Journal of Criminal Law and Criminology

Volume 79
Issue 4 *Winter*

Article 4

Winter 1989

The Federal Bribery Statute and Special Interest Campaign Contributions

William M. II Welch

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

 Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

William M. II Welch, The Federal Bribery Statute and Special Interest Campaign Contributions, 79 J. Crim. L. & Criminology 1347 (1988-1989)

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

0091-4169/89/7904-1347
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 79, No. 4
Copyright © 1989 by Northwestern University, School of Law
Printed in U.S.A.

COMMENT

THE FEDERAL BRIBERY STATUTE AND SPECIAL INTEREST CAMPAIGN CONTRIBUTIONS

I. INTRODUCTION

There's a new form of corruption in town, a corruption certainly more subtle than the political deals constructed in the smoked-filled cloakrooms prevalent during the days of Tammany Hall, but unfortunately equally pervasive. That corruption is excessive influence. Today, special interest groups wield enormous leverage over congressmen because of their ability to generate large sums of campaign contributions through their political action committees ("PACs"). Their power and influence threaten to abridge the notion of universal and equal sufferage and undermine our democratic system of government.

In 1962 Congress enacted a revision of the federal bribery statute[1] as part of a conflict-of-interest package of legislation to deter the type of heavy-handed use of clout and money that PACs exercise today. Congress did not intend the legislative package either to alter significantly the present bribery statute or to restrict the courts' broad construction of it.[2] Additionally, the President broadly stated that the purpose of the statute was to uphold the public's confidence in government.[3]

The seemingly expansive reach of the bribery statute has effectively discouraged the explicit, quid pro quo arrangements involving the exchange of campaign contributions for political favors.

---

1 18 U.S.C. § 201 (Supp. IV 1986).

2 S. Rep. No. 2213, 87th Cong., 2d Sess. 8 (1962).

3 President Kennedy, expressing the government's responsibility to preserve high ethical standards of behavior by government officials, stated that the principle of unwavering integrity, absolute impartiality and complete devotion to the public interest "must be followed not only in reality but in appearance. For the basis of effective government is public confidence, and that confidence is endangered when ethical standards falter or appear to falter." 107 CONG. REC. 6835 (1961).

Although instances of legislators accepting campaign contributions in return for specific official action (e.g. promised votes or pressure on public agencies) occasionally arise, most political scientists think that such transactions are rare.[4] However, the effectiveness of 18 U.S.C. § 201 crumbles in the face of excessive influence. Indeed, even the Supreme Court has recognized that bribery laws "deal with only the most blatant and specific attempts of those with money to influence governmental action."[5] Reform of the federal bribery statute is essential to end the invidious form of corruption that now permeates Capitol Hill.

This Comment focuses on reforming the federal bribery statute. Initially, this Comment will analyze the threshold question of whether or not PAC campaign contributions do influence congressional voting. The next section will discuss the current state of the federal bribery law, highlighting its deficiencies. Additionally, this Comment will examine a potential constitutional problem resulting from a stricter enforcement of the federal bribery statute. The final section will articulate a plan for greater enforcement of the bribery statute.

II. THE EFFECT OF PAC CAMPAIGN CONTRIBUTIONS UPON THE VOTING BEHAVIOR OF CONGRESSMEN

A. THE APPEARANCE OF CORRUPTION

The threshold issue in this Comment is the influence of special interest campaign contributions upon the voting behavior of congressmen. If the evidence showed that such deleterious pressures did not exist, it would be unnecessary to consider a reform of the federal bribery statute. However, this comment will demonstrate that the evidence supports the inference of a corruptive influence of special interest campaign contributions upon congressional voting behavior.

Ever since the Supreme Court decided in *Buckley v. Valeo*[6] that

---

[4] Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 826 (1985). *See also* Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 104 (1986)("[N]o one thinks that such transactions are in any sense common, at least in the Congress."); K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 161 (1986)("The common wisdom among political scientists is that there are so many legal avenues of influence that very few organizations resort to illegal methods.")[hereinafter "SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS"].

[5] Buckley v. Valeo, 424 U.S. 1, 28 (1976).

[6] 424 U.S. 1 (1976). The Court in *Buckley* also capped the size of campaign contributions at $1,000 for individual and $5,000 for PACs per primary, runoff or general election.

statutory limits upon congressional election expenditures were unconstitutional, the exponential growth in congressional campaign spending has drastically altered the nature of our electoral system of government. Members of Congress now devote more of their time fundraising than ever before because of the need for greater sums of campaign funds.

Congressmen depend increasingly upon special interest campaign contributions from PACs for a larger proportion of their campaign war chests because PACs represent a source of easy money.[7] As a result, special interest groups and PACs occupy the enviable position of possessing the leverage to extract a higher price for their donations to insure the receipt of the full value of their contributions.[8]

The statistical evidence staggers the mind. The 1985-86 congressional elections established new records for total campaign spending and total amounts of contributions from PACs. Federal Election Committee (FEC) figures showed that congressional candidates spent $450 million between January 1, 1985, and December 31, 1986.[9] This marked a 20% increase over the previous record of $374.1 million that was spent during the election cycle between 1983-84.[10] Senate candidates increased their spending by 24%, or to a total of $211 million, while House candidates spent 17% more than they did in 1983-84, or a total of $239 million.[11]

The FEC also reported that PACs and non-party committees gave a record $132.2 million to congressional candidates in the 1986 election cycle, up from $105.3 million contributed in the 1984 election cycle.[12] PAC funds represented 28% of total receipts, a 2% increase from 1983-84.[13] Twenty-one percent of Senate candidates' receipts, or $45 million, came from PACs, a rise from the 17% figure in 1983-84, while PACs contributed 34% of House candidates' receipts, or $87.2 million, which was the same as the figure in 1983-84.[14] PACs continued to favor incumbents over challengers, with

---

7 Practically speaking, it is much easier to solicit a contribution of $5,000 from a PAC than contributions of $1,000 from five individuals. Furthermore, not only is the supply of individual contributors of $1,000 limited, but the competition for them is especially keen. *See* Glen, *Early-Bird Fundraising*, 19 NAT'L J. 1588 (1987).

8 Solomon, *When Fat Cats Cry*, 19 NAT'L J. 418, 418 (1987).

9 Gaunt, *Hill Campaign Spending Hits All-Time High*, 45 CONG. Q. WEEKLY. REP. 991, 991 (1987).

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

incumbents in both the Senate and House receiving $89.5 million, while challengers received $19.2 million.[15] Forty-six of the fifty top PAC recipients in the House were incumbents, while only two were challengers.[16] These figures certainly reveal that PACs possess the ability to exert great leverage over congressmen. Unfortunately, as the evidence will show, this leverage translates into the exercise of excessive influence over our elected officials.

