International Journal of Politics and Good Governance
Volume 4, No. 4.1 Quarter I 2013
ISSN: 0976 – 1195

REFLECTIONS ON *QUID PRO QUO POLITICAL CORRUPTION* IN UNITED STATES CAMPAIGN FINANCE REFORM

Mordu Serry-Kamal
Associate Professor of Political Science and Public Administration, Winston-Salem State University, North Carolina, USA

ABSTRACT

Many Americans, apparently annoyed by the infusion of limitless amounts of money into the coffers of political candidates by vested interests, are clamoring for governmental controls which would be effective in resolving the issue of this endless outpouring of money in the political arena, once and for all. A fundamental concern of the American electorate is that, the *cozy* relationships between financial donors and politicians give an impression of supposedly illegal political transactions that appear to be based on quid pro quo political interrelationships. Therefore, given the fact that politicians have failed to police themselves through the enactment of effective legislations, some in the public domain are depending on the United States Supreme Court to resolve the problem through judicial action. In this paper, however, the writer will argue that given the history of the American political system, in conjunction with limitations imposed by constitutional, political, and definitional considerations, the Supreme Court will be unable to provide such a straight-jacket definition for quid pro quo political corruption.

INTRODUCTION

For decades, Americans have continuously registered their frustrations regarding the seemingly limitless infusion of money, primarily by vested interests, into the electoral process at all levels of government. Because of the disproportionate political influence generated by such donors of money, through campaign finance contributions to political candidates, many individuals in the general electorate have maintained the view that their representatives are much more accountable and responsive to the demands of vested interests than they are to the vast majority of voters who have elected them. As a result,

some critics appear to have observed this relationship as one that falls within the realm of *quid pro quo political corruption*.

In an apparent response to this public outcry, the Congress of the United States attempted to address the campaign finance issue through the enactment of a series of reform measures especially between 1907 and 2002. As will be demonstrated later, certain stipulations of some of these reform measures were ultimately struck down by the Supreme Court because they were deemed violations of free speech rights in the First Amendment to the United States Constitution. Salient examples of these congressional measures are: *the Tillman Act of 1907; the Federal Corrupt Practices Act of 1925; the Federal Election Campaign Act of 1971; the 1974 Amendments to the Federal Election Campaign Act of 1971; and the Bipartisan Campaign Reform Act of 2002.*

Despite these attempts at reforming the electoral system, however, the measures failed to accomplish their goal of limiting the influence of money, in order to eliminate the appearance of *quid pro quo political corruption* in the electoral process, as had originally been envisaged by lawmakers. This dramatic failure of these measures has been demonstrated, in recent years, by the elaborate and continued increase in the volume of money, along with an increase in the political influence of the vested interests that disseminate such money within the political system.

Overall, the failure of these reforms has generally been attributed to a number of factors. One, for apparently self-aggrandizing political and economic reasons, legislators appeared to have allowed loopholes in the campaign finance reform laws to flounder. Two, such loopholes, in turn, allowed vested interests to circumvent the laws legally, thereby allowing such interests to continue raising and spending unlimited amounts of money in elections, to the mutual benefit of the donors and their recipients. Three, decisions made especially by the Supreme Court using the free speech provision of the First Amendment to the United States Constitution, have also contributed greatly in rendering the Congressional statutes ineffective.

This has, in turn, allowed special interests to continue raising and spending unlimited amounts of money. Four, according to some observers, the most significant of all the factors listed, in terms of its negative impact on reform, has been the lack of an operational definition for *quid pro quo political corruption*. In other words, no reform measure can be expected to be effective when exactly what is to be reformed has not been conceptually determined.

In the political arena, some observers have argued that this lack of an operational definition has enabled certain prosecutors to base their decisions on selective interpretations of what they think constitutes *quid pro quo political corruption*. Based on this technical discrepancy, such observers have contended that in the absence of a clear definition, accused political actors may be convicted of *quid pro quo* violations on bogus political grounds which may have absolutely nothing to do with established law. Therefore, in an apparent attempt to educate the public regarding this phenomenon, a number of journalists and academics have brought this particular issue into the political limelight in one form or another.

