Before the United States Senate
Committee on Rules and Administration
Hearing on S. 1285, the "Fair Elections Now Act"

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Chairman Feinstein, Ranking Member Bennett, and members of the Committee, thank you for this opportunity to testify on S. 1285, the "Fair Elections Now Act", which proposes taxpayer financing for Senate election campaigns. My name is Steve Hoersting, Vice President of the Center for Competitive Politics, a non-profit organization promoting dynamism in campaign finance. I am a former general counsel to the National Republican Senatorial Committee under then-Chairman Sen. George Allen and served as chief counsel to former Commissioner Bradley A. Smith of the Federal Election Commission.

We have all heard the arguments repeatedly. But taxpayer financing of election campaigns does not improve citizens' perceptions of government; does not increase the competitiveness of elections; does not lead to more political participation by citizens; does not lead to better representation in our statehouses and would not lead to better representation in Congress if adopted. Taxpayer financing is expensive, places non-participants at an unfair disadvantage, and, polls show, is not what the People want from their government or candidates.

The introduction of S.1285 is due in no small part to the resounding defeat of campaign expenditure limits suffered before the United States Supreme Court in the case of *Randall v. Sorrell*,[2] and many of the interests asserted by the State of Vermont in enacting expenditures limits are listed with the opening sections of S. 1285.[3]

The question is whether Congress should adopt a "voluntary" plan to achieve indirectly what the Supreme Court prohibited if mandated directly. And there is a question as to just how "voluntary" S. 1285 actually is, a topic I will address later in my testimony. But first I will address the argument that public financing improves citizens' perception of candidates and government.

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[1] I thank Paul Sherman and Michael Schrimpf for their assistance and suggestions.
[2] 126 S. Ct. 2479 (2006).
[3] *See* Fair Elections Now Act, S. 1285, 110th Cong. § 101 (2007)

Taxpayer financed campaigns do not improve citizens' perceptions.

"Campaign finance law is unique in jurisprudence because public opinion is deemed directly relevant for determining whether or not a law is constitutional."[4] Since the "appearance of corruption matters"[5] and is cited as a rationale in S. 1285, it is worth looking at survey data to determine American's impressions of taxpayer financing and the officeholders who accept or reject it.

Critics of privately financed campaigns -- the true "public" financing -- believe that candidates funded by voluntary contributions are overly dependent on private donors. Yet, the Democratic Party's most recent nominee, John Kerry (along with current Democratic National Committee Chairman Howard Dean) refused to take taxpayer subsidies for their 2004 presidential campaigns, and no one thought that decision suddenly made them more corrupt. Senator Obama, a sponsor of S. 1285, asked in a formal advisory opinion request[6] to the Federal Election Commission whether he may decide late in the 2008 presidential cycle whether to accept public funds or private funds. The FEC responded that he may, as a matter of law, make the determination later in the election cycle. Whatever Senator Obama may decide, no one believes he would become more corrupt or less corrupt the day after he makes the decision to accept or forgo public financing. The same is true of 2008 hopefuls John McCain, Rudy Giuliani, Hillary Clinton or John Edwards.

In fact, a recent Gallup Poll[7] shows that "Americans prefer presidential candidates to forgo public funding" by a large margin: 56%-39%. Only 20% think that the "record amounts" of money being raised to fund to 2008 contest will lead to a worse president. What is most interesting is that support for taxpayer financing drops as income drops – that is, the poorest are those most likely to oppose tax financing, by a 65% to 29% margin, once income falls below $30,000. This supports the longstanding suspicion that taxpayer financing of elections is a fancy of the well-to-do, not the indigent. This opposition is consistent with other polling on the topic, and consistent with dwindling national support for the tax earmark for the presidential campaign fund, where support has dropped to 9.12% of federal returns in 2005.[8]

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[4] David M. Primo and Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELEC. L. J. 23, 24 (2006).
[5] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[6] Federal Election Commission, Advisory Opinion 2007-03 (March 1, 2007)
[7] Lydia Saad, *Americans Prefer Presidential Candidates Forgo Public Funding: Most believe record money-chase won't result in worse or better president*, GALLUP NEWS SERVICE (April 27, 2007)
[8] Federal Election Commission, *Presidential Fund Income Tax Check-off Status*, 1992-2006 (May 2007) (showing almost steady decline from the date the fund was created, with a high of 27.5% of filers in 1976 and 28.6% in 1977 to 9.21% of filers in 2004 and 9.12% in 2005).

The Tarrance Group[9] asked in June of 1993 (sample: 1000): "Do you favor or oppose using taxpayer dollars to pay for political campaigns of candidates running for Congress? Those in favor: 18%; opposed: 77%; undecided: 5%.