Anecdotal evidence of PACs' excessive influence over congressional voting abounds and embellishes the realities underneath the cold, statistical evidence.[17] Some lobbyists openly acknowledge that PAC funds represent "a civilized approach to vote-buying . . . [or] . . . a means of buying access."[18] Lobbyists often will withdraw support from a candidate to punish him for his failure to deliver.[19] Others engage in the practice of split giving, which entails the allocation of PAC funds to both candidates in a campaign. "Because the split giver is guaranteed to have backed a winner, the practice has an aroma of the cynical purchase of influence."[20] Although only a minority of PACs contribute in this way, and infrequently at that, PACs admit that they "use split giving to ensure that they are on the right side of the winner, whoever he or she may be."[21] Finally, some lobbyists note the existence of widespread discontent and express disgust with the system.[22] One lobbyist exclaimed recently that it is " '[a] prostitutionalization of the process . . . We're skirting the edge of felonious conduct.' "[23]

Members of Congress also readily acknowledge the corruptive influences of PAC campaign contributions. One congressman, discussing Congress's veto of the Federal Trade Commission's rule requiring the disclosure of known defects in used cars,[24] recalled how another member of Congress said to him, " 'I got a $10,000 check from the National Auto Dealers Association. I can't change my vote

---

15 *Id.* The remaining PAC money went to open-seat candidates.

16 *Id.* at 993.

17 *See generally* E. DREW, POLITICS AND MONEY (1983) (arguing that the raising of money by politicians to pay for their election campaigns has fundamentally distorted our democratic system of government).

18 Solomon, *supra* note 8, at 421 (1987).

19 SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS, *supra* note 4, at 241. Schlozman and Tierney quoted one trade association executive as saying, "It depends on their voting record. If you gave to them and then they end up screwing you, you're not going to support them again." *Id.*

20 *Id.*

21 *Id.* at 242.

22 Solomon, *supra* note 8 at 418.

23 *Id.*

24 Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. § 455 (1982).

now.' "[25] A United States senator elaborated upon another senator's observation that PACs attached strings to their contributions by stating that "[t]hese strings are pulled and votes delivered."[26]

B. WHAT MOTIVATES PACS TO CONTRIBUTE?

While the statistical and anecdotal evidence vividly depicts a system in which PACs buy influence with impunity, such evidence certainly is not dispositive upon the question of whether or not PAC contributions in fact influence congressional voting. However, political scientists have attempted to answer that question more definitively through the use of sophisticated statistical analysis of congressional roll call voting.[27] Their examination of the motivations and reasons behind the PACs' allocation patterns to congressmen greatly assists in determining whether or not PACs have a corruptive influence upon congressmen. While proponents of the present system talk about buying access,[28] the following studies indicate that PACs are motivated by a more results-orientated approach.

PACs allocate campaign contributions in an attempt to maximize their interests in the outcomes of narrow, parochial policy concerns.[29] One study extensively analyzed what the contribution allocation patterns among PACs indicated about their motivations, values and goals.[30] It focused on four types of PACs: auto, defense, labor and oil.[31] The study examined "four broad categories of incentives . . . [attributable] to political action committees: parochial issue concerns, broad or ideological issue concerns, the desire for access to congressmen, and the desire to control congressmen."[32]

The results of the study indicated that although the auto PACs

---

[25] Comment, *The Campaign Finance Reform Act: A Measured Step To Limit the PACs Role In Congressional Elections*, 11 J. LEGIS. 497, 507 n. 85 (1984).

[26] Chiles, *PACs: Congress on the Auction Block*, 11 J. LEGIS. 193, 209 (1984). Although Senator Chiles defused his comment upon congressional voting practices with the statement that "certainly no member of Congress would link a vote on a particular matter to a political contribution," that statement appears to be nothing more than a diplomatic gesture.

[27] These studies permit "inferences about whether *in the aggregate* acceptance of PAC donations increase[] significantly the chances that a legislator would vote in accordance with the PACs' wishes." SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS, *supra* note 4, at 255.

[28] Schlozman and Tierney write that "[u]pon examination, it appears that the boundary between access and influence is less clearly defined than it is sometimes assumed to be." SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS, *supra* note 4, at 104.

[29] Gopoian, *What Makes PACs Tick? An Analysis of the Allocation Patterns of Economic Interest Groups*, 28 AM. J. POL. SCI. 259, 268-69 (1984).

[30] *Id.* at 259.

[31] *Id.* at 260.

[32] *Id.*

considered the home district of a legislator to be the single most important factor in their decision to contribute funds,[33] auto PACs also considered the voting records of incumbents on issues of narrow economic interest as an important factor in their decision.[34] Defense PACs almost singularly conditioned their contributions on committee assignments that "strategically placed incumbents on committees in the House which control funds and legislation vital to the success of defense firms."[35] The home district concerns of the defense contractors' headquarters also influenced defense PACs' allocative decisions.[36] Labor PACs premised their allocation decisions almost exclusively upon labor voting records, with ideology or party affiliation not even a factor for incumbents with voting records favorable to labor.[37] Their narrow policy concerns induced them to target their contributions to those incumbents with voting records loyal to their agenda.[38] Finally, although ideological orientation influenced the contribution patterns of oil PACs more significantly than the other PACs,[39] oil PACs also based their contribution patterns upon narrow policy concerns and the voting records of House members on important matters.[40] In short, the evidence substantiates the view that PACs "are self-interested, materially oriented, and narrowly focused."[41]

PACs achieve their desired results and narrow policy objectives by contributing disproportionately to party leaders, committee

---

33 *Id.* at 277. Nevertheless, the author noted that those PACs that considered the home district connection of congressmen in their decisionmaking regarded those congressmen as members "who can be expected to share the interests and concerns of the industries based in their districts or neighboring district. In these various ways, the economic interests examined here pursue ends in the allocation process which illustrate their narrow policy objectives." *Id.* at 279.

34 *Id.* at 277.

35 *Id.* at 279.

36 *Id.* at 276-77.

37 *Id.* at 277.

38 *Id.* Saltzman also studied, among other things, the allocation of labor PAC money. However, he found that labor PACs did not take a special interest approach, but rather pursued a broad ideological program. *See* Saltzman, *Congressional Voting on Labor Issues: The Role of PACs*, 40 INDUS. & LAB. REL. REV. 163 (1987)[hereinafter "Saltzman, *The Role of PACs*"].

39 *Id.* at 279.

40 *Id.* at 268-72. However, Gopoian makes too large of an inferential leap from the evidence in his study to his conclusion that broader ideological concerns motivate the allocation patterns of some special interest groups. The results consistently indicated that PACs contribute with selfish economic interests in mind. Moreover, the oil PACs that reported that they contributed money based upon broader ideological concerns have every incentive to respond in such a manner in order to cast their activities in a more favorable light. Their motivations should not be generalized to "some interest groups," but regarded at best as a very specific aberration in the results. *Id.* at 279.

