gation, Judge Newman proposes that all depositions be supervised by a judicial officer – a magistrate judge or a member of a panel of experienced lawyers. Judge Newman says that supervising depositions would cut down on the delay, squabbling, and harassment that occurs during depositions. He said that when he was a district judge a lawyer asked for an adjournment of a trial because he had identified a new witness and he needed to take his deposition. Judge Newman told him to ask the questions at that moment in the courtroom. The lawyer was finished in 15 minutes.

Judge Newman has been told that Japan has a system of judicially supervised depositions, and there are no depositions in Europe. However, litigants in the United States claim that they need the fullest possible exploration of facts for fairness. In this focus on fairness of result, the fairness in the system is lost. The result is that litigation is too slow and costly.

Certainty before imposing death penalty sentences: After a jury decision to impose the death penalty, the judge should determine whether the defendant's guilt was proven to a certainty – a standard beyond reasonable doubt. The court would have to evaluate the evidence and consider whether witnesses were reliable. An example of unreliable witness testimony would be an eyewitness who only saw the defendant once, as opposed to a witness who knew the defendant. Another example would be a jailhouse snitch or a person with immunity who had an incentive to testify to satisfy the prosecution.

Strengthening the federal remedy for official misconduct: Judge Newman points out that the standards for an ordinary tort and a constitutional tort are different. For an ordinary tort the plaintiff has to prove the defendant's negligence and damages. Plaintiffs suing for official misconduct face additional hurdles: immunity and lack of employer liability. Judge Newman proposes to eliminate immunities for officials and make government employers liable for paying damages. Judge Newman recommends changing Section 1983 to permit the U.S. Attorney to bring suit along with the victim; putting the burden on the defendant officer to prove the lawfulness of his or her action, after the plaintiff proves that the misconduct caused harm; and providing for a minimum amount of damages for violation of a constitutional right.

Judge Newman's other proposals are eliminating the standing requirement and permitting anyone to sue government officials; limiting diversity jurisdiction and allowing only discretionary access to federal courts; raising the burden of proof for state of mind; taking "beyond a reasonable doubt" seriously; deterring litigation abuse by setting up a system of warnings followed by suspension or disbarment; allowing contingency fees for defendants' attorneys in civil cases; reviewing unobjected to sentencing errors; using realistic punishment terminology; reducing prison guard assaults by limiting the amount of time guards can serve; and allowing TV in the courtrooms.

Legal History

The Supreme Court's *Worst* Decision on Campaign Finances

By C. Evan Stewart

Jesse Unruh was a legendary figure in California (and national) politics for virtually his entire adult life. And one of his most famous statements was: "money is the mothers' milk of politics." He, of course, was right. That is, until this basic truism ran into the U.S. Supreme Court, when the Court truly split the baby: sometimes money *is*, and sometimes money *is not*. Huh?

Watergate and the Root of All Evil: Money

For the movie *All the President's Men*, William Goldman

(the screenwriter) attributed the phrase "follow the money" to Deep Throat (a/k/a Mark Felt) in his advice to Bob Woodward on how to disentangle the web of intrigue that was broadly labeled Watergate. And in reaction to Watergate, Congress in 1974 passed a number of amendments to the Federal Elections Campaign Act of 1971 in an effort, not just to "follow the money," but to limit severely its impact upon federal elections. The key provisions of the 1974 amendments directed at limiting the impact of money were (i) to limit to $1,000 what individuals or groups could contribute to federal office candidates, and (ii) to limit independent expenditures by an individual or a group advocating any one federal office candidate. (Other provisions (e.g., public disclosure of the names of contributors of more than $100, creation of the Federal Election Commission, etc.) were also part of the new regime; and while those (and other provisions) were also challenged to the Supreme Court, in my judgment they were not so highly controversial, consequential, or impactful, and thus will not be the focus of this article.)