A CBS News and *New York Times* Poll[10] asked in April 1997 (sample: 1347): "Some people have proposed public financing of political campaigns – that is, using only tax money to pay for political campaigns. Would you favor or oppose public financing to pay for political campaigns? Those in favor: 18%; opposed: 78%; undecided: 4%. They posed the same question in February 2000 (sample size 1225). Those in favor: 20%; opposed: 75%; undecided: 5%.

The passing of Clean Elections Campaign Acts themselves in the several states yielded similar results. The Arizona statute passed, by initiative, on the slender margin of 51%-49%.[11] In Maine, during a period of several years, the legislature defeated more than 40 campaign finance regulation bills. Advocates of taxpayer financing decided to circumvent the legislature and put the issue directly to the people in a ballot initiative in 1996.[12] Maine voters supported the Maine Clean Elections Act by a 56% to 44% margin because the reform organization "Public Campaign chose to emphasize the result not the mechanism, pouring the old wine of public financing into the new bottle of the 'Clean Money Option.'"[13] One advocate of taxpayer financing noted that: "In Maine … there was no organizational opposition, literally nobody on the other side. … Plus, Maine is a good-government state, and they had a lot of prominent people saying that they were for it. And with all that, they only got 56 percent."[14]

The most recent effort to enact taxpayer financed elections shows just how unpopular the idea is with voters. Last November, in California, Proposition 89, a taxpayer financing measure, was placed on the ballot, and voters overwhelmingly rejected it.[15] Just how unpopular was Proposition 89? More Californians rejected Proposition 83, which proposed increased penalties for sex offenders, than supported taxpayer financing.[16]

"Clean elections" is the reform that dare not speak its name. Asking voters to support "clean elections" is like asking them to support "a good economy," "honest politicians," "fair wages" or "effective health care." That it still has so little support is what is really remarkable. In Massachusetts, voters overwhelmingly approved "clean

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[9] Stephen R. Weissman and Ruth A. Hassan, *Public Opinion Polls Concerning Public Financing of Federal Elections 1972-2000: a Critical Analysis and Proposed Future Directions* (2005) available at http://www.cfinst.org/president/pdf/PublicFunding_Surveys.pdf
[10] *Id.*
[11] Patrick Basham and Martin Zelder, *Does Cleanliness Lead to Competitiveness? The Failure of Maine's Experiment*, WELFARE FOR POLITICIANS 73, 76 (John Samples, ed., Cato Institute 2005).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] http://www.sos.ca.gov/elections/sov/2006_general/measures.pdf.
[16] *Id.*

elections" by a "2-to1 margin."[17] When the legislature put the matter to the people again, in a nonbinding referendum, but asking voters whether they "support taxpayer money being used to fund political campaigns for public office in the Commonwealth of Massachusetts" the measure failed overwhelmingly.[18]

Congress has considered legislation for taxpayer financing of campaigns for congressional elections nearly every session since 1956, although no law has been enacted. In the Bipartisan Campaign Reform Act of 2002,[19] Congress mandated that the General Accounting Office ("GAO") study the results of the unique public financing programs in Maine and Arizona. The GAO studied several factors, many of which I will address below. But on the question of reducing the perception of special interest influence on government, the GAO found no benefit in taxpayer funded election campaigns:

The GAO asked the candidates "to what extent, if at all, they agreed with the statement that, once elected, candidates who participated in the public financing program have been more likely to serve the broader interests of their constituents as a whole and less likely to be influenced by specific individuals or groups. 67 percent of the non-participating candidates in Maine, and 68% in Arizona said "little or no extent", and for participating candidates only 42% in Maine and 56% in Arizona answered "great or very great extent." The GAO asked the citizens of Arizona and Maine the same question. Almost 2/3s in both states answered that there was no effect on their confidence in government or it was too soon to tell. Only slightly more in each state answered that public financing increased their confidence (17% in Maine; 21% in Arizona) than those who said it *decreased* their confidence (8% in Maine; 15% in Arizona).

Senator John McCain makes statements such as "I work in Washington and I know that money corrupts."[20] Science suggest otherwise. Professors Ansolobehere, de Figueiredo, and Snyder show that there is little or no evidence that campaign contributions have a systematic effect on policy outcomes at the federal level.[21] Stephen G. Bronars and John R. Lott confirm that campaign contributions are tied to ideology and do not buy legislative votes:

> Our tests strongly reject the notion that campaign contributions buy politicians' votes… . [O]ur estimates demonstrate a remarkable degree of stability in voting patterns over time, thus lending support to [other studies that show] it is costly for ideological politicians to alter their positions. Contrary to the usual presumption, the article shows that campaign

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[17] Rick Klein, *Future of Massachusetts' Campaign Finance Could Rest on Voting Results*, BOSTON GLOBE (Nov. 3, 2002).
[18] *Massachusetts Legislature Repeals Clean Election Law,* NEW YORK TIMES (June 21, 2003).
[19] Pub. Law. 107-155 (2002).
[20] George F. Will, *McCain and the Constitution*, WASHINGTON POST, May 11, 2006.
[21] Primo and Milyo, *supra* note 16.