41 *Id.*

chairs, incumbents, and other powerful congressmen.[42] PACs target powerful legislators because of their ability to influence the votes of other legislators. The decentralized and fragmented power structure of the congressional committee system lends itself to the goals of PACs. By ingratiating themselves to one or two powerful members of a committee, those legislators can significantly affect the outcome of important legislation.

Indeed, one study found corporate and union "PACs contribute disproportionately to legislators who have a comparative advantage in producing the services desired."[43] The authors of the study assumed that PACs purchase legislative services through campaign contributions and, therefore, seek the lowest cost suppliers of those services.[44] They focused on five "legislative assets"—committee assignments, voter preferences, electoral security, tenure, and political party—to assist in the determination of which legislators would be the low cost suppliers of a specific service and, as a result, receive disproportionate contributions from specific PACs.[45]

The authors of the study predicted that committee members would receive a greater amount of PAC funds than their colleagues because they were the most cost-effective in obtaining services for union and business PACs respectively.[46] Secondly, they believed that conservative legislators would receive more corporate PAC money and liberal legislators would receive more union funds because the cost of disenchanting constituents by servicing special interests would be low.[47] Lastly, they predicted that legislators with "safe" seats would receive less PAC contributions because safe incumbents need less campaign funds and will not supply special interest services at a low cost.[48]

The empirical results supported those predictions. A committee assignment on Education and Labor reduced corporate contributions by $6,600, but generated extra campaign revenue of around $8,000 in union contributions.[49] A seat on the Energy and Commerce Committee earned a member about $6,700 in extra corpo-

---

42 Schlozman & Tierney, ORGANIZED INTERESTS, *supra* note 4, at 236. They report that PACs contributed an average of $126,000 and $95,200 to party leaders and committee chairs respectively. *Id.* at 233.

43 Grier & Munger, *The Impact of Legislator Attributes on Interest-Group Campaign Contributions*, 7 J. LAB. RES. 349, 349 (1986).

44 *Id.* at 354.

45 *Id.* at 352-54.

46 *Id.*

47 *Id.* at 355.

48 *Id.*

49 *Id.* at 356-58.

rate contributions, but generated only $4,000 in extra union PAC Funds.[50] The statistics also highlighted the importance of one's voting record or reputation as a conservative or liberal legislator. "[A]n extreme pro-business position (a 100 percent voting record) generate[d] $40,700 in extra corporate contributions,"[51] but cost a legislator in terms of union contributions.[52] Finally, the results corroborated the prediction that a safe seat was a significant negative influence on corporate and union PAC contributions to incumbents.[53]

C. DOES PAC MONEY INFLUENCE CONGRESSMEN?

While it is important to determine what factors motivate PACs to contribute money, it is equally important to determine if congressmen are influenced. Several studies document a strong relationship between PAC campaign contributions and congressional voting. These studies illustrate the existence of a relationship between PAC money and congressional voting and provide strong evidence upon which a case for reform of the federal bribery statute can be built.

One study looked at the impact of labor and corporate PAC campaign contributions on the voting of U.S. Representatives on labor issues during 1979-80.[54] The author used the AFL-CIO's Committee on Political Education ("COPE") score as the dependent variable in his study.[55] Under COPE, each congressman is rated upon their votes on certain vital labor issues; a congressman's COPE score increases from zero to 100% as he or she votes more pro-labor. The author examined each congressman's political party, his political vulnerability, his constituency pressures, and PAC money that he received as variables that might explain COPE scores.[56] He concluded that "PAC contributions . . . [had] a significant direct effect on roll-call voting" even when controlling for a congressman's political party and constituency pressures.[57]

The author determined that labor PAC contributions led to higher COPE scores at a cost to labor PACs of between $13,280 and $20,450 per pro-labor vote, after controlling for party and constitu-

---

50 *Id.* at 356-58.
51 *Id.* at 356-57.
52 *Id.* at 356-58.
53 *Id.* at 357-58.
54 Saltzman, *The Role OF PACs*, *supra* note 38.
55 *Id.* at 165.
56 *Id.* at 165-66.
57 *Id.* at 163.

ency pressures, while corporate PAC contributions led to lower COPE scores at a cost to corporate PACs per anti-labor vote of between $36,630 and $49,020.[58] After controlling for party, political vulnerability, and constituency characteristics, he found that the combined impact of labor and corporate PAC contributions increased the average COPE score for Democratic incumbents by six to ten percentage points.[59] He further discovered that labor and corporate PAC contributions also lowered the average COPE score for Republican incumbents by two and three percentage points respectively at these estimated "prices" for votes.[60] The author concluded that the results evidenced the direct influence of PAC contributions upon roll-call voting.[61]

Similarly, another study, which empirically examined the relationship of constituency, ideology, party and PAC contributions with Senate voting on the 1980 trucking deregulation bill,[62] concluded that the results showed "clear and strong statistical associations between contributions and voting."[63] The authors of the study reviewed the findings of relatively recent research studies on the determinants of congressional voting and determined that the nature of the legislative issue conditions the influence that any particular factor will have upon congressional voting.[64] They found that "PAC contributions should have maximal impact when other factors do not dominate a congressman's decision calculus."[65]

---

58 *Id.* at 169.

59 *Id.* at 169-70.

60 *Id.*

61 *Id.* at 178.

62 In 1979, Congress commenced debate on the Motor Carrier Act of 1980. The trucking industry had been virtually deregulated by the time debate began. During 1977 and 1978, the ICC promoted deregulation by relaxing entry restrictions into the regulated trucking market and diminishing the price-fixing power of the industry's rate bureau. Thus, the only issue facing Congress was whether to validate, halt, or reverse the ICC's administrative deregulation. The opponents of deregulation stressed that "service to small communities in non-metropolitan areas would deteriorate." This issue of service was the only major question that was raised relating to senators' constituencies. The American Trucking Association, ("ATA"), the most influential of the opponents, contributed over $250,000 through its political action committee to 54 senators and 319 representatives. A majority of those congressmen examined deregulation in committees. Frendreis & Waterman, *PAC Contributions and Legislative Behavior: Senate Voting On Trucking Deregulation*, 66 Soc. Sci. Q. 401, 404 (1985).

63 *Id.* at 410. Frendreis and Waterman did not intend constituency, ideology and party affiliation to form a comprehensive list of the determinants of voting behavior. Rather, this list permitted a comparative assessment of the influence of PAC contributions upon voting behavior relative to the influence of the three other factors. *Id.* at 402 n.2.

64 *Id* at 403.

