1-1-2011

Statement of Professor Kendall Before Illinois Campaign Finance Reform Task Force, Special Public Hearing, Pursuant to Illinois Public Act 96-832 (SB 1466) (December 15, 2011)

Walter J. Kendall III
John Marshall Law School

STATEMENT OF

WALTER KENDALL

Professor of Law
The John Marshall Law School

Before Illinois Campaign Finance Reform Task Force
December 15, 2011

My name is Walter Kendall. I am a Professor of Law at The John Marshall Law School. I have been teaching there for over 35 years specializing in Administrative and Constitutional Law. At one time or another since graduating from law school, I have worked for a federal regulatory commission (the then FPC), a state Department (IDPA), and a multi-national corporation (Baxter Laboratories). I've been an elected School Board member of a large suburban district (District 15 in the northwest suburbs) and a Cook County Democratic Township Committeemen (Palatine Township); and worked in every election cycle for one candidate or another since 1970. I have through the years served on the Boards of and represented many public interest groups, local, statewide and national, including the Cook County Human Rights Commission.

The Illinois Campaign for Political Reform asked me to prepare some remarks on the historical constitutional context in which the debates about campaign finance reform, particularly public financing of elections, have and are taking place. I am honored to be so asked and happy to try to be helpful to the Task Force.

Elections are the cornerstone of republican or representative democracy. They are an essential part of how we identify, measure, aggregate and give voice to our individual and common interests, needs and dreams. That means that the range of views considered and the salience they have must be determined by all who are eligible to and do participate.

From the very beginning of the Republic the better off have had power disproportionate to their numbers. Some say that's what the Founders intended: that they feared the rabble would pursue their private interests rather than the public interest. Certainly Madison wanted large electoral districts to increase the likelihood that the best candidates would succeed. But he also famously knew that men were not angels, that the elites could not be trusted either. Lord Acton

put into a famous statement the deep belief of the Founders – power corrupts. This recognition, this concern about corruption, underlies all the great principles of our system – federalism, separation of powers, even the first amendment.

Upon some reflection one can see the constitution as creating an anti-corruption structure. The following chart is from Professor Zephyr Teachout's article in the Cornell Law Review The Anti-Corruption Principle

Constitutional Provision	**Feature**	**Reference**	
Article I, Section 2	Fact and Frequency of Elections	*The Federalist No. 39*	
Article I, Section 2	Residency Section in Qualifications Clause	Notes of King, August 8, 1787 Notes of Madison, August 8, 1787	
Article I, Section 2	Requirement that the Same Qualifications Apply to State and Federal Elections		
Article I, Section 2	Advise and Consent	Notes of Madison, .July 18	
Article I, Section 2	Inhabitancy Requirement	Notes of King, August 8, 1787 Notes of Madison, August 8, 1787	
Article I, Section 2	Number of Representatives	Letter from Madison to George Hay, August 23, 1823	
Article I, Section 2, Clause 1	Election "By the People"	Notes of Yates, June 6, 1787	
Article I, Section 6, Clause 2	No Conflict Clause	Notes of Yates, June 22, 1787	←No double dipping
Article I, Section 7	2/3 Veto Override	Notes of Madison, September 12	
Article I, Section 9	Power of the Purse		←Clause 7 accounting for appropriations
Article I, Section 9	No Title of Nobility or Gifts from Foreign States	Randolph, *in Debates and Other Proceedings of the Convention of Virginia* 321-45 (2d ed. 1805)	
Article I, Section 10	Forbids the Creation of Titles of Nobility		
Article II, generally	Generally – An Executive	Notes of Madison, September 6, 1787	
Article II, Section 1	Same Day Elections	Notes of Madison, August 8, 1787	
Article II, Section 1	Method of Electors Voting	Rufus King in the Senate of the United States, March 18, 1824	
Article II, Section 2	Treaty-Make Power	Notes of Madison, August 8, 1787	
Article II, Section 2	Appointments Clause	William Findley in the House of Representatives, January 23, 1798	
Article II, Section 4	Causes for Impeachment	Notes of Madison, July 24, 1787	
Article II, Section 4	Fact of Impeachment	Notes of Madison, July 24, 1787	
Article II, Section 4	Agents of Impeachment	Notes of Madison, September 8, 1787	
Article III Section 1	Inferior Federal Courts	Notes of Madison, June 5, 1787	
Article III, Section 2	Jury Requirement	Notes of Madison, September 12, 1787	

And it was not just corruption in the use of governmental power that concerned the Founders. They were also concerned about corruption in the use of private economic power. In that regard, let me shamelessly refer you to a brief review essay I wrote on Madison and the Market Economy published in the Quinnipiac Law Review.

As Professor Teachout says, "The Framers were obsessed with corruption." George Mason said early in the deliberations at the Constitutional Convention, "If we do no provide against corruption, our government will soon be at an end." To begin to understand what they understood by corruption, we can look at the warning of Pierce Butler: "We have no way of judging of mankind but by experience. Look at the history of the government of Great Britain … A man takes a seat in parliament to get an office for himself or friends, or both; and this is the great source from which flows its great venality and corruption."

Notice the emphasis on experience; then substitute Illinois for Great Britain, and the General Assembly for Parliament and one can see that there is a continuing urgency to understanding the Constitution as the Founders did. Professor Teachout makes it clear that they understood corruption as "self-serving use of public power for private ends, including without limitation, bribery, public decisions to serve executive power (or legislative leadership) because of dependent relationships, and use by public officials of their positions of power to become wealthy."

