

If money talks at election time, let individual voters' voices be heard

by Chibli Mallat

One of the most positive aspects of the presidential campaign in the United States is the revival of the debate on the issue of money's distortion of the political process generally, and of the electoral process in particular.

Unprecedented heights of private disbursements by and for presidential candidates have been reached. George Bush Jr., six months before the election, has already spent more than \$60 million on his campaign, which is twice as much as any presidential candidate has spent previously on an entire campaign.

It took the common sense of John McCain to put the question of money back squarely on the agenda. McCain's record in the Senate with his colleague Russ Feingold is important, even if McCain himself, as one of the notorious "Keating five" who received favors from shady financiers just before their scheme went bust, cannot exhibit the purest record on the issue.

Meanwhile, the electoral process has become so dependent on money that voters are losing interest as their voices are being drowned by the dollar chorus. Potentially outstanding leaders are foregoing running for office, so trying - financially and emotionally - has elected life become. President Carter continued to pay his campaign debts several years after he had left the White House.

The irony is that McCain's legislative initiative to reform the system was snuffed by a mixture of filibuster and disdain, chiefly by his Republican colleagues. But the killing of the mild Feingold-McCain bill has forced the issue back with a vengeance, while reinforcing the need to do something about the self-serving hubris of the senatorial corps.

Beyond the sociological profile of an essentially affluent white-male corps of aging senators harking back to the 19th century, such congressional filibusters are becoming even more difficult to accept in view of the dogged pursuit of presidential peccadilloes in the impeachment trial of Bill Clinton.

Together with the vexing question of money in politics, the worrying entrenchment of interests comes as a reminder that a constitutional reform of congressional terms is long overdue. After all, the constitutional amendment limiting the presidency to a maximum of two terms is half a century old. Voters are keen to discover whether they can discourage the "ins" from digging themselves in and whether they can prevent the "outs" from being excluded from high federal office.

Nor should similar questions spare high-

ranking federal judges, including justices on the Supreme Court. "God forbid one may attempt to suggest a retirement age for the Brethren," many would say in fear of undermining judicial independence, or simply in deference to the court. True, law is a profession unlike that of the political career of a president or a congressperson, and involves different criteria of leadership, including longevity and experience. Still, all holders of high federal office should be appointed for a limited time. Ten or 12 years is sufficient time for judges at the top of their careers to make their mark in public life.

More pressing is the issue of money. There have been previous attempts at regulating its troublesome power and the achievements of the Federal Election Commission, certainly in terms of promoting transparency, cannot be underestimated. But campaign finance reform was frozen in 1976 by the US Supreme Court in the decision on Buckley vs Valeo.

In that decision, the constitutional regulator of America introduced a schizophrenic interpretation which remains law to this day. In a 150-page opinion, the court held that

laws may dictate the maximum contribution an individual can give to a political candidate, but that laws may not regulate the expenditures any campaign or campaigner chooses to disburse.

Since money talks, the justices argued,

legislative enactments preventing a candidate or a group supporting him from talking - by spending money - would be an abridgment of the freedom of speech guaranteed under the First Amendment. They aren't a violation of the constitution, Buckley held in the same breath, if they prevent a voter from spending as much as she likes to support her candidate.

The heavy legacy of the imprecise parameters of Buckley vs Valeo turns on its head the argument of money and freedom of expression. The buck was stopping nowhere for late 20th-century America.

First, campaign pundits found easy ways to introduce loopholes in the regulation of contributions: this is the infamous category of "soft money," which allows entrenched interests to fund at will political machines, as opposed to campaigns or candidates. More fundamentally, the notion of regulating campaign disbursements has remained off constitutional bounds since the formulation of the Buckley principles, reaffirmed by the Supreme Court as recently as Jan. 24 this year in the Nixon vs Missouri decision.

In the heyday of the presidency of Earl Warren, the one chief justice who most advanced the rule of law in America since its

rightly celebrated first president, John Marshall, the US Supreme Court made real the principle of "one person, one vote", and brought to the fore racial inequality as a constitutional issue. By 1976, lack of judicial imagination and, arguably, fairness set in. Buckley vs Valeo was a significant indicator of a visionless court and an increasingly callous American political system.

By ruling that the right to spend at will enhances freedom of speech, the court chose to ignore the risk that the voice of the individual voter might be seriously curtailed. Billionaire candidacies increased severalfold. The Perots and Forbeses are the legacy of Buckley.

Enter McCain, who reminded the public that political channels needed to be cleaned up to bring back the citizens from their disaffection towards the public scene.

To complement the universally accepted one person, one vote formula, the idea of one person, one voice was introduced by Harvard law professor Laurence Tribe in 1985 as the next frontier of American constitutionalism. No system will be able fully to accommodate such a daring formula, but there are many proposals in the air to reform campaign finance.

One is to close the soft-money loophole. A more effective one is to stand Buckley on its head. If America wants to open up the democratic process,

voters should be allowed to spend as much as they want in support of their favorites, but a cap should be placed on the spending of candidates and their political machines in presidential campaigns.

This would individualize the electorate again, limiting the contributions of today's big donors and bringing them a little closer to the person at the bottom of the giving league. "Equality of voices" would obtain because candidates wouldn't need to target the wealthy individual or corporatist donations. A candidate constrained by a ceiling of \$1 million for his or her campaign would be better inspired to get 10,000 individual contributors at \$100 a head than two corporate donors at half a million dollars apiece. Should they choose to rely on a few donors, they would not be making the better choice to be elected.

In other words, Buckley vs Valeo had it upside down. Whatever the right jurisprudential formula - "money is speech," or "money enables speech" - the effective way forward is to cap expenditure, not to limit contributions.

By capping expenditures, donors would naturally be prevented from peddling their

influence in political campaigns, as candidates would be encouraged to spread their limited campaign allowances, rather than seek to intensify ad infinitum the astronomical masses of money made available by lobbies and conglomerates.

"Congress shall make no law abridging freedom of speech," says the First Amendment. The right jurisprudential formula should then appear in the form of a more telling question in 21st-century America: should money be able to abridge equality in the electoral realm? By posing the question in this way, the First Amendment principle is made to fit better. Caps on expenditure should enhance the individual citizen's vote and voice to the detriment of special interests which have allowed a candidate to go on a wild electoral spending spree, as witnessed recently in Bush's campaign.

But even if a reasonable campaign bill is devised and accepted to combine supportive federal funds and limit expenditures, a key question of American electoral politics remains: would campaign finance regulation result in less disaffection in the electorate?

This is an urgent issue and there is presently a full academic policy program on "the vanishing voter" (www.vanishingvoter.org).

Who can know what makes a person cast his or her vote this way or that at various electoral opportunities? The dullness

of political campaigns and their susceptibility to moneyed interests are not the only factors that make an individual either eager or reluctant to cast a vote.

More disturbing is the question: so what if the voter vanishes? Is it not a positive value of civilization that the state has receded so much that the larger public is not worried, and not concerned, with the result of elections fought on nuances that do not trouble the system? If the system runs reasonably well regardless of the current or future incumbent, the vanishing voter may fit into the dream of a political system in which the state has faded so much that it doesn't matter any longer.

Back on planet Earth, term limitation and enhanced understanding of the one person, one voice principle should be among the more immediate political tasks, and the next president could do a lot during his tenure to address these issues.

Chibli Mallat is a practicing lawyer and a professor of law. This is the fifth article in the series: American Presidential Choices - A View from the Edge. The next article will discuss crime and community.

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