For example, George Will, in his February 2012 article entitled "*Is It Bribery or Just Politics*", published in the Washington Post, made the following assertions: "All elected officials, and those who help finance elections in the expectation that certain promises will be kept - and everyone who cares about the rule of law - should hope the Supreme Court agrees to hear Don Siegelman's appeal of his conviction. Until the court clarifies what constitutes quid pro quo political corruption, Americans engage in politics at their peril because prosecutors have dangerous discretion to criminalize politics. Siegelman, a Democrat, was elected Alabama's governor in 1998 and was defeated in 2002. In 2006, he and a prominent Alabama businessman - Richard Scrushy - former CEO of HealthSouth - were convicted of bribery". The underlying implication of George Will's communiqué appears to be that, since there is no operational definition for *quid pro quo political corruption* there, commensurately, appeared to have been no actual legal basis

over which these two individuals have broken any laws that would have required their convictions.

But given the political traditions which had been based on, and supported by, the federal Constitution for centuries; and assuming that such a definition might be restrictive of the rights of Americans to participate in politics freely in accordance with the Constitution, will the Supreme Court now be in any position to alter that tradition radically by providing a clear-cut definition for quid pro quo political corruption? Quite apart from the difficulties involved in defining corruption, *quid pro quos* have, after 1791, been constitutionally-legitimate facets of the participation of citizens in the political system. Therefore, on the basis of these projections this writer posits that, given the history of the emergence of the American political system, constitutional, political, definitional, and practical considerations will certainly pose insurmountable obstacles to the articulation of a clear definition for *quid pro quo political corruption* by the United States Supreme Court.

This contention will be supported by analyses involving these four major factors: first, the difficulty of defining corruption; second, a practical application of James Madison's theoretical construct of the viability of political factions in the American political system; third, the Supreme Court's interpretation of the First Amendment to the United States Constitution, regarding campaign financing, in landmark cases that include - *Buckley v. Valeo (1976)*, *Colorado Republican Federal Campaign Committee v. FEC (1996)*, *Federal Election Commission v. Wisconsin Right to Life, Inc. (2007)*, and *Citizens United v. Federal Election Commission (2010)*; and fourth, continued increases in the costs of elections in the United States.

THE DIFFICULTY OF DEFINING CORRUPTION

Although it is generally recognized that the concept of corruption is difficult to define, this writer nevertheless regards it as a practice which depicts an exchange of favors

between or among certain participants engaged in a *transaction*, that might be illegal, in order to generate outcomes that would be mutually-beneficial. Further, in an attempt to shed more light on the issue, Arvind K. Jain, in a 2001 article entitled "*Corruption A Review"*, published in the Journal of Economic Surveys, explains the phenomenon in this manner: "Although it is difficult to agree on a precise definition, there is consensus that corruption refers to acts in which the power of public office is used for personal gain in a manner that contravenes the rules of the game. Certain illegal acts such as fraud, money laundering, drug trades, and black market operations, do not constitute corruption in and of themselves because they do not involve the use of public power. However, people who undertake these activities must often involve public officials and politicians if these operations are to survive and hence these activities seldom thrive without widespread corruption".

A PRACTICAL APPLICATION OF JAMES MADISON'S THEORETICAL CONSTRUCT

Through his writings in the *Federalist Papers* contained in a 2001 book that is edited by Robert Scigliano, entitled The Federalist: A Commentary on the Constitution of the United States, the influence of James Madison had been decisive toward the establishment of the Constitution of 1787. In addition, James Madison is also widely regarded as the delegate who drafted the First Amendment which, along with the rest of the Bill of Rights, emerged ex post facto in 1791. One of his major contributions attempted to address the issue regarding the role of interest groups or *factions* (as Madison had referred to them in Federalist 10) in the emerging democracy. According to Benjamin Ginsburg et al, in their 2011 book entitled We the People: An Introduction to American Politics, Madison and others "… believed

that interest groups thrived because of liberty - the freedom that all Americans enjoyed to organize and express their views. If the government were given the power to regulate or in any way to forbid efforts by organized interests to interfere in the political process, the government would in effect have the power to suppress liberty".

