

When Campaign Finance Reform Is Unconstitutional: Remembering James Madison

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INTRODUCTION

Campaign finance reform is a subject that has inflamed passions all across the country for many years. Along the way, it has become easy for many to say that all of our ills as a nation are caused by incompetent politicians who have been bought by special interests through the process of campaign contributions. Who can possibly be in favor of such a system, they ask.

Robert Samuelson, a well-respected columnist accurately summarized this circumstance when he recently wrote in the *Washington Post*:

Few subjects inspire more intellectual conformity than "campaign finance reform." All "right-thinking" people "know" that election spending is "out of control," that the present system of campaign finance is corrupt and that only reactionaries block reform....Who cares if these common beliefs are either wrong or wildly exaggerated --or that most "reforms" would do more damage to democracy than any harm they might cure? The case against "reform" is almost impossible to make, because people's minds are closed.

Over the past several years, as we have debated legislation in the Congress to "reform" the laws governing campaign expenditures, I believe there has been an issue at stake which is far more fundamental than campaign reform. In this debate, draped in the cloak of "reform" we are talking about the most crucial political questions that any society can confront; issues that were confronted and resolved by those we now refer to as the Founding Fathers. Accordingly, I believe it essential to frame this issue in a context that one might not normally think of when addressing the issue of campaign reform, but which I think is absolutely crucial to consider if we are to proceed without doing serious damage to American political traditions.

JAMES MADISON'S "TENTH FEDERALIST"

One cannot discuss fundamental questions of government in America without returning to the writings of James Madison, commonly called the "Father of the Constitution." On this

topic, however, the appropriate reference is neither from the Constitution in its original form, nor the Bill of Rights as a set of amendments to it -- both products of Madison's genius -- but rather from a paper that has come to be known as "The Tenth Federalist," a political tract written during the time that the nation was debating the ratification of the Constitution.

Many were afraid of the document because of the impact it would have on their existing government. James Madison, along with John Jay and Alexander Hamilton set forth, in a series of pamphlets that are now known as *The Federalist*, the intellectual and philosophical underpinnings of American government. The edition from which quotations are taken here is *The Federalist* (New York: The Modern Library, n.d.).

In the tenth of this series of publications, Madison addressed the fundamental question of what to do about what we now call "special interests," or in the 18th century vernacular, a "faction." In the 10th Federalist, Madison defines faction as "a number of citizens...who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." I can think of no better description of a special interest than this one.

Madison then tells us,

There are two methods of curing the mischiefs of faction:...removing its causes [or]...controlling its effects. There are again two methods of removing the causes of faction:...by destroying...liberty ...[or] by giving to every citizen the same opinions, the same passions, and the same interests....[T]he first remedy ...[is] worse than the disease.

Certainly all Americans would agree with this. Controlling the mischiefs that come from special interests by destroying the basic liberty that guarantees to each his or her own right of opinion would destroy the very basis of the nation in which we live.

Madison goes on to say, "The second...is as impracticable as the first would be unwise. As long as the reason of man continues fallible...different opinions will be formed....The latent causes of faction are thus sown in the nature of man...."

No contemporary writer could place the situation more

succinctly or precisely than Madison has. Special interests arise among us because we are free, and, as long as we are free, we will disagree to one extent or another.

Madison continues by stating:

The inference to which we are brought is, ... the *causes* of faction cannot be removed and ... relief is only to be sought in ... controlling its *effects* ... Relief is supplied by the republican principle ...

... A pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. ... [S]uch democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property.

... A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking ...

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens ... over which the latter may be extended.

Madison explains what he means when he refers to the “greater number of citizens” by telling us, “The influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states.” This was his argument in favor of creating a large, single republic, rather than perpetuating the confederation of a series of relatively small ones.

But it is to his first point about the difference between a democracy and a republic that I return. In a pure democracy, every decision is made by the vote of every citizen. In a republic, as Madison says, “The delegation of the government ... [is] to a small number of citizens elected by the rest ...” It is this form of government that the Constitution gives us, and under which we have lived for well over two centuries.

What does all this have to do with campaign finance reform?

We are faced with a society very different from the one in which Madison lived, particularly with respect to the means that a faction can employ to influence and, on occasion, even control public opinion. Let us take these modern tools of communication and apply them to the model that Madison suggests.

APPLYING MADISON’S INSIGHTS TODAY TO THE ISSUE OF CAMPAIGN FINANCE “REFORM”

Is it possible for a modern special interest, or faction, to create a “conflagration” simultaneously in several states? Given the power of television, national publications, and the Internet, the answer is clearly yes. A special interest group, be it rooted in a labor union, an environmental association, a business alliance, or a religious association, now possesses the means, if

it can raise the money needed to employ them, to reach every citizen in the country virtually simultaneously, without regard to any political boundaries or geographical barriers that might exist. Examples of this behavior are all around us.

In the 1996 election, the labor unions publicly announced that by increasing the compulsory dues paid by their members, they could raise at least 35 million dollars to be spent in an effort to guarantee that candidates who support their political agenda were elected to the House of Representatives. Various religious organizations, calling themselves the Christian Coalition, banded together and by using the outlets of communication available to them in the churches that belong to the group, set out in the 1994 elections a common message to all of those who are adherents to all of those particular denominations. The same group has repeated that process in the 1996 and 1998 elections.