Buckley v. Valeo

To challenge the constitutionality of the 1974 amendments, an odd coalition of discordant political and legal forces (e.g., James Buckley (Conservative Senator, New York), Eugene McCarthy (former Democratic Senator, Minnesota), the New York Civil Liberties Union, the American Conservative Union, etc.) came together and sued the Secretary of the U.S. Senate (Francis Valeo) and the Clerk of the U.S. House of Representatives, both in their official capacities and as the ex-officio members of the Federal Election Commission (also named as defendants were the Commission, the U.S. Attorney General, and the U.S. Comptroller General). Through a complicated process, the lawsuit went quickly to the D.C. Circuit Court of Appeals. And with one very minor exception, the Court of Appeals upheld the 1974 amendments, finding "a clear and compelling interest" in preserving the integrity of the electoral process. *Buckley v. Valeo*, 519 F.2d 817, 841 (D.C. Cir. 1975). With that judicial determination, the plaintiffs moved on to the U.S. Supreme Court.

Lead counsel for the challengers was Ralph K. Winter, a Yale law professor (and later a distinguished judge for the Second Circuit); assisting him (among others) was a young ACLU lawyer, Joel M. Gora, who has gone on to a distinguished academic career at Brooklyn Law School. The challengers argued that "the law was the greatest frontal assault on the First Amendment protection of political speech and association since the Alien and Sedition Acts. It would stifle the voices of outsiders, political underdogs, and dissidents, and thereby … entrench the incumbents in Congress[,] who had written the law precisely to barricade themselves in power." Arrayed against them, defending the federal statute, was a cavalcade of legal heavyweights, including Archibald Cox, Lloyd Cutler, and Solicitor General Robert Bork.

The case was argued before the Court on November 10, 1975. On January 20, 1976, in a 143 page *per curiam* opinion, with five separate concurring and dissenting opinions by different Justices, the Court rendered its decision(s). (The *per curiam* nature of the opinion is itself a tad confusing/misleading. Justice Stevens recused himself from the case and the only thing all eight Justices seem to have agreed upon was that there was a proper "case or controversy" before the Court. Three Justices (Brennan, Powell, and Stewart) did in fact sign on to the whole enchilada. As we will see, the other five Justices could only agree with certain disparate parts of the Court's *per curiam* opinion.) The *per curiam* opinion soared with First Amendment rhetoric:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate

on public issues in a political campaign.

But then the *per curiam* Court, in applying this soaring rhetoric, drew a line of enormous consequence – delineating a Constitutional difference between a campaign *contribution* and a campaign *expenditure*. Thus, some federal limits on campaign *contributions* were fine and dandy, while federal limits on campaign *expenditures* were unconstitutional.

The Court determined that any and all restrictions placed upon what could be spent in federal political campaigns (i.e., *expenditures*) clearly violated First Amendment rights; such moneys constituted protected speech, irrespective of amount(s). At the same time, however, the $1,000 limitation imposed upon individual *contributions* was consistent with the First Amendment because of Congress' express concern with avoiding the fact (or appearance) of corruption. (The limits on contributions were further defended on the ground that they would "act as a brake on the skyrocketing cost of political campaigns.") And yet this did not apply to wealthy individuals underwriting their own campaigns; since the wealthy could not "corrupt" themselves, any limitations on what they could spend on their own individual races violated their (the wealthy's) First Amendment rights.

On its face, the Court's Constitutional distinction between *contributions* and *expenditures* – one is not speech, the other is – made (and makes) no sense; neither did the Constitutional carve-out for the wealthiest Americans who want to hold high political office. And it did not take any period of great reflection to figure these (and other) problems out; many of the Justices noted a number of them in their own separate opinions.

Chief Justice Burger's concurrence and dissent went right after the most obvious flaw. Agreeing with the *per curiam* opinion's determination that campaign *expenditures* were protected political expressions that could not be restricted consistent with the First Amendment, Burger contended that "contributions and expenditures are two sides of the same First Amendment coin." He went on, belittling the "word games" employed to distinguish between the two – saying that such games "will not wash." Burger went on to predict that the contributions rulings would "foreclose some candidacies" and "also alter the nature of some electoral contests drastically." He also noted that the Court's approved finance regime would give "a clear advantage" to candidates with personal fortunes over less affluent opponents, constrained by the fund raising limits of $1,000; other losers in this system would include minority parties and little-known, first-time candidates.