65 *Id.*

Therefore, they premised their study upon three separate conditional assumptions:

> If an election is imminent, and the issue is highly relevant to a representative's constituency, then constituency influence will predominate in voting decisions, and no impact will be found for PAC contributions. However, if an election is imminent, and the issue is not highly relevant to one's constituency, then a relationship between PAC contributions and voting should appear. Finally, if an election is not imminent, then other factors (e.g., party or ideology) should become more important.[66]

The empirical results showed that "ATA contributions . . . [had] the strongest independent impact on trucking deregulation voting" even after the other factors were taken into account.[67] Furthermore, the evidence indicated that the "relationship between ATA contributions and anti-deregulatory voting appears to be even more clearly conditional on proximity to re-elections in these equation estimates."[68] The authors concluded that campaign contributions do influence leglislative votes on particular kinds of issues when other factors are not operating as strongly as they normally do.[69]

Just as the statistical and anecdotal evidence had limitations, similarly the dynamic and impulsive world of politics limits the ability of political scientists to explain fully and accurately the actions of PACs and congressmen. Nevertheless, one should not discount the value of the evidence. The studies illustrate that PACs contribute with purposes and objectives in mind. They reveal that the probability of PAC contributions influencing congressional voting increases in certain circumstances. In the aggregate, the evidence paints a vivid picture of a systematic and pervasive pattern of excessive influence.

If in fact the excessive influence of PACs corrupts the legislative process in certain situations, the continued, unregulated practices of PACs in those cirucmstances effectively precludes individual citizens from participating in that process. PACs consume the attention and time of our elected officials, relegating the ideas and opinions of individuals to second class status. Furthermore, PAC influence ne-

---

66 *Id.* at 403. Schlozman and Tierney arrive at a similar conclusion, but cast it in terms of visibility instead of relevancy. They contend that PAC influence will diminish "on visible issues that engage intense partisan conflict, constituency preferences, or personal committments on the part of the legislator," but will increase when such factors are not present. SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS, *supra* note 4, at 252.

67 *Id.* at 407.

68 *Id.* at 409.

69 *Id.* at 410.

gates the very notion of a respresentive form of democratic government. The dominance of PAC influence in the forum of debate irreparably damages the citizenry's faith in the ideal of "one man, one vote."

Even if the corruptive pressures of PACs are not widespread, the appearance of corruption, which the evidence documents, threatens to undermine our system of government. Charges of vote or access buying and excessive influence destroy not only public confidence in our government and its officials, but also the integrity of the electoral process. As public cynicism increases, the need for reform becomes more imminent.

III. THE FEDERAL BRIBERY STATUTE: THE NEED FOR REFORM

A. THE FEDERAL BRIBERY STATUTE

Prosecution for the illegal use of campaign contributions to influence a congressman falls within 18 U.S.C. § 201.[70] 18 U.S.C. § 201 proscribes the bribery of a public official.[71] Section 201(b) applies to the briber. In relevant part, it provides that a violation occurs whenever a person "directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . or offers or promises any public official . . . to give anything of value . . . with intent . . . to influence any official act . . . or . . . such public official."[72] Section 201(c), on the other hand, relates to the activities of the public official. It states that a public official who "directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for [another] . . . in return for . . . being influenced in his performance of any official act" violates the statute.[73]

---

[70] 18 U.S.C. § 201 (1982).

[71] Although § 201 actually prohibits the bribery of any public official, § 201(a) defines "public official" as a "Member of Congress."

[72] Section 201(b) states:

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give any thing of value to any other person or entity, with intent -

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official or such person who has been selected to be a public offical to do or omit to do any act in violation of his lawful duty . . .

[73] Section 201(c) states:

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives,

The receipt or gift of a gratuity constitutes a lesser included offense to bribery under section 201. Section 201(f), in relevant part, states that the giver of a gratuity violates the statute whenever he or she "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official . . . for or because of any official act performed or to be performed by such public official . . ."[74] Section 201(g) applies to the public official receiving the gratuity. It states, in relevant part, that a public official, who "otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" breaks the law.[75]

In sum, the five material elements for bribery under section 201 are: (1) a public official; (2) a corrupt intent; (3) something of value accruing to the benefit of the public official; (4) a relationship between the valuable article and an official act; and (5) an intent to influence or be influenced. The material elements for the receipt of a gratuity are substantially the same. However, the gratuity provision does not require the commitment of the offense with either a corrupt intent or an intent to influence the public official. Instead, it merely requires that there be an intent that the benefit pass to the public official "for or because of" an offical act.[76]

---

or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty . . .

[74] Section 201(f) provides:

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official;

[75] Section 201(g) states:

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . .

[76] *Id.*

B. JUDICIAL INTERPRETATION OF SECTION 201

United States v. Brewster[77] remains the seminal case which articulated the distinction between legitimate and illegitimate campaign contributions. In *Brewster*, the defendant, a former United States Senator from Maryland and member of the Senate Committee on Post Office and Civil Service, illegally accepted campaign contributions from a mail order catalogue company, Spiegel Inc., while the Postmaster General had publicly proposed a postal rate increase, although there was no pending piece of legislation in the Senate.[78] The government based its indictment upon a series of cash transactions received by the Senator from January 1967 until July 1967.[79]

In January of 1967, Brewster and his administrative assistant met with an individual named Anderson, who explained his representation of Spiegel, its opposition to higher postal rates, and its interest in the defeat of the proposed increase.[80] After the discussion, Anderson gave Brewster an envelope containing $5,000 in cash.[81] On April 27, 1967, approximately twenty-two days after postal rate increase legislation had been introduced in the Senate, Anderson and a man he introduced as Morris Spiegel visited Brewster and his administrative assistant at Brewster's office. Morris Spiegel discussed the postal rate legislation and the tactics to defeat the rate increase with Brewster.[82] Spiegel subsequently handed to Brewster an envelope containing $4,500 in cash.[83] Another transaction followed this exchange. On July 19, 1967 Brewster's administrative assistant received a $5,000 check from Anderson.[84] All of these payments were deposited in an account for the District of Columbia Committee for Maryland Education, which served as a conduit for Brewster's political contributions.[85]

Acting on Brewster's motion, the district court initially dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution[86] shielded Brewster from prosecution under 18 U.S.C. § 201. The United States filed a direct appeal to the Supreme Court to resolve the issue. The Supreme Court held that the Speech and Debate Clause did not preclude the prosecution

---

77 506 F.2d 62 (D.C. Cir. 1974).
78 *Id.* at 65.
79 *Id.*
80 *Id.* at 66.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 U.S. CONST. art. I, § 6.

of a member of Congress under a criminal statute as long as the Government's case did not rely on legislative acts or the motivations for those acts.[87] The Court reversed the dismissal and remanded the case back to the District Court.[88]

At trial, Brewster argued that although Anderson intended to influence his action on the postal legislation with the payments, he did not accept any money in return for being so influenced.[89] The jury acquitted Brewster on the three bribery counts, but convicted him of the lesser included offense of accepting an illegal gratuity under section 201(g).[90] On appeal, Brewster argued that the trial judge erred by not charging the jury "to distinguish between legal and illegal political contributions sufficiently to enable the jury to determine guilt or innocence."[91]

The *Brewster* court held that the gratuity subsection 201(g) was a lesser included offense within the bribery subsection 201(c).[92] The court focused on the requisite criminal intent needed to constitute the acceptance of a bribe under section 201(c) rather than the acceptance of a gratuity under section 201(g) as a means of distinguishing the two offenses.[93] The court determined that section 201(c) required a higher degree of criminal intent than section 201(g).[94] This higher degree of criminal intent manifests itself in the bribery statute through a necessary and

> explicit quid pro quo which need not exist if only an illegal gratuity is involved; the briber is the mover or producer of the official act, but the official act for which the gratuity is given might have been done without the gratuity, although the gratuity was produced because of the official act.[95]

The court also articulated a standard for the requisite criminal

---

87 United States v. Brewster, 408 U.S. 501, 524-25 (1972).

88 *Id.* at 529.

