days. These problems culminated earlier this year with the indefensible and absurd position of having no functioning enforcement agency for six months in the middle of the 2008 presidential election.

In order to change the process of having congressional leaders name the FEC Commissioners, we recommend that the President establish a bipartisan blue-ribbon panel or advisory group, potentially including some independents, to submit potential FEC nominees to the President for his consideration in submitting FEC nominees to the Senate for confirmation.

The public credibility of the bipartisan panel would be strengthened by including distinguished and publicly recognized individuals in the group. Such credibility also will help to overcome the concerns and political objections likely to be raised by defenders of the current appointment process. For example, the panel could include retired judges, academics, law enforcement officials, state ethics officials, or other individuals of established experience and integrity. The panel should publicly propose multiple names for each position to the President for his consideration as nominees.

A merits-selection model for the appointment of FEC Commissioners would attack the central problem of the agency, which has been the naming too often of Commissioners whose first loyalty runs to the congressional leaders and political parties that choose them to serve on the Commission, or who are ideologically opposed to the laws they are supposed to enforce.

There is legislation that has been introduced, which would more fundamentally restructure the FEC in order to address other key issues – such as the evenly divided partisan composition of the agency; its inability to make findings on its own that the law has been violated or to impose penalties on its own, powers that other federal agencies have; its far too slow enforcement time frames, and the like.



Even in the absence of such legislative restructuring, however, the President can make essential, major improvements in the functioning and effectiveness of the agency by changing the appointment process next year and choosing his nominees from a new, broader pool of qualified candidates than is presently the practice.

3. Soft money spending by 527s and outside groups. There is a continuing problem with the spending of soft money to influence federal elections by outside, independent groups, such as 527s and section 501(c)(4) groups whose major purpose is to influence federal elections.

This is due, in part, to the fact that law has not been updated to take account of court decisions and more clearly delineate how it applies to such outside groups.

The key issue here involves when a group becomes a federal “political committee” and therefore has to comply with federal campaign finance laws. This, in turn, is controlled by whether the group has a “major purpose” to influence elections, and has made “expenditures” to do so. The statutory language relating to these issues has not been modified and updated since the law was enacted in 1974, and fails to take account, for example, of major changes in the definitions that have resulted from Supreme Court rulings and evolving campaign finance practices.

The Administration should support legislation to modernize and update the campaign finance laws to address new problems that have arisen in the field, such as the increased soft money spending by 527 groups to influence federal elections.

4. Pending court cases. There are three pending court cases of potentially major significance.

The first, *Citizens United v. FEC*, is pending before the Supreme Court and will be argued this spring. It involves a challenge to the constitutionality of the disclosure provisions of BCRA, which apply to expenditures made for “electioneering communications.” The constitutionality of these disclosure provisions was subject to a facial challenge in the *McConnell* case and they were upheld by an 8 to 1 vote.

Disclosure laws have typically been upheld by the Supreme Court under less demanding standards of scrutiny than other campaign finance regulations. If the Court were to depart from its past practices on this score, it would have major implications not only for campaign finance disclosure laws, but also for other disclosure regimes, such as lobbying disclosure. Thus, the case has important ramifications.

The case is currently being handled by the Solicitor General’s office and the government’s brief is due in early February. There is a need to ensure that appropriate attention is given to this case during the transition by the incoming Obama Administration, and that the new Solicitor General recognizes the importance of this case.



The second case (*Speech Now v. FEC*) challenges the constitutionality of individual contribution limits as they apply to outside groups which engage only in independent expenditures.

If this case is lost, it would fundamentally undermine the effort to require 527 groups that are spending money to influence federal elections to comply with federal campaign finance laws, since the groups, even if required to register as political committees, would still be free to use unlimited individual contributions to pay for campaign ads to influence federal elections.

While this case is focused on challenging the limits on individual contributions to 527 groups that only make independent expenditures, if the plaintiffs are successful, the case can be expected to be followed by a constitutional challenge to the prohibition of corporations and labor unions making contributions to such 527 groups.

The third case (*Republican National Committee v. FEC*) challenges the constitutionality of the ban on party soft money as applied to various party activities that do not involve expenditures on express advocacy or the functional equivalent of express advocacy.

Carried to its logical extreme this challenge if successful would not only open the door to national parties again raising and spending unlimited soft money contributions from corporations, wealthy individuals, trade association, labor unions and others, but it would also open the door to federal candidates doing the same thing.

Both the *SpeechNow* case and the *RNC* cases are pending in federal district court in Washington, and are in their early phases. Both cases are extremely important to the future effectiveness of the nation's campaign finance laws in preventing corruption and the appearance of corruption regarding government decisions and actions.

In both cases, the FEC is the defendant, and the agency's Office of General Counsel is handling the defense of the statute. In recent years, FEC lawyers have done excellent work in vigorously defending the law as against many challenges that have been brought.

There is always a possibility that some FEC Commissioners might try to interfere with a vigorous defense of the statute by the agency's lawyers. While we have no reason to believe that this has occurred in the past, nevertheless, the Administration should be vigilant to ensure this does not happen in the future. The Administration should be prepared to have the Department of Justice step in to defend the law, if circumstances warrant.

The Administration should carefully track these cases and be prepared to take whatever steps that would be helpful in winning them.

The stakes are enormous in these three cases.



If the RNC case is lost, it will represent a return to the dark ages of corrupting campaign finance contributions fundamentally undermining the integrity and credibility of government decisions and federal office holders, at the enormous expense of the American people.