Justice White, in his concurrence and dissent, agreed with Burger's poo-pooing of the delineation between *contributions* and e*xpenditures*. But then he arrived at exactly the opposite conclusion. According to White, neither *contributions* nor *expenditures* constituted speech – rather, caps on spending of any kind are "neutral" vis-à-vis political speech. While it made no sense to cap *contributions* and not *expenditures*, White would have deferred to those with political expertise (i.e., Congress and the president) to determine what should be done "to counter the corrosive effects of money in federal election campaigns." White also disagreed with the *per curiam* opinion's carve-out for wealthy candidates' spending as much as they would like on themselves: "Congress was entitled to determine that personal wealth ought to play a less important role … than it has in past. Nothing in the First Amendment stands in the way of that determination."

Justice Marshall's opinion was directed at the *per curiam* opinion's carve-out for wealthy candidates, pointing out that the political landscape going forward would definitely favor millionaires. Justice Blackmun's opinion dissented from the determination that the $1,000 limit on contributions was constitutional. (Justice Rehnquist's opinion was directed at the *per curiam* opinion's ruling on public financing of campaigns, believing it would serve to entrench the two party system and unconstitutionally penalize minority parties.)

The Aftermath of *Buckley*

While some hailed the *per curiam* ruling for "declaring for the

first time that campaign funding limits violated First Amendment rights," others with political experience knew better. Indeed, as former Senator (and later a D.C. Circuit Court judge) Buckley would later write on the 40th anniversary of the *Buckley* ruling:

> In the wake of the *Buckley* decision, we are left with a package of federal election laws and regulations that have distorted virtually every aspect of the election-process. The 1974 amendments to the Federal Election Campaign Act were supposed to deemphasize the role of money in federal election campaigns. Instead, the limit on individual contributions has made the search for money a candidate's central preoccupation.
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> [And for those] reformers [who] complain about the power of political action committees – the notorious PACs … their proliferation and growth are a direct consequence of the restrictions placed on individual giving.

And as Buckley further noted, the still-current delineation between *contributions* and *expenditures* "makes politics the playground of the super-rich who can finance their own campaigns." Indeed (and not surprisingly), since 2012, a majority of the members of Congress and Senate are millionaires many times over.

As noted by Justice White, the Court – made up of folks who have never run for political office – does not have first-hand expertise or experience with money's role in politics. And in subsequent decisions, the Court often displayed similar proclivities when it came to assessing the role of money in politics. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (holding that the Michigan Campaign Finance Act, which barred corporations from making expenditures in political campaigns, did not violate the First and Fourteenth Amendments); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that the Bipartisan Campaign Reforms Act's restrictions on "soft-money" contributions did not violate the First Amendment).

While some hailed the *per curiam* ruling for "declaring for the first time that campaign funding limits violated First Amendment rights," others with political experience knew better.

But in more recent years, perhaps influenced by Justice Scalia's dissents in *Austin* and *McConnell* (that campaign restrictions at issue in those cases were intended to (and had the effect of) stifling critics of elected officials), the Court has moved in the direction of attempting to correct the crazy-quilt campaign finance system it created by its 1976 ruling in *Buckley*. The first such case was *Citizens United v. FEC*, 558 U.S. 310 (2010). Because so much heat (and very little light) has been directed at *Citizens United*, perhaps a brief re-cap is in order. At issue in that case was whether a non-profit corporation could produce and distribute a movie entitled *Hillary: The Movie*; the movie was critical of Hillary Rodham Clinton who was (at that time) the front-runner for the Democratic Party's presidential nomination in 2008. (In 2004, Michael Moore had done a similar movie critical of President George W. Bush entitled *Fahrenheit 9/11*.) The U.S. District Court for the District of Columbia ruled that the Bipartisan Campaign Reform Act (upheld in *McConnell*) barred corporations (and unions) from making independent expenditures in political campaigns (with criminal penalties for non-compliance). At oral argument before the Supreme Court, Justice Alito asked the government's lawyer defending the law (Deputy Solicitor General Malcom Stewart) whether it could also be used to bar a publishing company from distributing a book critical of Senator Clinton. Stewart answered: "Yes"; at reargument six months later, Elena Kagan (then Solicitor General, now a Supreme Court Justice) essentially affirmed Stewart's candid response – that position may have been the straw that broke the camel's back.