The statements of Ginsburg et al appear to suggest that, in order to prevent the government from usurping these rights from the American people, the principle of freedom of association (group formation), along with the right to *petition* the government (make requests) and the right to *lobby* the government, were all encoded into the First Amendment to the United States Constitution. According to thefreedictionary.com, "Lobbying involves the advocacy of an interest that is affected, actually or potentially, by decisions of government leaders. Individuals and interest groups alike can lobby governments … [Further], the practice of lobbying is considered so essential to the proper functioning of the U.S. government that it is specifically protected by the First Amendment to the U.S. Constitution".

Therefore, it is these rights to form interest groups, to petition the government, and to lobby the government which enables factions; that possess the required resources, obtain unlimited access to decision-makers, and also obtain unlimited influence in the public policy-making arena. Even though there is nothing in the Constitution that would restrict the participation of such factions, because of their disproportionate possession of political and economic resources, this manifested political infrastructure has nevertheless created the atmosphere within which public concerns have been expressed regarding the disproportionate domination of the political system by such groups. Therefore, since this situation has continued to pose an intractable dilemma for the government, and realizing its inability to criminalize the practice due to restrictions imposed by the Constitution, Congress and the courts have proceeded to regulate this behavior rather than attempting to abolish it.

These projections provide irrefutable evidence that regardless of the public's intuition about the disproportionate domination of the political process by vested interests and their political counterparts through quid pro quos, such activities have, nevertheless, long been protected by free speech in the First Amendment to the Constitution. In other words, under the current Constitution, it is lawful for factions to organize, petition, and lobby

government officials in diverse ways, including through campaign finance funds quid pro quo.

To some significant extent, this writer's positions are supported by academics in the existing literature on campaign financing. For example OferRaban, in a 2011 article entitled "*Constitutionalizing Corruption*: *Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns*" published in the University of San Francisco Law Review, states that " … since it is perfectly legitimate for individuals or entities to provide financial support to a candidate with the expectation that the candidate will respond by producing those political outcomes the supporter favors, it is presumably equally legitimate for the candidate, once elected, to produce the expected responsiveness". In addition, according to Martin H. Redish and Elana N. Dawson, in their 2011 article entitled "*Worse than the Disease: the Anti-Corruption Principle, Free Expression, and the Democratic* Process" published in the William and Mary Journal Volume 20, the principle of anti-corruption "… stands in stark contrast to the foundational precepts of American political theory that were embodied in the First Amendment right of free expression … [therefore, *inter alia*,] citizens may seek to influence the political process to advance their own personal interests". Thus, extrapolating from these two quotations, the authors appear to posit explicitly that free speech in the First Amendment allows for quid pro quo relationships.

THE SUPREME COURTS' INTERPRETATION OF THE FIRST AMENDMENT

The Supreme Court has demonstrated consistency in its interpretation of free speech in the First Amendment. The underlying foundation of this interpretation, as already stated, is that Americans possess the constitutional rights to form groups, petition, and lobby their government representatives, within the realm of free speech and association. In addition, these interpretations have also constituted a reflection of certain pivotal issues: one, a reaction to congressional statutes which the court felt may have unduly intruded on the First Amendment rights of American citizens in campaign financing; two, a depiction

of the court's tendency to regulate, rather than to abolish outright, the quid pro quo political relationships between vested interests and politicians involved in campaign financing. The cases that follow are, therefore, a representative sample of Supreme Court rulings that are consistent with the exercise of such free speech rights.

- One, *Buckley v. Valeo (1976)* - In this case, according to the Buckley v. Valeo Oyez website in http://www.oyez.org, the Supreme Court arrived at these decisions regarding Congressional restrictions imposed by the *Federal Election Campaign Act of 1971*: … "the governmental restriction of independent expenditures in campaigns, the limitation of expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures, did violate the First Amendment. Since these practices do not enhance the potential for corruption that individual contributions to candidates do, the court found that restricting them did not serve a government interest great enough to warrant a curtailment on free speech and association".

- Two, *Colorado Republican Federal Campaign Committee v. FEC (1996)* - In this case, according to the Colorado Republican Federal Campaign Committee Oyez website in http://www.oyez.org, the Supreme Court decided that the *Federal Election Campaign Act of 1971* was in violation of the First Amendment because the expenditure made by the political party in question was independent since it was not coordinated with a candidate. [The Federal Election Commission (FEC) is the bureaucratic organization which enforces federal campaign finance laws].