> donations can be "rational" even when they do not alter how an individual politician votes.[22]

Polls show that Americans do not prefer taxpayer financing of elections, and prefer that their candidates not accept taxpayer financing for elections. Studies by political scientists, polling data, and a study by the United States government itself, show that taxpayer financed election campaigns do not improve citizens' perception of their government or their elected representatives in Washington. In fact, public financing schemes result in a decrease in trust in government, especially when compared to disclosure laws accompanying robust political spending. According to political science professors Jeffrey Milyo and David Primo:

> [P]ublic financing schemes are typically devised to limit overall expenditures, so they may have a greater impact on the beneficial aspects of political expenditures. When the smoke clears and "politics as usual" returns after reform, individuals may become even more disenchanted with their government. Therefore, the apparent counterintuitive finding that disclosure and public financing work in opposite directions on political efficacy is quite plausible. This is potentially the most policy-relevant finding [in the study], as well, since public financing is the type of reform most likely to be implemented in jurisdictions with mature regulatory regimes.[23]

There is no evidence then that taxpayer financed election campaigns deliver on that which they promise most. "Despite the fact that campaign finance reform is assumed to improve public confidence in government, for many reforms the connection is lacking. Certain reforms, such as public financing and spending limits, may even do *harm*."[24]

How Clean Elections statutes work

Clean election acts, and S. 1285 is among them, create a system favoring subsidized candidates over those who chose to opt out of public funding. Qualifying candidates receive a certain sum for primary and general elections, and, if facing an unsubsidized individual in the races also obtain matching funds for campaign expenses and for independent expenditures made by or no behalf of unsubsidized opponents. An unsubsidized individual will expend additional time (and costs) raising private funds, yet will face contribution limits. A private individual's choice to donate to an unsubsidized

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[22] Stephen G. Bronars and John R. Lott, *Do Campaign Donations Alter How a Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J. LAW & ECON. 317, 346-47 (1997).

[23] David M. Primo and Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELEC. L. J. 23, 35 (2006).

[24] Allison Hayward, *Campaign Promises: A Six-Year Review of Arizona's Experiment with Taxpayer-financed Campaigns*, GOLDWATER INSTITUTE, Policy Report No. 209 (March 28, 2006).

candidate's campaign is diluted, as any subsidized opposition candidate will receive matching funds based on the amount given.[25]

Like, S. 1285, to be eligible for taxpayer financing, a candidate must raise a number of $5 "qualifying contributions" from registered voters in his of her own district. At the outset of the campaign, each tax-funded candidate is allowed to raise a modest amount of seed money from private sources to assist in raising the necessary qualifying contributions (up to $100 per individual). … In return, the candidate receives a fixed sum of taxpayer money and agrees not to raise any private money during the primary or general election campaigns. If a tax-funded candidate is being outspent by a privately funded candidate, "the Act anticipates that possibility and provides a mechanism -- called 'matching funds' [or "Fair Fight Funds" under S. 1285] -- for the certified candidate to try to stay financially competitive with the opposing nonparticipating candidate.[26]

The GAO Study in Arizona and Maine

In the Bipartisan Campaign Reform Act of 2002, Congress mandated that the General Accounting Office ("GAO") study the results of the unique public financing programs in Maine and Arizona. The GAO noted that clean elections programs were intended to 1) increase voter choice by encouraging more candidates to run for office; 2) increase electoral competition by, and among other means, having fewer uncontested races; 3) reduce the influence of special interest groups and, thereby, enhance citizens' confidence in government; 4) curb increases in the cost of campaigns; and 5) increase voter participation (e.g., increase turnout for elections). It found that "in comparing the 2000 and 2002 elections to those in 1996 and 1998, GAO's findings regarding changes in electoral competition were inconclusive. Various measures—contested races (more than one candidate per race), incumbent reelection rates, and incumbent victory margins—reflect mixed results."[27] Term limits and redistricting were as much a factor in electoral changes as the Clean Elections Acts. "Average legislative spending decreased in Maine but increased in Arizona in 2000 and 2002, compared to previous years."[28]

Further, particularly in 2002, both states experienced increases in independent expenditures—a type of campaign spending whereby political action committees or other groups expressly support or oppose a candidate. The extent of spending for public policy messages without explicit election advocacy is not known.[29]

In sum, the GAO concluded that, with only two elections from which to observe legislative races and only one election from which to observe most statewide races, it is

