

Yesterday, in response to John Kerry's statement that he regretted having taking public funds for the 2004 general election, Rick Hasen wrote some kind words about my recent Election Law Journal article on the presidential public funding system. He also included a link to the Journal's website. Today he posted a link to Bob Bauer's critique of my article. Unfortunately, the link to the Election Law Journal's website requires the reader to pay for my article while Bob's critique is free. Therefore, I want to take the opportunity to reply to Bob and to invite anyone who wants my full article to write to me off list at [mmalbin@cfinst.org](mailto:mmalbin@cfinst.org). At the end of these comments, I also make a connection between Sen. Kerry's statement and the issue of coordinated versus independent party spending.

Bob correctly identifies the CFI Task Force's rationale for public funding as being to promote competition and to give greater voice to small donors. He says that we gave "diverse examples" of candidates who would not have been viable "ranging from John McCain to Pat Buchanan." Actually, we presented the following list of underdog candidates who were virtually broke when they received public funds, while running against much better funded opponents: Ronald Reagan (1976), Jimmy Carter (1976), George H.W. Bush (1980), Gary Hart (1984), Jesse Jackson (1988), Paul Tsongas (1992), Pat Buchanan (1992), John McCain (2000), John Edwards (2004), Dick Gephardt (2004) and Joseph Lieberman (2004). We argue that the country was better off because these candidates -- three of whom became Presidents -- were able to bring their cases before the voters. To those who think it might be better for a party just to anoint a front runner, we reply that members of the public (and even the party) are better off when the leader is tested during the primary, because that person will have to be tested in the general election anyway.

We explicitly acknowledge that Howard Dean was able to break through the fundraising barrier by using a hot issue to reach small donors. Small donors will be important in the future, but the 2004 evidence shows that most small donors came into the system late, after candidates were known. Our concern is that only four kinds of candidates so far have been able to afford to say "no" to public money: (1) incumbents, (2) front runners, (3) rich people and (4) candidates who can catch the wave of the moment, as Dean did with a hot issue. We have no objection to any of these kinds of candidates, but think it's bad for the system if the field does not give others a credible chance to sustain a campaign at least long enough to be heard in the early primaries. If they lose early and can't build momentum on the support of real voters, fine. But let's be sure the voters can hear a full range of choices. This is, after all, the single most important election choice we have to make, and the problem is likely to become worse as the system become even more frontloaded.

Fortunately, it does not take rocket science to fix the problem. The reason candidates leave the system is that the spending limits don't work for them. For front runners, opting out is a way to weed out the competition and to start the general election early. For everyone else, opting out becomes a necessity just to keep up. CFI's proposed solution to the spending limit problem has only a few key parts, very simple technically to legislate: (1) Raise the spending limit for the primaries to the same level as the general election. That is more than anyone has ever spent before capturing the nomination de facto on Super Tuesday. (2) Take the spending limit off for a participating candidate who has to run against someone who opts out. (3) Do away with distorting and burdensome sub-limits; (4) Get the public money to candidates early. (5) Let the parties help pay for the period between the effective end of the nomination fight and the beginning of the general election. If only one party's

candidate opts out of the spending limit, let the party of the participating candidate use coordinated funds to make up the difference.

The other parts of the CFI proposal are as follows: (1) change the matching fund ratio to a three-to-one match for the first \$100 to encourage small donors, (2) put a limit on the amount of public money that goes to any one candidate, so the fiscal emphasis is on helping candidates when they need it the most, (3) get the money to candidates early, and (4) raise the income tax checkoff from \$3 to \$5 to pay for the new cost, (5) get soft money out of the conventions and (6) ease up the rules for minor parties.

Bob is right to say that the emphasis in our proposal is about giving voice to candidates, empowering small donors, and empowering voters. Except for the convention funding section the emphasis is not so much on the corruption rationale or regulation. In fact, the proposal would mean less regulation, not more.

I agree with Bob that no candidate who takes public funds should legitimately have to regret having done so. But we should pay careful attention to the content of Kerry's complaint. First, it stemmed from the weird fact that his general election funding had to cover a month longer election period than Bush's. This is easily fixed by giving the two candidates the same disbursement date for their general election funds.

Second, Kerry noted that the DNC spent a lot of money on his behalf in independent expenditures but said he regretted not being able to control how it was spent. The DNC reported \$120 million of independent spending, more than 90 percent of which were described in the DNC's reports as negative media advertising. This was a peculiarly ineffective strategy against a sitting President whose negatives were well known by undecided voters when those voters needed to be persuaded to accept Kerry.

But this complaint about a lack of control by the candidate could be fixed easily by letting the parties make unlimited coordinating expenditures instead of forcing the perverse choice of requiring parties and their candidates to be independent. Despite the faulty reasoning in Colorado II, there simply is no logical "corruption" rationale for limiting party spending for candidates as long as contributions into the parties are fully controlled.

Finally, I would note that despite his aiming a critique in our direction, Bob's proposal at the end of his posting is not very far from the CFI Task Force proposal. Bob urges public funding without a spending limit. CFI urges public funding for primaries with a higher and reasonable limit, but the limit comes off for a candidate who has to face one who opts out. The difference, in reality, is not as large as the appearance of a difference.

I am happy to repeat our initial assessment: it is a shame that NO ONE in the current Congress, including past sponsors of public funding, has yet introduced a bill to repair the presidential system. What are they waiting for?

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