89 *Brewster*, 506 F.2d at 66-67.

90 *Id.* at 67.

91 *Id.* at 64. Brewster also urged that section 201(g) was erroneously designated and charged as a lesser included offenses under section 201(c)(1) and that section 201(g) was both unconstitutionally vague and overbroad. *Id.*

92 *Id.* at 83.

93 *Id.* at 71.

94 *Id.* The court said that "corruptly' bespeaks a higher degree of criminal knowledge and purpose than does otherwise than as provided by law for the proper discharge of official duty.' " The court further stated that "to accept a thing of value *in return for*: (1) *being influenced* in [the] performance of any official act' (section (c)(1), emphasis supplied) appears to us to imply a higher degree of criminal intent than to accept the same thing of value for or because of any official act performed or to be performed' (section (g)." *See Id.* at 71-72.

95 *Id.* at 72.

intent under section 201(g).[96] The *Brewster* court distinguished between the criminal intent needed for an elected public official and an appointed government official in the Executive Branch.[97] The court in *Brewster* noted that elected public officials receive campaign contributions "because the giver supports the acts done or to be done by the elected official."[98] Therefore, an element of criminal intent had to be applied to elected public officials in order to distinguish "in the case of an elected public official between an illegal gratuity and a perfectly legitimate, honest campaign contribution."[99]

The court stated that the criminal intent was found in the words "otherwise than as provided by law for the proper discharge of official duty, . . . for or because of any official act performed or to be performed by him."[100] Under this language, "there must be a more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence."[101] Proof of this more general criminal intent would support a conviction under section 201(g).[102] The court summarized its discussion and ended its opinion with the following:

> We have laid emphasis under the bribery section on "corruptly . . . in return for being influenced" as defining the requisite intent, incorporating a concept of the bribe being the prime mover or producer of the official act. In contrast under the gratuity section, "otherwise than as provided by law . . . for or because of any official act" carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, "with knowledge that the donor was paying him compensation for an official act . . . evidence of the Member's knowledge of the alleged briber's illicit

---

96 Id. at 73-74 n.26.

97 The court in *Brewster* noted that the Second Circuit's interpretation of criminal intent under section 201(g) could not be applied to an elected public official. *Id.* at 73. The Second Circuit in *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. granted*, 386 U.S. 940, *cert. denied*, 389 U.S. 80 (1967), held that section 201(g) made "it criminal to pay an official a sum which he is not entitled to receive regardless of the intent of either payor or payee with respect to the payment." *Id.* at 728-29, 730.

98 *Brewster*, 506 F.2d at 73.

99 *Id.*

100 *Id.*

101 *Id.* at 81. The court in *Brewster* stated that although Brewster knew that he was receiving the contribution because of his record of performance in the postal legislation field and that if he continued such a record he would likely receive further contributions, that did not distingish the contribution in *Brewster* from a legal contribution. "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation." *Id.*

102 *Id.* at 82.

reasons for paying the money is sufficient . . . "[103]

The *Brewster* court also added a second element to be proven under section 201. Section 201(g) requires that a public official accept or receive "anything of value for himself."[104] The court stated that this element would be satisfied "if a legislator knew that a contribution was being given for an official act, received the contribution and knowingly applied it to his own uses."[105] A finding that a campaign re-election committee was the alter ego of a candidate or merely a conduit for the candidate would support a conviction under 210(g).[106]

C. THE LEGITIMATE CAMPAIGN CONTRIBUTION EXCEPTION AND ENFORCEMENT OF SECTION 201

The D.C. Circuit's intepretation of the federal bribery statute effectively precludes the enforcement of section 201 against members of Congress.[107] The *Brewster* court correctly interpreted section 201 to require a more culpable intent under the bribery subsection (201(c)) than the gratuity subsection (201(g)). However, the requirement of a greater intent under both subsections and the "for himself" element under 201(g) have greatly increased the difficulty of prosecution under the federal bribery statute. The *Brewster* court's interpretation of section 201 implicitly excepted campaign contributions from the statute.[108] Such an interpretation has no basis in the statutory language of section 201.

The *Brewster* court's focus upon criminal intent—the terms "corruptly" in 201(c) and "otherwise than as provided by law for the proper discharge of official duty" in 201(g)—does not adequately distingush accepting a bribe from accepting a gratuity because it does not define the criminal intent element of either subsection. If, under section 201(c), a congressman received money in return for being influenced in an official action, his receipt of the money would be corrupt *per se* and would establish the requisite corrupt intent.[109] Furthermore, "otherwise than as provided by law for

---

103 *Id.* at 82 (quoting United States v. Brewster, 408 U.S. 501, 527 (1972).

104 18 U.S.C. § 201 (1985).

105 *Brewster*, 506 F.2d at 76.

106 *Id.* at 81.

107 *See* Weeks, *Bribes, Gratuities And The Congress: The Institutionalized Corruption Of The Political Process, The Impotence Of Criminal Law To Reach It, And A Proposal For Change*, 13 J. LEGIS. 123, 138 (1986).

108 Weeks, *supra* note 107, at 129.

109 *See id.* at 133 ("Thus, if it can be shown, as it must be under section 201(c)(1), that money is received by the congressman in return for his being influenced in his official conduct, how could it possibly not be received 'corruptly'? In this context, the very

the proper discharge of official duty" does not establish any intent requirement under the gratuity subsection, but rather by exclusion defines as forbidden those payments which are not available under federal law.[110] As a result, the requisite intent under the gratuity subsection reduces to "simply the intent to receive the payments for or because of any official act."[111] The distinction of a more culpable intent under the bribery subsection than under the gratuity subsection breaks down because it is difficult to conceptualize a public official accepting a thing of value for or because of his official acts "and at the same time not do[ing] it corruptly.' "[112]

Although the *Brewster* court additionally distinguished the bribery and gratuity offenses by requiring a showing of a quid pro quo, in which the thing of value is "the mover or producer of the official act,"[113] the statutory langauage of section 201(c) does not support this element. Furthermore, this element is invoked only when elected officials and campaign contributions run afoul of the statute.[114] On its face, section 201(c) distinguishes the bribery and gratuity offenses by requiring only "the specific intent to be influenced."[115] The courts have uniformly interpreted the statute in this manner when applied to public officials other than elected officials.[116] It becomes increasingly difficult to justify a standard based upon an individual's occupation in the government in light of the apparent prevalence of corruption in the system.