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[25] Patrick Basham and Martin Zelder, *Does Cleanliness Lead to Competitiveness? The Failure of Maine's Experiment*, WELFARE FOR POLITICIANS 73, 76 (John Samples, ed., Cato Institute 2005).
[26] State of Maine Commission on Governmental Ethics and Election Practices, *A Candidate's Guide to the Maine Clean Election Act* (Augusta, ME: Commission on Governmental Ethics and Election Practices, 1999).
[27] United States General Accounting Office, GAO-03-453 *Public Funding of Political Campaigns* 1 (May 2003).
[28] *Id.*
[29] *Id.*

too early to draw causal linkages to changes, if any, that resulted from the public financing programs in the two states."[30]

Voter choice

While one goal of taxpayer financing was to encourage more candidates to run for office, the GAO found that the average numbers of state legislature candidates per district race in Maine and Arizona in the 2000 and 2002 elections were not notably different that the averages for the two previous elections, 1996 and 1998. The survey of candidates in Maine's and Arizona's 2000 elections found mixed perspectives as to which of two factors—public financing for campaigns or open seats due to term-limited vacancies—played a greater role (or equal roles) in attracting new candidates to run for office.

Electoral competition

Public financing programs were expected to make elections more competitive, but the GAO's analyses were inconclusive. On the three measures of competitiveness—increases in the percentage of contested races, decreases in incumbents' reelection rates, or reductions in the incumbents' victory margins—clean elections programs showed no improvement.

- The percentages of contested legislative races in Maine's primary elections were … unchanged in 2000 and 2002, compared with 1998, and were less than the percentage of contested legislative races in 1996. The percentages of contested legislative races in Arizona's primary elections increased in 2000 and 2002, compared with 1998; however, the percentage of contested races in 2000 was about the same as 1996.
- Although 85 percent of the contested legislative primary races in Maine's and Arizona's 2002 elections had publicly financed candidates, legislative incumbent reelection rates remained about the same in both states after public financing was introduced.[31]
- Candidate participation in the public financing programs in Maine and Arizona had no effect on competitiveness as defined by incumbent victory margins.[32]
- May 2003 GAO report on Arizona's Clean Elections found that access to public funding in 2000 and 2002, "did not affect incumbent re-election rates," and furthermore extending their approach to 2004 Hayward claims, "it would seem incumbent re-election rates actually *rose* for House seats".[33]

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[30] *Id.*
[31] GAO, *supra* note 19
[32] *Id.*
[33] Hayward, *supra* note 24.

Campaign spending

The GAO found that average legislative spending decreased. But both states, Maine and Arizona, experienced increases in independent expenditures. Because it is constitutionally protected and unregulated, the extent of spending for issue advocacy—public policy messages that do not refer to a particular candidate—is not known.

Decreased spending is often cited as a laudable goal, but some political scientists question whether it is something we should try to achieve. In fact, political scientists "have shown that political spending has positive effects on perceptions of government."[34] And Professor David Primo shows that aggregate spending on Congressional elections does not appear to hurt trust in government."[35]

Voter participation

Turnout in Maine's and Arizona's 2000 elections did not significantly differ from prior presidential years, and the GAO believes that public financing was not a factor in turnout. A survey in 2002 of voting age citizens indicated that 60% were unaware of the public financing systems in the respective states.

Other studies

Political science professors Jeffrey Milyo and David Primo conclude that systemic empirical analyses have resulted in virtually *no evidence* that public financing improves competitiveness, citizen participation in government, or citizen perceptions of government.[36]

Political scientists Patrick Basham and Martin Zelder's empirical analyses of the Maine 1998 and 2000 elections support the following conclusions:

- The overall average margin of victory in both senate and house races declined by a statistically insignificant amount.
- Races or open seats that featured tax-funded candidates did not clearly show that taxpayer financing leads to more competitive elections, in fact, demonstrated the reverse.
- Despite limits on campaign spending by incumbents, the advantages of holding office were almost impossible to overcome. Most victorious clean candidates were incumbents, and almost all clean candidates retained their seats. The limits on house incumbents' spending under taxpayer financing did not reduce their margins of victory. A comparison of the average margin of victory of the clean house incumbents' average margin of

[34] David M. Primo and Jeffrey Milyo, *Public Financing of Campaigns* 9, July 26, 2006, available at http://www.fed-soc.org/doclib/20070328_PublicFinancingofCampaigns.pdf
[35] *Id.*
[36] *Id.*

victory in 1998 found no statistically significant improvement in competitiveness.