- Three, *Federal Election Commission v. Wisconsin Right to Life, Inc. (2007)* - In this case, according to Sandy Maisel and Mark Brewer in their 2012 book entitled Parties and Elections in America: the Electoral Process, the Supreme Court "essentially declared the ban [by the *Bipartisan Campaign Reform Act of 2002*] on groups using a candidate's name in issue advocacy ads thirty days before a primary election and sixty days before a general election, unconstitutional".

- Four, *Citizens United v. Federal Election Commission (2010)* - In this case, according to Sandy Maisel and Mark Brewer, the Supreme Court arrived at these decisions in support of free speech rights: one, "it removed BCRA [*Bipartisan Campaign Reform Act of 2002]* restrictions on corporate (and presumably union) funded electioneering communications; and two, "it struck down FECA [*Federal Election Campaign Act of 1971*] restrictions on the use of money directly from corporate (again, presumably union as well) treasuries to explicitly campaign directly for or against candidates for federal (and likely state as well) office, so long as such efforts were done independently". [Maisel and Brewer define *electioneering communications* as the regulated use of broadcast, cable, or satellite communications by candidates running for federal office].

INCREASES IN COSTS OF ELECTIONS IN UNITED STATES

Given the history of the steady increases in the costs of elections, in addition to the frequency of such elections at all three levels of government, financial donations into the coffers of political candidates have, commensurately, continued to increase. According to Spencer Overton, in a 2012 article entitled "*The Participation Interest"*, published in the Georgetown Law Journal, "Relatively few people make political contributions. While 64% of eligible Americans voted in the November 2008 election, less than 0.5% [less than one-half of one percent of the population] are responsible for the bulk of the money that politicians collect from individual contributors".

Further, in an attempt to address the issue of money and corruption in politics, some reformers have even advocated the idea of public funding as perhaps a potential replacement for, or that would at least be in competition with, the present system of private funding. This proposal, has however, been fraught with a number of very serious systemic setbacks; and as a result, may explain the reasons such an idea has never been seriously undertaken.

Analyses of these setbacks indicated above follow. One, because of the expense that is involved, the vast majority of citizens have demonstrated their inability to shoulder such increasing electoral costs, as Overton's projections above have attempted to imply. Two, perhaps partly due to a lack of confidence in the political system, many voters who may otherwise afford to make contributions have demonstrated their unwillingness to engage in such a practice. Three, because federal campaign finance laws have allowed presidential candidates, for example, to opt-out of the so-called public finance option, many presidential candidates have chosen to do so in order to remain effectively competitive with others who have decided to accept more money from private sources. The logic of this behavior is premised on the fact that the possession of more money might increase the chances of a candidate's electoral victory. Four, since Americans possess First Amendment constitutional rights to participate in politics, the public funding strategy, even if it had been pursued much more diligently, could not have legally supplanted the private option because to do so would have amounted to a revocation of such constitutional rights. Therefore, because they possess the means, rights, and the motive to do so, vested interests have continued to play a very significant and dominant role in making campaign financing contributions.

Sandy Maisel and Mark Brewer in their book, already cited, have catalogued a brief historical background of the steadfast increases in the costs of elections in the United States. The authors state the following: "… it is clear that the amount of money spent on campaigns in the United States has grown exponentially over the past sixty years. In 1952, political scientist Herbert Alexander calculated that approximately $140 million was spent on political campaigns nationwide. In 2008 - like 1952, a presidential election year - $5.3 billion was spent on campaigns for federal office alone according to the Center for Responsive Politics, with an additional unknown amount spent on state and local races across the nation. The recently completed 2010 [mid-term] elections have also shattered records, with preliminary figures compiled by the Center for Responsive Politics indicating that total spending on federal races in 2010 came up to just short of $4

billion, an increase of more than $1 billion from [the mid-term elections of] 2006. Many are speculating that President Obama will become the first presidential candidate to raise over $1 billion in his 2012 bid for reelection". In addition, the mass media have also speculated that the total sum of expenditures involving the 2012 presidential race alone might supersede $3 billion.