This distinction also breaks down under a closer scrutiny of the *Brewster* court's analysis of the difference between a gratuity and a

---

definition of a corrupt receipt of money can be nothing else than money received in exchange for being influenced."); Lowenstein, *supra* note 4, at 798 ("If the other elements are present, a public official is offered, seeks, or accepts an individual benefit that is intended to influence the recipient's official actions. What more is needed to make the offering, seeking, or accepting corrupt'? If nothing, then the word corruptly' as used in the statutes is redundant.").

110 Weeks defines a congressman's salary and expenses to which his job statutorily entitles him as the only payments which a congressman receives that are "as provided by the law for the proper discharge of official duty." Weeks, *supra* note 107, at 133. Therefore, he argues that Congress included the word "otherwise" and the ensuing language to make clear that public officials may not accept any payments beyond those available under federal law.

111 *Id.* at 134.

112 *Id.* (quoting *Brewster*, 506 F.2d at 71).

113 *Brewster*, 506 F.2d at 72.

114 Weeks, *supra* note 107, at 134.

115 *Id.* at 135.

116 *Id.* " '[The bribery subsection] requires proof of an extra element to convict, a specific intent to influence official action, while [the gratuity subsection] only requires proof that payment was made to an agent in a situation in where no payment was necessary.' " *Id.* (quoting *United States v. Umans*, 368 F.2d 725, 728 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967)).

legitimate campaign contribution.[117] In making the distinction, the court required that a gratuity be a "quid pro quo for a specific official act."[118] The court stated that "[t]here must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence."[119] The court later conditioned a gratuity conviction upon a "specifically identified act."[120]

Lastly, the requirement under subsection 201(g) that a public official receive payments "for himself" further insulates a public official from prosecution for accepting illegal campaign contributions. A congressman who receives campaign contributions directly accepts them as an agent of his election committee and must turn them over to his committee within ten days.[121] Under *Brewster*, as long as the congressman obeys the law and the campaign committee does not constitute the alter ego of the congressman, a congressman is safe from conviction under section 201(g).[122]

The rationale for excepting campaign contributions from section 201 essentially is "a rule of necessity."[123] Congressmen serve the interests of their constituents. If a congressman has any hope of remaining in office, he must remain attuned to their needs as well as their complaints. As a result, legislators propose and vote on legislation that favors their constituents. However, at the same time, congressmen rely on their constituents for financial support. They regularly solicit and accept campaign contributions from constituents in order to remain in office. "Thus, mutuality of support between legislator and constituent is inevitable."[124] While a presumption of unethical or illegal conduct may arise, for practical reasons the courts deem campaign contributions innocent and not within the scope of section 201.

However, judicial interpretation of section 201 endorses and perpetuates a system of influence buying. Quite simply, the "mutuality of support" between congressman and constituent does not accurately reflect reality. Contributors often are not constituents.

---

117 *See Brewster*, 506 F.2d at 81-82.

118 Weeks, *supra* note 107, at 135.

119 *Brewster*, 506 F.2d at 81.

120 *Id.* at 82.

121 Under 2 U.S.C. § 432 (1982), subsection (e)(2) treats a candidate who personally receives a campaign contribution as the agent of his campaign committee, and subsection (b)(1) then requires the candidate to forward that contribution to the committee's treasurer within 10 days.

122 *Brewster*, 506 F.2d at 81.

123 Weeks, *supra* note 107, at 130.

124 *Brewster*, 408 U.S. at 558 (quoting White, J., dissenting).

Concerned with their own narrow policy objectives, they possess no interest in either the needs or the interests of a congressman's constituents. Furthermore, arguments advancing the exception of campaign contributions from the federal bribery statute are completely antithetical to our democratic form of government.

> [These arguments] accept as not only not improper but, indeed, an expected and perhaps creditable example of democracy in action for elected officials to seek and accept campaign contributions in exchange for being influenced in their legislative conduct. The arguments thus endorse not simply the receipt of gratuities but outright bribes as appropriate conduct by federal officeholders. Such arguments simply ignore the familiar concept of universal and equal sufferage as well as the historic American abhorance for legislative decision-making based on the profit motive.[125]

It is time that the courts' views and analyses of campaign contributions within the federal bribery statute be re-assessed in light of the developments of the last few years. The federal bribery statute's inability to regulate effectively the excessive influence of PACs mandates a reform of the statute.

IV. A Potential Problem With A Tougher Federal Bribery Statute

A. *Buckley v. Valeo* and the Constitutional Challenge

Influence plays a fundamental and essential role in our democratic process. It represents one means for citizens to transmit information about their preferences to public officials. Campaign contributions constitute one vehicle with which citizens communicate that information. Therefore, any reform of the federal bribery statute must take into account the communicative function that campaign contributions serve. A bribery statute that sweeps too broadly in attempting to eradicate excessive influence could have an enormous chilling effect on a citizen's willingness to communicate his or her preference in the form of campaign contributions. This undoubtedly would prompt constitutional challenges under the first amendment.

Buckley v. Valeo[126] and its progeny pose the most serious obstacle to reforming the federal bribery statute. The Supreme Court in *Buckley* invalidated various provisions of the amended Federal Election Campaign Act[127] ("FECA") as an unconstitutional violation of

---

125 Weeks, *supra* note 107, at 131.

126 424 U.S. 1 (1976).

127 Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

an individual's freedom of speech under the first amendment. Relevant portions of the Act limited individuals and political action committees to contributions of $1,000 and $5,000 respectively to any single candidate for federal elective office per election.[128] It also limited the overall annual contribution of an individual contributor to $25,000.[129] The Act barred annual independent expenditures by individuals and groups "relative to a clearly identified candidate" from exceeding $1,000 per candidate per election.[130]

The Supreme Court upheld the constitutionality of the contribution provisions.[131] The Court found that the contribution provisions served the sufficiently important State interest of safeguarding the integrity of the political system and preserving public confidence in our system of representative government without impinging upon the first amendment rights of individual citizens or candidates.[132] The Court reasoned that a regime of large individual financial contributions fostered not only the actuality of "a political *quid pro quo* from current and potential office holders,"[133] but also "the appearance of corruption stemming from public awareness of the opportunities for abuse."[134] The Court entrusted Congress with discretion and power to enact the necessary legislation to combat "the reality or appearance of corruption."[135]

The Court, however, struck down the independent expenditures provisions as "substantial and direct restrictions" on the ability of individuals and associations to exercise their first amendment rights.[136] The Court stated that "the governmental interest in preventing corruption and the appearance of corruption" did not justify a ceiling on independent expenditures because expenditure limitations did not eliminate those dangers.[137] It believed that an exacting interpretation of the provision, which was necessary to avoid unconstitutional vagueness concerns, permitted contributors

---

128 *Id.*

129 *Id.*

130 *Id.* The statute also subjected personal campaign spending by a candidate and overall general election and primary expenditures to prescribed limits. It also required the reporting and public disclosure of campaign contributions and expenditures that exceeded specified threshold levels and established the Federal Election Committee as well as a system to publicly fund Presidential campaigns. This analysis, however, will not focus on the Court's interpretation of those provisions.