- Term limits were relatively effective at opening up the state's electoral process to greater competition. Newly competitive seats benefited more from the introduction of term limits than from the introduction of taxpayer financing.
- Under a system of taxpayer financing, the number of contested primaries rose only marginally from 1998 and remained well below the level of prior, privately funded elections.
- The lure of subsidized campaigning did not attract a substantial number of independent and minor party candidates.[37]

Rather than making incumbents more vulnerable to challenge, the Maine Clean Elections Act has helped to entrench incumbents, thereby diminishing electoral competition.[38] The research of Michael J. Malbin of the Campaign Finance Institute and Thomas Gais on various earlier taxpayer financing efforts in other states found no evidence that taxpayer financing increases electoral competition.[39]

S. 1285 is unfair to non-participants.

The GAO found in its study that, irrespective of political ideologies or partisanship, state agency officials and other observers predict that—based on election strategies and other decisional factors—increasing numbers of candidates will choose to run with public funding in future years.[40] This is because lean elections acts so subsidizes one's potential opponent conditioned on one's activity in a private campaign that it borders on being coercive. As stated by a state party committee executive director, "There are a lot of [candidates] who are running under clean money because … [t]hey believe that if they don't, they'll be running at a disadvantage."[41] This raises questions about whether clean elections statutes are as "voluntary" as they seem.

S. 1285 provides "Fair Fight Funds" to participating candidates saving them the costs of fundraising. "It makes it virtually impossible for a challenger to beat a well-known incumbent," said one commenter on the Arizona clean elections law. "Every time

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[37] Basham and Zelder, *supra*, note 2 at 102-103.

[38] *Id.* Also, in presidential campaigns, John Samples of the Cato Institute:

> demolishes the argument that taxpayer funding has increased voters' choices by increasing the number of presidential candidates. The seven elections before 1976 had an average of 10.7 candidates who received at least 1 percent of the votes in the two major parties' primaries. Since taxpayer financing was enacted, the average has been 7.8 candidates. In the 15 elections since 1945, the two most successful independent candidates -- George Wallace in 1968 and Ross Perot in 1992 -- did not use government funds.

See George F. Will, *Checkout for an Undemocratic Checkoff*, WASHINGTON POST, Sept. 28, 2006, at A23.

[39] Michael J. Malbin and Thomas L. Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 135-37 (Albany, NY: Rockefeller Institute Press, 1998).

[40] GAO, *supra* note 19.

[41] John Wildermuth, *The 'clean' campaign finance idea grows*, September 18, 2006.

you raise a buck for yourself, you raise a buck for your opponent."[42] In 2002, for example, "Matt Salmon, the GOP candidate for governor, ran as a privately funded candidate. President Bush visited Arizona to raise money for Salmon's campaign and generated $750,000. After paying $250,000 for expenses, Salmon was left with $500,000 for his campaign."[43] But the Arizona clean elections commission gave Napolitano $750,000 to match what Salmon raised, "meaning she made more from Bush's Arizona visit than the Republican candidate did."[44]

S. 1285 also protects participating candidates from disbursements for electioneering communications or independent expenditure made by organizations other than the competing candidate. S. 1285 disadvantages non-participants by providing a broadcast discount of 20% (or 80% of the lowest unit rate provided under law to other candidates).[45]

Institute for Justice President and General Counsel Chip Mellor writes about some of the perverse incentives in Arizona's Citizens Clean Election Act:

> Democratic gubernatorial candidate Janet Napolitano, a Democrat, won the 2002 Arizona governor's election, defeating Matt Salmon in a state with "3-2 Republican registration advantage." Napolitano sought the qualifying $5 contributions for public funding from labor union members and received $615,000 the day after the primary. In contrast, Salmon, having faced two subsidized opponents in the primary, entered the race against Napolitano with his private funding already overextended. Napolitano initiated a negative campaign against Salmon while he sought additional funding and then benefited from matched funds when the Arizona state Republican party made $200,000 in independent expenditures for Salmon. Napolitano also received help from independent expenditures made on her own behalf; Democratic Party Chairman Jim Peterson spent $2.3 million of his own fortune. Of course, Salmon was unsubsidized and received no matching benefit based on Peterson's [independent expenditures].
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> [N]ot only did Napolitano receive more than $2.25 million in taxpayer subsidies, but her status as a publicly funded candidate freed her from the time constraints and expenses involved with fundraising, a luxury that her unsubsidized opponent did not have.[46]

Mellor also notes that the Arizona law did not eliminate special interest influence, and did not necessarily invite more candidates into the race:

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] §. 201.
[46] Chip Mellor, *Three Lessons from Arizona*, WELFARE FOR POLITICIANS 31, 37-8 (John Samples, ed., Cato Institute, 2005).

