STATEMENT

of

Roger Pilon, Ph.D., J.D.
Vice President for Legal Affairs
B. Kenneth Simon Chair in Constitutional Studies
Director, Center for Constitutional Studies
Cato Institute
Washington, D.C.

before the

Committee on Rules and Administration
United States Senate

March 29, 2000

The Presidential System and Campaign Reform

Mr. Chairman, distinguished members of the committee:

My name is Roger Pilon. I am vice president for legal affairs at the Cato Institute and director of Cato's Center for Constitutional Studies.

I want to thank you Mr. Chairman for inviting me to testify before the committee on "The Presidential System and Campaign Reform." In this lull between the decisive presidential primaries and the general election, there is much talk, of course, about campaign finance "reform" in general, especially in light of the attention Senator McCain and the media gave the subject during the primary season. And more specifically, just last week before this committee Mr. Alan B. Morrison, speaking on behalf of Public Citizen, offered a proposal that others too have made, namely, to expand the current presidential election fund and tax check-off system to cover national parties and, by implication, congressional elections.

On previous occasions I have shared my thoughts with congressional committees on the constitutionality of various reform proposals. Today I'd like to make a few more general observations about the reform movement, then turn, with that as context, to the more specific issues before the committee.

"Reform" in General

In a March 10 Report to Congress entitled "The Presidential Election Campaign Fund and Tax Checkoff: Background and Current Issues," the Congressional Research Service surveyed the present uncertain state of the program—for the first time there is a shortfall in funds and there are pro-rated payments—and then began its evaluation of the system with the following observation:

> Underlying most evaluations are sharply opposing views of public funding, a schism little changed from the start. Supporters see it as a democratic, egalitarian system, offering the best chance to reduce corrosive effects of money on the political process and renew public confidence in it. Opponents see it as a waste of tax money, which artificially skews the results and forces taxpayers to fund candidates whom they oppose.

Then on March 18, as if in echo of that observation, the *National Journal* ran a lengthy article on campaign finance reform entitled "Forever Unclean," which noted, not entirely tongue-in-cheek:

> A campaign financing system that has evolved from restraint to recklessness since the post-Watergate reforms a quarter-century ago has, at last, achieved a certain state of perfection: Everyone feels put upon."

I have made no secret of my own views about the constitutionality of the present system. Despite the Supreme Court's having struck down many of the 1974 amendments to the Federal Election Campaign Act of 1971—and having since repeatedly checked the many efforts of the Federal Election Commission to expand its jurisdiction—I believe that the Court did not go far enough in 1976 in its seminal *Buckley v. Valeo* decision. In particular, the argument for allowing restrictions on contributions has always struck me—and some on the Court, I might add—as thin. In a truly free society, people should be able to give whatever they want to whomever they choose—including candidates for public office. If "corruption" is suspected, then the burden should be on those who suspect it to prove it.

The implication of our present system, however, seems to be that once a contribution exceeds a given threshold—in this case, $1,000—the presumption of innocence disappears. Or is it, rather, slightly different: that above that figure a presumption of corruption arises—the idea being that $1,000 is enough to corrupt a member of, or candidate for, Congress? Who on this committee would be bought so cheaply? What then is the right figure? Anyone?

My point, plainly, is that our present arrangements rest on a bed of sand. The Court has said that campaign contributions and expenditures are protected speech under the First Amendment and that, accordingly, they can be restricted only for compelling reasons and only by means narrowly tailored to serve those ends. And the prevention of corruption or its appearance is the only such reason the Court has recognized. But the means the Court sanctioned are hardly tailored to that end, much less narrowly so. Indeed, last fall, when Senator McCain raised the specter of corruption by money, he was

challenged by several of his colleagues to produce the evidence—at which point he backed off.

And so what we have is the allegation of corruption in general, not corruption in particular. And that, of course, is the easiest allegation in the world to make, because no one in particular is hurt and everyone in general is happy to be caught up in the grand moral crusade against "corruption"—even if no one can quite put his finger on the real thing.

But if we cannot locate precisely the corruption that so animates and drives us, we can surely sow the seeds of "corruption"—or something that looks like it—which is exactly what we have done. Once the Court gave its blessing to restrictions on contributions, it soon became clear, as inflation reduced the value of the limit and the costs of campaigning continued to rise, that candidates, parties, and anyone else interested in having a say in the outcome of elections would have to find some way "around" the limit. Thus, the very effort to find a way to do what we should never have been denied the right to do is now branded "corruption." And in a perverse way, the pattern we see in so many other areas of government intervention in the free affairs of men repeats itself here: one intervention only begets calls for another intervention to "correct" the problems created by the previous intervention, *ad infinitum*, until at last we find ourselves suffocating under a surfeit of interventions that no one any longer begins to comprehend. More than one student of our maze of campaign finance laws has made that observation. Yet calls for still more "reforms" continue unabated.

And it is not simply the complexity or the dubious constitutionality of the maze that troubles. It is also the moral implications. For every "reform" is put forward in the name of "reform"—with all the moral approbation that accompanies that idea, and the opprobrium that attaches to its opponents. Who, after all, could be against "reform"? The very idea connotes something to be reformed, some corruption in the system that needs to be rooted out. Those calling for reform thus occupy the moral high ground, while those on the other side are deemed benighted—or worse. It is a morality play with white hats and black foreordained.