131 *Buckley*, 424 U.S. at 29.

132 *Id.* at 26-29.

133 *Id.* at 26.

134 *Id.* at 27.

135 *Id.* at 28.

136 *Id.* at 58-59.

137 *Id.* at 45.

to circumvent the restrictions.[138] The Court reasoned that as long as contributors refrained from expenditures that expressly advocated "the election or defeat of a clearly identified candidate," they could spend as much as they wanted and exert improper influence upon a candidate or officeholder.[139]

Secondly, the Court felt that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions."[140] The Court reasoned that independent expenditures not only could conceivably provide little assistance to a candidate's campaign, but also could prove to be counterproductive.[141] It further stated that the "independence" of an expenditure not only undermined its value to the candidate, but also alleviated "the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."[142]

B. THE *BUCKLEY* PROGENY

The *Buckley* opinion expressly defined the only sufficiently legitimate and compelling state interest in restricting constitutionally protected campaign finances as the prevention of corruption or the appearance of corruption. Although the Court did not clarify what constituted "corruption" or "the appearance of corruption", a reform of the federal bribery statute that sought to deter undue influence probably would be constitutionally permissible. The Court in *Buckley* probably did intend to include undue influence within its definition of the state's legitimate interest in preventing corruption or the appearance of corruption.

The *Buckley* Court appeared to delineate corruption as a quid pro quo and "the absence of prearrangement and coordination of an expenditure."[143] However, the phrase "appearance of corruption" appears to encompass precisely the type of corruptive influences currently exercised by PACs. The Court's concern for "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" typifies the present mistrust of a political financing system dominated by PAC money.[144] Furthermore, other

138 *Id.*
139 *Id.*
140 *Id.* at 46.
141 *Id.* at 47.
142 *Id.* (emphasis in original).
143 *Id.*
144 *Id.* at 27.

language suggests a more expansive definition of corruption. The Court implied such an interpretation, for example, when it stated that the "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action."[145] Indeed, the Court was even more explicit when, in upholding the reporting and disclosure sections of the FECA, it recognized as legitimate Congress' interest in achieving "through publicity the maximum deterrence to corruption and undue influence possible."[146]

Buckley's progeny are cases in which the Court adjudicated campaign finance reform laws and first amendment issues. At first glance, these cases appear equally as ambiguous on the definition of corruption as *Buckley*. However, a closer reading of these cases illustrates that they support the notion that excessive or undue influence constitutes a form of corruption that fits within the Court's exception to first amendment concerns. Therefore, excessive or undue influence constitutes a form of corruption sufficiently within the state's legitimate and compelling interest to preserve the integrity of and the public's confidence in the democratic system.

In *First Nat'l Bank of Boston v. Bellotti*,[147] the Court invalidated a Massachusetts criminal statute as unconstitutional under the first amendment. The statute prohibited national banking associations and business corporations from making contributions or expenditures on referendum issues that did not affect materially the association or corporation's business. In its decision, the Court recognized the state's legitimate interest in "preserving the integrity of the electoral process, [and] preventing corruption."[148] After considering the appellee's underlying assumption that corporate "participation would exert an undue influence on the outcome of a referendum vote," the Court determined that the appellee's arguments did not merit its consideration.[149] However, in reaching that conclusion, the Court stated that if the appellees had supported their arguments with record or legislative findings, those arguments would have merited the Court's consideration.[150] In essence, the Court implied that undue influence was a form of corruption that the Massachusetts legislature could have statutorily restricted without invoking first amendment constitutional concerns.

---

145 *Id.* at 27-28.
146 *Id.* at 76.
147 435 U.S. 765, 776 (1978).
148 *Id.* at 788.
149 *Id.* at 789.
150 *Id.*

Similarly, in *Citizens Against Rent Control v. Berkeley*,[151] the Court acknowledged that undue influence was excepted from the rule that the first amendment precluded limits on political activity. The Court held that a Berkeley, California ordinance, which limited to $250 contributions to committees organized to support or oppose ballot measures subject to public vote, violated the constitutional rights to freedom of association and speech quaranteed under the first amendment.[152] The Court relied on *Buckley* in reaching its decision. It interpreted the *Buckley* holding as identifying "a single narrow exception to the rule that limits on political activity were contrary to the First Amendment."[153] The Court stated that "[t]he exception relates to the perception of *undue influence* of large contributors to a *candidate*."[154] Quoting from *Buckley*, the Court in *Citizens Against Rent Control* defined that exception as "the avoidance of the appearance of improper influence."[155]

Some commentators contend that the Supreme Court provided the definitive answer to the question of what constitutes corruption within the first amendment exception in *Federal Election Comm'n v. National Conservative Poltical Action Comm.*[156] The Supreme Court held that a section of the Presidential Election Campaign Fund Act,[157] which made it a criminal offense for an independent political action committee to spend more than $1,000 to further the election of a candidate who received public financing, not only violated the first amendment, but also was unconstitutionally vague.[158] The Court adopted the rationale in *Buckley* that "there was a fundamental constitutional difference" between independent expenditures and campaign contributions.[159] As in *Buckley*, the Court reasoned that the independence of the expenditures "undermine[d] the value of the expenditure to the candidate, and thereby alleviate[d] the danger that expenditures will be given as a quid pro quo for improper

151 454 U.S. 290, 297 (1981).

152 *Id.* at 292-94.

153 *Id.* at 296-97.

154 *Id.* at 297 (emphasis added).

155 *Id.* (quoting *Buckley*, 424 U.S. at 27).

156 470 U.S. 480 (1985). *See generally* Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMMENTARY 97, 103 (1986) (stating that "the Court made its position clear in FEC v. NCPAC: . . . that preventing corruption or the appearance of corruption are [sic] the only legitimate and compelling government interests thus far identified for restricting campaign finances.' ". *Contra* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045, 1081 (1985).

157 26 U.S.C. § 9012(f).

158 *Federal Election Commission*, 470 U.S. at 403.

159 *Id.* at 497.

commitments from the candidate."[160] The Court appeared to define corruption when it stated that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors."[161] It seemingly limited corruption as a financial transaction that required prearrangement and coordination, a classification under which undue or excessive influence would not fit.