> Although it sought to eliminate special interest influence, the Citizens Clean Election Act has in practice only made the problem worse. Napolitano turned to labor union workers to collect the qualifying $5 contributions to qualify for subsidies. Napolitano succeeded in obtaining the qualifying contributions and, ultimately, becoming governor of the state, in large part because of the union support she cultivated. Mike Newcomb, former Democratic gubernatorial candidate, claims that he was unable to qualify for public funding because the United Food and Commercial Workers union leaders decided to back Napolitano. These leaders, having already placed their support behind a Democratic candidate, denied Newcomb the opportunity to pitch his candidacy before the whole union. Napolitano's use of Clean Election Act funds for her campaign did not "level the playing field," as it were, but instead enabled Napolitano to effectively shut out another Democratic candidate seeking union support. The suggestion that the Act minimizes the effects wealthy special interests have over state politics clearly rings false. Napolitano, in collecting her qualifying contributions from union members, will be indebted to their interests to the same extent had she accepted "unclean" contributions from union leaders and their political action committees.[47]

S. 1285 is expensive

Reform organizations have estimated the cost of taxpayer funded congressional campaigns at "about $4 per voting age citizen per year."[48] According to data in the 2000 census,[49] there were 193,376,975 citizens age 18 or older. $4 per voting age citizen per year yields $773,507,900 or $1,547,015,800 every two years. The operating budgets of the following federal agencies are less than the cost of funding congressional elections:

Election Assistance Commission (FY 08): $15.5 million
Equal Opportunity Employment Commission (FY 08): $328 million
Federal Communications Commission (FY 08): $313 million
Federal Election Commission (FY 08): $59 million
National Endowment for the Arts (FY 08): $128 million
National Endowment for the Humanities (FY 08): $141 million
National Labor Relations Board (FY 08): $256 million
National Transportation Safety Board (FY 08): $83 million
Office of Government Ethics (FY 08): $12 million
Office of Special Counsel (FY 08): $16 million

S. 1285 increases the power of an independent bureaucracy

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[47] *Id.*

[48] Common Cause, *et al.*, *Breaking Free with Fair Elections: A New Declaration of Independence for Congress* (March 2007)

[49] Census 2000, *PHC-T-31, Voting-Age Population and Voting-Age Citizens*, available at http://www.census.gov/population/cen2000/phc-t31/tab01-01.pdf

S. 1285 establishes a Fair Elections Review Commission.[50] The Fair Elections Review Commission would be tasked, after each general election, with conducting a comprehensive review of the Senate fair elections program, including: the number and value of qualifying contributions for future elections; the amount of allocations from the Senate Fair Elections Fund; the overall satisfaction of participating candidates; other such matters as the Commission deems appropriate.[51] The Commission shall then consider participation thresholds, including whether the number and value of qualifying contributions required "strikes a balance between the importance of voter choice and fiscal responsibility … and any other information the Commission deems appropriate."[52]

Remarkably, the Commission also would consider whether allocations from the Fund are sufficient for voters in each State to "learn about the candidates to cast an informed vote."[53] In other words, as few as three individuals on a federal agency will report on how much information is "sufficient" for sovereign citizens to make an "informed" choice of Senator.

But the Commission's report would not just be its opinion on sufficient levels of influence; its choice would be enacted into law. The report *shall* also include legislative language, in the form of a proposed bill for introduction in Congress, with respect to any recommendation involving either an increase in the number of qualifying contributions (determining the participation thresholds for competing candidates), or an increase in the amount of allocations from the Fund (determining how much information voters need to make an "informed" choice).

Members of the Commission "shall be individuals who are nonpartisan" and "exceptionally qualified to perform the duties … of the Commission."[54] But Nobel Laureate James Buchanan teaches that there is no such thing as the disinterested bureaucrat, and experience teaches that there is no policy wonk "disinterested" in who holds power in Congress. In such matters, there are no "nonpartisans." Equally, there is no person "exceptionally qualified" to determine when the citizenry has "sufficient" political information to cast an "informed" vote. This presupposes that there is such a thing as an ideal amount of information, and that there are persons aware of that ideal. Setting spending at amounts "sufficient" to foster "informed" votes is akin to wage and price controls for political speech markets. History teaches that wage and price controls, from the Roman Emperor Diocletian in the 1st Century to President Nixon's failed effort in the late 20th Century, lead to market dislocations, shortages, and the creation of black markets, or what campaign finance enthusiasts call the "hydraulic theory" of campaign finance (money will find a way), and what "reformers" may call "circumvention."[55]

[50] § 121.
[51] § 121(b)(1)(A)(i)-(iv).
[52] *Id.*
[53] § 121(b)(1)(B).
[54] § 122.
[55] See generally, *McConnell v. FEC*, 540 U.S. 93 (2003).

More remarkable still, is section 126. Section 126 *requires* the Majority Leader, to introduce any proposed legislative language contained in the Commission's report, not later than 60 days after the Commission files the report. The "Commission bill" shall be referred to the Senate's Committee on Rules and Administration. But not later than 60 days after the introduction of the Commission bill, the Committee *shall* hold a hearing on the bill and *shall* report the bill to the Senate. No amendments to the bill will be in order. If the Senate Committee on Rules and Administration has not reported a Commission bill at the end of 60 days, the Committee shall be automatically *discharged* from further consideration of the Commission bill, and the Commission bill *shall* be placed on the calendar. S. 1285 has requirements for floor consideration, rules out of order amendments to the bill, and limits debate. Voting would occur immediately after debate. Similar but shorter measures are provided to wisk the Commission's bill through the House of Representatives.[56]

I know of no other administrative agency guaranteed an opportunity to have its legislative recommendations given an up-or-down vote on the floors of the House of Representatives and the United States Senate. It might be argued that the Commission bill should proceed directly to the floor without amendment, and forced to a vote over the objections of any and all Senators, to prevent the troublesome prospect of incumbent officeholders rigging election requirements for the competitors that will challenge them. Incumbent protectionism in campaign finance has a long pedigree[57] and is, indeed, a real danger. But there is a greater danger: the danger of an unaccountable agency short-circuiting our legislative processes and interceding between the People and the duly-elected legislators sworn to represent them to push their policy recommendations, unaltered, to final consideration.