Therefore, if special interests are responsible for the absolute bulk of the financial contributions made in election cycles, and a restrictive definition for *quid pro quo Political corruption* were to be determined by the Supreme Court, a sequence of events might transpire almost immediately. One, most participants in quid pro quo relationships might find themselves being accused of criminal acts. These circumstances will be much worse than the current situation in which only some participants are being accused of breaking laws. Two, knowing that the likelihood of criminalization is much higher than ever, rational thinking individuals and groups might be reluctant to donate their money to political candidates; and, political candidates might be reluctant to make requests for financial donations. Three, the inevitable outcome of these developments might become the collapse of the political system itself; especially, when there is no other viable system that would effectively replace the current campaign finance system.

CONCLUSION

The issue of campaign finance reform continues to pose a major dilemma for the United States on two fronts. On one hand, there is a manifested political determination that the domination of the process by a few vested interests who spend most of the money, must be controlled in order to allay concerns that the political system is endemically corrupt; and, that democracy exists only for the well- connected. On the other hand, such systemic determination cannot be accomplished at the constitutional expense of the rights of citizens to participate freely in the political process in accordance with the dictates of the First Amendment.

Because of this dilemma, therefore, the roles of Congress and that of the courts have been

relegated to one of *managing* a problem that appears irresolvable. This situation makes it clear that for as long as the federal Constitution continues to exist in its present form, especially the Bill of Rights (none of which has ever been amended), nothing substantially will change regarding the domination of the political process by vested interests through quid pro quos. This assertion has been made even more vividly clear by the Supreme Court's rulings in the 2010 *Citizens United* case regarding the rights of citizens to make *unlimited* campaign finance contributions to political candidates. In addition, by refusing to grant certiorari to Don Siegelman's appeal of his bribery conviction which took place in the state of Alabama, the United States Supreme Court also appears to have signaled an extreme lack of appetite to even create the appearance of wanting to consider a specific definition for *quid pro quo political* corruption; despite the fact that approximately one hundred former state Attorney-Generals, who expected the Supreme Court to provide such a specific definition, had urged the court to agree to hear the case.

Further, according to David D. Savage, in a June 2012 article entitled "*Court Refuses to hear Former Alabama Governor's Challenge to Bribery Conviction"*, published in the LATimes.com, the Supreme Court's decision has preserved "… rulings that say prosecutors and jurors can decide when a favor linked to a campaign contribution amounts to a bribe". This comment would imply that selective interpretations of *quid pro quo political corruption*, by prosecutors and jurors, will continue ad infinitum. Therefore, for reasons pertaining to restrictions imposed by the First Amendment to the Constitution; reasons regarding the difficulty of defining corruption; and other practical considerations as posited, the United States Supreme Court will not be inclined to advance a specific definition for exactly what constitutes *quid pro quo political corruption*.

REFERENCES

Buckley v. Valeo (1976) in http://www.oyez.org.

Colorado Republican Federal Campaign Committee v. FEC (1996) in http://www.oyez.org.

Ginsburg, Benjamin et al, We the People: An Introduction to American Politics, Eighth Essentials Edition, W. W. Norton and Company, New York, 2011.

Jain, Arvind K., "Corruption A Review", Journal of Economic Surveys, Blackwell Publishers Limited, 2001.

Maisel, Sandy and Mark Brewer, Parties and Elections in America: the Electoral Process, Fifth Edition, Rowan and Littlefield Publishers, Inc., New York, 2010.

Overton, Spencer, "The Participation Interest", Georgetown Law Journal, Volume 100, 2012.

Raban, Ofer, "Constitutionalizing Corruption: Citizens United, Its Conceptions of Political Corruption, and the Implications for Judicial Elections Campaigns", University of San Francisco Law Review, Volume 46, 2012.

Redish, Martin H. and Elana M. Dawson, "Worse than the Disease: the Anti-Corruption Principle, Free Expression, and the Democratic Process", William and Mary Journal, Volume 20, 2011.

Savage, David M., "Court Refuses to Hear Former Alabama Governor's Challenge to Bribery Conviction", LATimes.com, June 5, 2012.

Scigliano, Robert, Editor, The Federalist: A Commentary on the Constitution of the United States, The Modern Library, New York, 2001.

TheFreeDictionary.Com,

Will, George, "Is it Bribery or Just Politics?", The Washington Post, February 10, 2012.