However, the Court in *Federal Election Commission* did not exempt undue influence entirely from the first amendment exception. The vagueness of the statute primarily concerned the Court. The Court stated that it was not "quibbling over fine-tuning of prophylactic limitations," but felt that the overbreadth of the provision was so great as to require its invalidation.[162] That reasoning acknowledged the Court's initial grant of discretion and authority to Congress to enact legislation to pursue the basic governmental interest of preventing corruption and its appearance. Furthermore, by stating that "Congress could fairly conclude that large-scale PACs have a sufficient tendency to corrupt,"[163] the Court essentially stated that undue influence was a form of corruption within the first amendment exception. A "sufficient tendency to corrupt" hardly constitutes a financial quid pro quo or a prearranged or coordinated financial exchange.

In sum, the foregoing cases illustrate that a reformed federal bribery statute targetted at regulating the use of undue or excessive influence would not be deemed unconstitutionally impermissible under the first amendment. Instead, undue influence is a form of corruption that fits within the first amendment exception as a legitimate and compelling state interest.

V. Reform Suggestions For The Federal Bribery Statute

A reform of the federal bribery statute would prevent the egregious use of excessive influence wielded by PACs. However, reformation of the statute would be effective only if it accomplished two objectives. First and foremost, it must remove the campaign contributions exception to section 201 that congressmen enjoy today. Secondly, a reformed section 201 must "employ means closely drawn to avoid unnecessary abridgement of associational freedoms"[164] and a resultant judicial decree of unconstitutionality. The

160 *Id.* (emphasis in original).
161 *Id.* (emphasis in original).
162 *Id.* at 1471.
163 *Id.*
164 *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

proposed factor analysis test, outlined below, would achieve these goals.

The factor analysis test defines the criminal intent element under bribery subsection 201(c). It designates that this element is fulfilled when the facts satisfy two important factors: (1) when PACs are most highly motivated to influence congressmen, and (2) when a congressman is most susceptible to being influenced. When these two factors converge, the courts will presume a corrupt intent exists. The defendant then assumes the burden of disproving the existence of corrupt intent. The results of the empirical studies provide the basis upon which the factor test is constructed.

PACs are most highly motivated to influence congressmen when they attempt to address narrow, parochial policy concerns.[165] Often the issue itself will indicate the narrowness of the PACs policy concern. A preferential or beneficial change in the tax code is a prime example. Other indicators also exist to assist in the determination of the narrowness of PAC interests. PACs attempt to achieve their desired ends by contributing disproportionately to party leaders, incumbents, committee members, and legislators with strong voting records.[166] The flow of campaign funds to these individuals should serve as a warning flag of the intentions of contributing PACs. Therefore, whenever narrow, technical policy concerns are apparent, the first prong of the factor test is satisfied.

Congressmen are most susceptible to being influenced when an election is imminent and the issue is not highly relevant or visible to a congressman's constituency.[167] The imminency of an election would not be difficult to measure. Indicators of the relevancy of an issue to a congressman's constituency would include an examination of the perceived interests of the congressman's constituency, the amount of local political activity that the issue generates or, possibly, the geographical source of the PAC contribution. When the circumstances point towards the strong possiblity of a congressman being influenced, then the second factor will be satisfied.

The factor test accomplishes a number of objectives. First, it removes the campaign contributions exception that congressmen presently enjoy under section 201. However, in recognition of the

165 *See supra* notes 32-44 and accompanying text. *See also* SCHLOZMAN & TIERNEY, ORGANIZED INTERESTS, supra note 4, at 396 ("Organizations whose political ends are narrow and technical are more likely to be influential than those whose goals are more encompassing. In general, it is easier to affect the details of a policy than its broad outlines.").

166 *See supra* notes 43-52 and accompanying text.

167 *See supra* notes 62-68 and accompanying text.

importance of campaign contributions to our electoral system of government, it does so in a manner which does not sweep too broadly. The factor test narrowly defines those circumstances in which the likelihood of corruptive influences of PAC campaign contributions is greatest.

Secondly, the factor test removes the elected official/appointed public official distinction. The test would adopt the statutory intent language of section 201 that the courts traditionally apply to public officials. Intent under sections 201(c) and 201(g) would continue to be the specific "intent to influence" and the requirement of proof of payment where no payment is necessary respectively. The factor test merely defines what constitutes a specific "intent to influence" for elected officials. Furthermore, application of the factor test accords with the *Brewster* court's holding that required the offense of bribery to possess a higher culpable intent.

Furthermore, reformers of the federal bribery statute must reject the notion that the offense of bribery requires a quid pro quo. As mentioned, the statutory language of section 201(c) does not support such an interpretation. Furthermore, this requirement is only invoked when an elected official runs afoul of the statute. This only perpetuates the distinction between elected officials and appointed public official. Lastly, the requirement of a quid pro quo would preclude the regulation of excessive influence. However, as *Buckley* and its progeny illustrated, the Supreme Court included excessive influence within its definition of corruption that fell within the state's legitimate and compelling interest to prevent corruption as the government saw fit.

Lastly, the factor analysis test would not be unconstitutional for two reasons. First, the test does not run afoul of any first amendment concerns. The test seeks to regulate the exercise of excessive or undue influence by PACs. *Buckley* and its progeny indicate that regulation of excessive or undue influence constitutes a legitimate and compelling state interest that is sufficiently important to be sustained in the face of any first amendment attacks. Second, the test does not sweep too broadly. Satisfaction of the test requires the combination of two factors: the likelihood that PACs are attempting to influence congressmen and the susceptibility of congressmen to being influenced. The factor analysis test, however, can only be invoked when the elements of each factor are met. Compliance with the test, therefore, occurs only when the PAC motivations to influence a congressman and the likelihood of a congressman being influenced are greatest, for example, when the conditions of bribery

are met. As a result, the exacting requirements of the test fulfill the condition to "employ means closely drawn."

VI. CONCLUSION

The financing of political campaigns today involves big bucks and big business. Although campaign finance reform proposals circulate through the halls of Capital Hill, any drastic change in the system, with or without reform, probably will not occur. Media costs, political consulting fees, and the overall increase in the sophistication of political campaigns will require the continued consumption of large amounts of campaign dollars. Unfortunately, however, the change in the nature of campaign financing has institutionalized not only the role and leverage of PACs, but also the opportunities for corruption in the system.

This Comment has shown that the empirical evidence substantiates the claim that those opportunities for corruption do exist. Furthermore, this Comment has illustrated that the means used to police such activities are grossly ineffective. As a result, the monumental changes in the financing of congressional and presidential campaigns has engendered public disdain for our electoral system of government. As public distrust mounts, reform of the federal bribery statute becomes paramount. Reform can reaffirm the public's faith in the survival of our democratic principles of government.

WILLIAM M. WELCH II