The risk is not that the Commission would lower the number of qualifying contributions or reduce the amount of allocations; that is prevented by S. 1285. The risk is that the Commission would be unduly hesitant to raise them, particularly, the allocation amounts. The following candidates, all current U.S. Senators, benefited from lavish spending to defeat entrenched incumbent officeholders, funding that may not be available under S. 1285. Or, funding levels suggested in a Commission bill that fail to account for hostility toward one candidate or another by media organizations exempt from federal campaign finance law, including the fair-fight-fund triggers in S. 1285.

Saxby Chambliss, 2002

In 2002, Saxby Chambliss spent $7,743,004 to defeat incumbent U.S. Senator Max Cleland. Under S. 1285, assuming that Chambliss had qualified for taxpayer funding during the primary election, he would have been eligible for a total of $5,558,500 of funding, exclusive of Fair Fight Funds. Sen. Cleland spent over $9 million defending his seat. While the availability of Fair Fight Funds may have equalized some of the resources between the Chambliss and Cleland campaigns, Sen. Cleland also enjoyed

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[56] § 126(b)(2).

[57] John Samples, *The Fallacy of Campaign Finance Reform* (Univ. of Chicago Press 2006).

prominent media endorsements, like that of the *Atlanta Journal-Constitution*[58], which are not factored into the calculation of Fair Fight Funds.

John Thune, 2004

In 2004, John Thune spent $14,660,167 to defeat incumbent U.S. Senator Tom Daschle. Under S. 1285, assuming that Thune had qualified for taxpayer funding during the primary election, he would have been eligible for a total of $1,352,500 of funding, exclusive of Fair Fight Funds. Even if Thune had received the maximum possible amount of Fair Fight Funds, his total funds would have come to only $3,857,500, less than 20% of the $19,991,369 Sen. Daschle spent defending his seat.

James Webb, 2006

In 2006, Jim Webb spent $8,559,590 to defeat incumbent U.S. Senator George Allen. Under S. 1285, assuming that Webb had qualified for taxpayer funding during the primary election, he would have been eligible for a total of $4,857,500, exclusive of Fair Fight Funds. Had Webb received the maximum possible amount of Fair Fight Funds, his total would have come to $12,372,500. While this amount is greater than what Sen. Webb actually spent, it is noteworthy that Allen spent over $16 million defending his seat and had a double-digit lead in the polls until his "*macaca* moment."[59] But for that event, there is every indication that Webb would not have been able to unseat Allen, even with $12.4 million in taxpayer funds.

Like all things "reform," we can expect each Commission bill to have the backing of the mainstream media and the reform community (whose members will likely staff and Chair the Fair Elections Review Commission). In short, if you do not believe you can weather the reformers' storm for taxpayer financing, don't imagine you will be able to stop any recommendations in a Commission bill. Regulatory commissions have been known to engage in excesses without violating their statutory mandates. Law has unintended consequences, and there is no reason to believe the Fair Elections Review Commission will be any different. Indeed, evidence of excess is mounting in the states that have adopted clean elections statutes.

Lessons from the states

Disqualifying candidates

"In a historic move, the Citizens Clean Election Commission voted Thursday [March 24, 2005] to oust state Rep. David Burnell Smith from office for overspending his public campaign limits by more than $6000. The 5-0 vote marks the first time in the

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[58] *OUR OPINIONS: Allow Cleland to continue using his own judgment*, THE ATLANTA JOURNAL CONSTITUTION, Oct. 29, 2002, at 22A.
[59] *Exclusive Poll Results Show Allen Losing Ground*, Aug. 21, 2006, available at http://www.wusa9.com/news/news_article.aspx?storyid=51530

United States that a legislator has been ordered to forfeit his office for violating a publicly financed election system."[60]

Under Arizona law, the penalty for a candidate who overshoots his spending limit by more than 10 percent is to be removed from office. "Backers of the Clean Elections Law think this case is especially important, saying that if candidates are allowed to break spending limits and just face a fine, it could shake the foundation of the public-financing system."[61] As noted by Barb Lubin, executive director of the advocacy group Clean Elections Institute, "It's important that candidates take the Clean Elections law seriously. This is important so people cannot cheat and get elected to office."[62]