The National Rifle Association, spending the dues paid to it by those who voluntarily join as members, sent broad mailings and purchased advertising time on the electronic media, to make sure that anyone who agreed with its views with respect to gun legislation, would be stimulated to go to the polls and support candidates who are of the same mind.

On an issue perhaps closer to home for me as a Senator from Utah, groups of environmental supporters, concerned about a bill introduced by members of the Utah delegation relating to land use in Utah, purchased full-page ads in the major newspapers across the nation urging an outpouring of communication to the Congress seeking defeat of the Utah-based legislation.

Madison's statement that “the influence of factious leaders may kindle a flame within their particular states, but will be unable to spread a general conflagration through the other states,” is clearly no longer true.

That means we must return to the other “great point of difference between a [direct] democracy and a republic” of which Madison writes—namely “the delegation of the government ... to a small number of citizens elected by the rest ...” It is through this device, primarily, that we must now find hope for protection against the tyranny of a pure democracy, where a faction, able to temporarily obtain a majority opinion, can then ride over the interest and opinions of the rest of the citizens in society.

When he discusses the republican principle, Madison is referring to elected officials. Nonetheless, the same principle applies to campaigns. We do not vote in campaigns as a pure democracy, deciding every issue; instead, we vote our choices among a “small number of citizens” who have offered themselves to serve in public office. Through a process of conventions or primaries or both, we winnow this number down until we make the final choice, through the democratic process, but it is an example of the republican, representative principles nonetheless.

The rhetoric we are hearing about the need for campaign reform flies in the face of the Madisonian preference for a

republic over a pure democracy as a governmental form. The more we limit the amount of money that is available to the representatives who seek office, or candidates, the more we weaken the republican principle and move toward a pure democracy. Or, given the erosion of Madison's second protection against democratic excess, the more we strengthen the hand of special interests. This is particularly ironic as all of the calls for such campaign finance reform are made in the name of supposedly weakening the power of the special interests.

Consider the following. In a particular congressional district, we have candidate A and candidate B, both under strict spending limitations, which means that each has a limit on the amount he or she can spend to tell the voters about their respective positions on the issues. The special interests, on the other hand--the labor unions, the environmentalists, the Christian Coalition, or the NRA -- have no such limits, which means that the voters can and presumably will be bombarded with information aimed at influencing their vote. Unless we repeal the First Amendment right of free speech and press, which I am by no means advocating, the special interests will never have such limitations placed upon them.

Receiving proportionately less and less information from the candidates, and more and more from the special interests, the voters will ultimately make their choices on the basis of which special interest message is the most persuasive. The candidate's intellect, training, character, and talent will become secondary if not, in the end, lost altogether in the elective process.

If, in the name of "reform" we set up a circumstance which limits the ability of a candidate to raise and spend his or her own money, therefore limiting that candidate's ability to put forth his or her own positions, we strengthen the hands of those who have no such limits, but strong political positions to promote.

We weaken the ability of a candidate to stand up to a special interest when we say to the candidate, "If you disagree with the position taken by the AFL-CIO, or the Sierra Club, or the Christian Coalition, or the Trial Lawyers Association, or the NRA, you have only a limited number of dollars available to use to make that case. They, on the other hand, can say whatever they want without limitation about you and your position."

That is not a fair fight. That is not the position that Madison laid before American voters as they contemplated

the Constitution. That is not the kind of fundamental change in our political processes that we should be pursuing here. But what kinds of fundamental changes should we pursue?

THE NEED FOR FULL DISCLOSURE

I believe in the power of full disclosure. I support measures that would eliminate all limitations on candidates to raise and spend money, as long as those candidates are open and candid in disclosing to their voters where their money came from. I would extend those disclosure requirements to special interests. We know that the AFL-CIO is spending money that comes from dues assessments laid upon its members. The more people know that, the more questions that can be raised as to whether those members approve of the ways those dues are being spent.

What we do not know is where the money comes from that supports the purchasing of advertisements by some of the environmental groups that have entered the political arena. We do not know the exact nature of the contributions that keep the doors of the Christian Coalition open, or pay for the ads or airtime that it purchases. And we do not know the extent to which people on the payrolls of these various organizations show up in campaigns, and work on behalf of one candidate's election or the other.

I do not condemn any of the activities of any of these groups. They are fully protected by the First Amendment in their right to believe as they wish, speak as they wish and campaign as they wish. Nonetheless, if we are to preserve the principles laid down by Madison and his contemporaries, we have the right to know more about the inner-workings of these "factions" than we do now. They are major players in the political game, and deserve to be given the same scrutiny as the candidates themselves.

I close by going back to Madison, "Liberty is to faction what air is to fire...." Absolutely a major purpose for which the Founding Fathers created the Constitution, is protecting the rights of everyone to have his own special interest, belong to his own faction, and hold his own opinions. An attempt on the part of the Senate of the United States to destroy that right is clearly and appropriately going to be held unconstitutional as it has been again and again.