The Supreme Court's opinions beginning with Buckley v. Valeo have considered corruption in its various guises: to be either criminal bribery (Citizens Against Rent Control … v. City of Berkeley); inequality (FEC v. Mass. Citizens for Life); drowned voices (1st N/Bk of Boston v. Bellotti); a dispirited public (Nixon v. Shrink Missouri Government PAC); or a loss of

integrity in the system at large ("corruption is a subversion of the political process") (FEC v. Nat'l Conservative PAC).

In Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, the current Court seemed to focus on the quid pro quo, (the bribery or criminal) understanding of corruption; and perhaps the drowned voices concern. It was dismissive of the inequality or leveling concern. Sadly perhaps because of the Common law methodology or because none of the Justices were ever elected officials, the dispirited public and loss of integrity (rotting from within) understandings of how the Constitution have been overlooked – but not rejected.

Frankly, I sometimes think this Supreme Court's understanding of the workings of democracy and political power is as unrealistically idealized as was the Court's understanding of the market and economic power before the New Deal. Neither Court seemed to understand the truth in Justice Brandeis's warning: "We can either have democracy in this country or we can have great wealth concentrated in the hands of the few, but we can't have both."

It is therefore important that this Task Force recognize that the Founders had it right. Corruption is about more than bribery. Any systemic practice that distorts the pursuit of the public interest; that diminishes participation in politics; or that permits officials to enrich themselves is corruption.

This look back to the Founders and the summary of the Supreme Court's decisions beginning with Buckley v. Valeo shows that:

1. Anti-corruption is a high order constitutional norm or value that underlies separation of powers and federalism even the first amendment and thus helps to constitute our system of governance.

2. The Court recognizes that "dependence on outside contributions (creates) coercive pressures and attendant risks of abuse of money in politics."

3. Public financing is a constitutional response to the inherently corrupting effects (i.e., dependency creating effects) of money in electoral politics.

4. Public financing systems that are voluntary, do not limit non-participant candidate expenditures, or the expenditures of independent entities, and do not trigger state benefits or burdens "in direct response to the political speech" of non-participating candidates are constitutional.

5. Supreme Court opinions, none of which were repudiated by Bennett, permit subsidies to speech on a differential basis as long as the basis is viewport neutral. So for instance exclusion of marginal candidates from public television debates is permissible (Arkansas ETV v. Forbes); granting tax benefits on condition of not lobbying (speech) is permissible (Reagan); making government grants limiting the speech topics the recipients can address is permissible (Rust v,. Sullivan).

6. As the court said in Bennett; "Limiting contributions, of course, is the primary means we have upheld to combat corruption." As long as the limits are not so low that they limit effective campaign contribution requirements and limitations they are constitution.

7. Disclosure requirements on candidates and their campaigns both in connection with contributions received, and expenditures made, have been sustained as long as the requirements are clearly limited to concerns about corruption.

So in closing, let me offer a thought or two about the Report you will be writing, and also suggest a few reforms you might consider.

- In my opinion the Report ought to emphasize the centralness of what Professor Teachout calls the anti-corruption principle. It should approach campaign finance reform and public funding not as externals introduced to work at the margins, but rather as constitutive of our democracy.
- The Report should clearly recognize the reality of the corrupting effect of money, especially big money, in politics generally and elections particularly. The Supreme Court has, so should the Report.
- There should be no equivocalism about the Constitutionality of public funding of elections in the Report. Yes arguments about how the balance between democracy (independence and accountability of elected officials), federalism, separation of powers, and the first amendment should be struck, but no question that the State has constitutional authority to work towards clean elections.
- The Report should make clear that the effects of public financing that the Supreme Court found troubling and that critics point to, things like candidates changing plans depending on how they assess the resources of their opponents, or last minute expenditures, are the norm now, and not arguments against public financing.
- The Report should reject the argument that public financing results in less speech. It seems to me the Court's critics of public financing confuse loudness and frequency of speech with quantity and quality of speech when they say it will result in less speech. A properly constructed system should encourage more people to actively participate as contributors, even candidates. More participants means more speech.
- And it should be bold in suggesting possible reforms. The Task Force needs to be realistic, but it should not assume the role of the Legislature. Rather it should be more

like a think tank and present lots of possibilities to be analyzed and criticized. Yes eliminate the obviously unrealistic or unconstitutional, but open new avenues of thought. Our rules of elections are constantly changing as our economy and society change, and as our understanding of democracy, equality and liberty change. Your Task Force Report should be thought of as an agent of change towards clean elections.

- TV and other media time and space could be bought and made available to participating candidates.
- In the language of the Bennett opinion expenditures are currently considered 'independent" if "not coordinated with a candidate (as) the candidate-funding circuit is broken." Just as the law distinguishes between degrees of involvement and cooperation in liability contexts the definition of "independent" could be tightened to reduce bundling and other congruent forms of participation in campaigns. Unless the separation between candidates and "independent" expenditures groups negates the possibility that quid pro quo corruption will occur it is insufficient to be truly independent and should be considered as contributions.
- Upon the exceeding of the limit on the participating candidate by the non-participating candidate, the limit could be removed and the participating candidate would be free to raise funds on their own. This triggers no state conferred benefits and thus does not fall under the ban of Bennett.
- To encourage greater participation of individual voters the system should operate in such a way that (a) individuals making small contributions are given a tax benefit; and (b) candidates that raise money in small individual amounts receive some additional benefit.
- Similarly, efforts should be made to revitalize political parties.

- All official publications in connection with the election could prominently indicate which candidates have participated in this program.

These comments are offered as a historical constitutional context for your deliberations in the spirit of reform. The suggestions all need further thought. But again unless your Report challenges the Legislature little or no change will result. I think it was FDR who reminded us that "Where there is no vision the people perish."

Thank you for this opportunity to participate in your important work.