"Reform" in Particular

With that very brief overview as background, let me say first that, quite apart from its other problems, the Presidential Election Campaign Fund (the Fund) suffers first, and most importantly, from the moral presumptuousness just noted. And we have seen that in the primary season now concluding. Once the Fund was established, that is, it set "the standard." Thereafter, anyone who declined to participate was automatically—and often unthinkingly—felt to be somehow "suspect." The murmur—"Why can't you be like the rest of us (or them)?"—could be heard from other candidates and media alike. "Why can't you abide by the same rules as everyone else?" George W. Bush was not the first candidate to feel the moral "sting" of those sentiments, of course. But unlike those few others who have forgone the Fund and its quasi-public money, he is the only one to have advanced beyond the primaries.

At an elemental level, then, the very presence of the Fund "taints" those who choose, for whatever reason, not to participate. And it does so because this whole campaign finance reform juggernaut is infused with and animated by the ideas of egalitarianism. It is thought, first, that private money, which will never be equal among candidates, somehow "corrupts" the process—again, without any convincing, particularized evidence on the matter. And then it is thought that whatever money is allowed—whether private, from respect for the Constitution, or public, as with the Fund—must in some way be equalized, as it has been between major party candidates in the general election. The metaphor of a "level playing field" is ever present in the debate, as if we were talking about some sporting event.

But elections are not sporting events. They are contests between candidates for offices established by the Constitution. Candidates, almost of necessity, reflect different interests and different levels of support, including financial support—the support of those willing to underwrite their campaigns for office. No law aimed at creating a "level playing field" will ever change that. It will only compel those who feel disadvantaged by the egalitarian effort the law undertakes to look for ways around it. Thus, again, the effort to import an egalitarianism that is utterly out of place in the election context only begets the "corruption" of the scheme that was designed to prevent the "unfairness" of unequally funded candidacies.

But if the egalitarian impetus for public funding is misplaced, that leaves the "corruption" of private money as the main argument for such funding. Set aside the point that no one has stepped forward to declare his own corruption—to say nothing of his colleague's—we all know that money does buy, at least, influence, whether or not that influence leads to quid-pro-quo corruption. But influence was around long before the "reforms" of 1974; it is still around; and it will continue to be around as long as politicians have the power to redistribute and regulate as they do today. Campaign finance "reforms" have done nothing to check that influence. To the contrary, they have only further institutionalized it. For the natural antidote against those who would use their public trust contrary to their oaths of office is a vigorous political campaign to unseat such officials. Yet that, precisely, is what modern "reforms" have made more difficult—if not near impossible, judging from House races—by restricting individual and PAC contributions to artificially low levels.

Exhibits A and B are the presidential candidacy of Senator Eugene McCarthy in 1968, against the establishment presidency of Lyndon Johnson, and the senatorial candidacy of James Buckley in 1970, against two virtually identical establishment candidates. Under present restrictions, neither of those candidacies could have gotten off the ground. Absent those restrictions, they were funded, over a fairly short period of time, by substantial contributions from relatively few people. Were the cadidates "corrupted" by those contributions—contributions that today are thought to be anathema? Hardly. In fact, the corruption, were it to have happened, would have been to artificially *limit* those contributions, a measure that would likely have preserved the status quo. Yet that, precisely, is what we have today. Make no mistake: campaign finance "reform" is

incumbency protection. The correlations are as compelling as the explanations for them: What serious citizen would mount a challenge under today's restrictions?

But the morally troubling implications of public funding do not stop with the matters already noted. There is the further difficulty that arises from putting a candidate to a choice between forgoing public funds—to which he is at some level entitled—and forgoing his right to accept funds to any limit—which he would otherwise be entitled to do. We venture thus into the thicket of these "public funds." At one level, of course, the funds are "voluntarily" designated by taxpayers through the check-off provision. But that amounts simply to putting the taxpayer to a choice between contributing to the Fund or contributing to the Treasury what he would otherwise owe in taxes. Because the Fund thus draws down the Treasury it is, in that sense, public money. At that point, the public, through the Congress, puts the candidate to a choice between money that, in some fraction, is his too, and his right to accept private funds beyond the limits set by the rules that establish the Fund. The situation is not exactly akin to the mugger's proposition—"Your money or your life; you choose."—but it has that air about it. Put it this way: In his testimony last week, Mr. Morrison blithely remarked that Congress could, consistent with Supreme Court rulings, add further conditions to those already in place regarding receipt of public funds. But how extensive could those conditions be before they become unconstitutional? This is a vexing area of the law. Once we start down that road, there is no principled place to stop. The better counsel is to think before going down the road.

Lest it be thought that, in the grand scheme of things, we are talking about relatively trivial amounts of money here, let me remind the committee that one of the great complaints about campaign finance is the "obscene" amount spent on campaigns. Well, let's look at that. It is estimated that about $200 million will be spent in this cycle on House races. Based on a federal budget for FY2000 of nearly $1.8 trillion, it will take Congress 59 minutes to appropriate what we will spend on House races during the entire cycle. In other words, the federal government spends more in an hour than the nation spends in two years trying to decide who controls that spending. Now, which of those spending totals do members of Congress think is too high?

Let me note finally that apart from the several infirmities I have already noted that afflict both the public funding scheme and the more general system of restraints within which that scheme rests, there are other problems with the Fund, not least of which is the fact that it now seems to be in financial trouble. The CRS reports that taxpayer participation rates have fallen "from a high of 28.7% on 1980 returns to 12.5% on 1997 returns" and that a shortfall in payments to primary campaigns has occurred for the first time in the history of the Fund. In its February 29 report, the Federal Election Commission also notes that there are "insufficient funds" to reimburse the amounts the FEC has certified for each of the 1999/2000 primary candidates. Needless to say, the trends readily apparent in the history of the Fund do not bode well for expanding the reach of public funding.