It is easy for United States Senators, who employ premier election lawyers and accountants, to believe that such an accounting error could never happen to them, or that they could never find themselves so much on the wrong side of a regulatory commission. But in an audit of the Bush-Cheney 2004 committee, required by the Presidential Public Financing system, and handed down earlier this year by the FEC, three of six Commissioners determined as a matter of law that the Bush-Cheney 2004 Committee exceeded its public expenditures allotment of $74,000,000 by $42,000,000, or 56.7%.[63] It is worth remembering that the Bush-Cheney 2004 committee retained the most elite election lawyers in the nation. Removal from office is not, yet, a penalty under S. 1285. But what should be the penalty to a candidate who exceeds a limit when his opponent surrenders his right to engage in unlimited spending to run under the strictures of a taxpayer financed system? As Barb Lubin says, and as you can expect to hear the reformers begin to say if S. 1285 becomes law, "It's important that candidates take the Clean Election law seriously."

There is another loser in Arizona: the citizenry who elected David Burnell Smith to office. In removing Smith from office, the Citizen's Clean Election Board usurped, under color of law, the electoral judgment of the sovereign citizens of Arizona and replaced it with their own. No agency should have that kind of power. No law should be adopted that would seem to make the exercise of such power necessary.

Determining who is, and is not, "the press"

This story ran in the Arizona Star Net:

> The Citizens Clean Election Commission is going to have to decide what is a legitimate newspaper and what is not.

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[60] Chip Scutari and Robbie Sherwood, *Legislator told to quit over campaign violation*, THE ARIZONA REPUBLIC (Mar. 25, 2005).
[61] *Id.*
[62] *Id.*
[63] *See* Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub, Audit of Bush-Cheney '04, Inc., *available at* http://www.fec.gov/members/lenhard/speeches/statement20070321.pdf; *see also*, Report of the Audit Division on Bush-Cheney '04 and the Bush-Cheney '04 Compliance Committee, Inc., *available at* http://www.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf.

> Todd Lang, executive director of the Citizens Clean Election Commission, said he is exploring whether an endorsement of Republican gubernatorial hopeful Len Munsil in a catalog published by a Prescott gun dealer amounts to an in-kind contribution to Munsil's campaign.
>
> Lang said that if it is – which is his preliminary conclusion – then the value of the endorsement, mailed to about 13,000 Arizonans – would be ascribed to an expense by the Munsil campaign, which would trigger a match of public monies to Don Goldwater, the other publicly financed candidate in the GOP campaign.
>
> What Lang and the commission conclude has implications far beyond the J&G Gun Sales catalog. It puts the state in the position of defining what is a legitimate news publication.
>
> That's because an endorsement by what the commission considers a newspaper or magazine does not trigger matching funds, even if it were to suggest that people volunteer time or donate funds to the candidate.
>
> But an identical plea in a private publication that goes out to more than just association members, Lang said, effectively is a donation.
>
> Lang said there is no evidence of coordination between [the catalog printer] and Munsil that would have made the [communication] an illegal direct campaign donation. But he said it still could qualify as an in-kind contribution.
>
> He conceded that course of action is fraught with potential pitfalls. The first, he said, is determining the value of the endorsement.
>
> Potentially more serious would be that the Citizens Clean Election Commission would have to determine what is a legitimate news publication, whose endorsement does not trigger matching funds, and what is not.
>
> "My preliminary take is this is not a newspaper," Lang said.[64]

Of course, the Federal Election Commission now determines which entities enjoy the press exemption under Federal campaign law. But such determinations do not yet determine whether your opponent receives Fair Fight Funds due to the actions of an independent organization that you, as a candidate, cannot control.

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[64] Howard Fischer, *Gun dealer's endorsement in governor's race stirs questions*, July 11, 2006, available at http://www.azstarnet.com/metro/137398

Random audits

S. 1285 gives the FEC *random* audit authority for participating campaigns.[65] Since its creation the FEC has been limited to auditing those committees that accrue a certain number of audit points by repeated errors or omissions in reports filed with the agency. This allowed committees to control to some extent whether they would have to endure the costs and burdens of an FEC audit. Under S. 1285 that control ceases and the FEC would audit campaigns irrespective of whether there was any cause for an audit.

The system will soon require random audits of non-participating candidates, as well. Otherwise, how will the FEC know that it is properly and fairly awarding "Fair Fight Funds" to the participating candidates? It is by this process that campaigns will cede more power to the agency, thus bureaucratizing campaigns.

Conclusion

Studies show there is *no evidence* that taxpayer financing regimes upon which S. 1285 is modeled improve competitiveness, citizen participation in government, or citizen perceptions of government. Rather, they make increase the power of administrative agencies relative to that the People and their elected representatives.

[65] § 106.