On January 21, 2010, Justice Kennedy issued the Court's (four to five) opinion, ruling that the Bipartisan Campaign Reform Act's provision violated the First Amendment: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens [including corporations or unions], for simply engaging in political speech." By this ruling, the Court's prior decision in *Austin* was overturned, and *McConnell* was partially overruled as well. (Professor Gora, in writing about *Citizens United*, has taken to task Mrs. Clinton for her "chutzpah" in the 2016 election, in which she "repeatedly promised – to great applause each time – not to nominate anyone to the Supreme Court who was not prepared to overrule [*Citizens United*]." Professor Gora not only thought such a litmus test improper, but noted "the irony of a leading presidential candidate attacking a decision that permitted a group of citizens to question her fitness for office." J. Gora, "Money, Speech, and Chutzpah," *Litigation* 48, 52 (Summer 2017).)

More recently, the Court had the opportunity to review some of the 1974 amendments to the Federal Election Campaign Act. In *McCutcheon v. FEC*, 572 U.S. ____, 134 S. Ct. 1434 (2014), the Court (by a five to four vote) struck down the limit on contributions an individual can make over a two-year period to national party and federal candidate campaign committees. Chief Justice Roberts wrote in his plurality decision: "The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse." Justice Thomas concurred separately (thus providing the fifth vote), but argued that *all* limits on contributions are unconstitutional (i.e., *McCutcheon* left intact the limits on how much individuals can give to an individual political candidate (which now maxes out at $2,700 per election)).

Buckley – what the *Wall Street Journal* has called the Court's "original First Amendment sin" – thus still stands, albeit significantly weakened in breadth and devoid of much (if not all) sense. And notwithstanding the *Buckley* Court's prediction, discussed above, money keeps flooding exponentially into our political campaigns at ever faster rates. So let me give the last word to the principal litigant in *Buckley*, Senator/Judge Buckley, who has written: "The answer … is not to place further restrictions on the freedom of speech, as so many continue to argue…. [Rather,] [o]ur current law addresses the problem [of corruption] by requiring a timely disclosure of all contributions over a specific amount. That enables opponents to publicize any gift that might arise to an adverse influence, and the public can then judge whether the contribution in fact is apt to corrupt the recipient."

Postscripts

- For those wanting to delve deeper into the legacy of *Buckley v. Valeo*, *see* Volume 25, Issue 1 of Brooklyn Law School's *Journal of Law and Policy* (December 2, 2016).
- Floyd Abrams, who successfully argued *Citizens United v. FEC* in the Supreme Court, has recently published a wonderful book: "The Soul of the First Amendment" (Yale Univ. Press 2017). As Abrams makes abundantly clear, the purpose of the First Amendment is to protect Americans from governmental attempts (to quote Justice Robert Jackson) to seize "guardianship of the public mind." Abrams has been castigated by the political left for aligning himself with the political right in that case. But Abrams does not view the constitutional principle (and amendment) at issue in political terms. As he has written: "What threatens democracy is any law, such as that at issue in *Citizens United*, that makes criminal the showing on television of a documentary – like a movie denouncing a candidate for the presidency of the nation simply because the organization that prepared it had received some corporate grants. The film at issue in *Citizens United – Hillary*: *The Movie* – was, in my view, grotesquely unfair to then-Sen. Clinton. But that sort of political speech is precisely what the First Amendment most obviously protects."