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Fighting the Appearance of Corruption

Ronald M. Levin*

It is a special honor to be the recipient of a chair named after Dean Henry Hitchcock. After all, he was a descendant of Ethan Allen—and when it comes to chairs, these Ethan Allen people ought to know what they're doing.

But I also have more important reasons to feel honored by my new association with this law school's first dean. He had a biography of achievement and eminence that speaks for itself. As many of you know, in a few months I will become chair of the ABA Section of Administrative Law and Regulatory Practice. When you put that together with the chair I am receiving today, and you also bear in mind that I have been chair of two sections of the Association of American Law Schools, pretty soon I may have an entire dining room set. Nevertheless, if I should start thinking, from time to time during the coming year, that being chair of the ABA section is a really big deal, it will be helpful to remember that Dean Hitchcock was president of the entire ABA—in addition to being a dean, a provost, a teacher of eight separate law school courses, a newspaper editor, a political party delegate, a founder of the local YMCA, and a legal advisor to General William T. Sherman. Service as the Hitchcock Professor will be a small reminder that there are always more worlds to conquer and more leaders to emulate in the proud traditions of this distinguished law school.

In my remarks today, I want to revisit some issues that I explored a few years ago when I wrote a study on congressional ethics and political corruption for the ABA.¹ Over the years, our society has become increasingly intolerant of what we regard as ethical conflicts between public responsibilities and selfish concerns.

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1. See Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 (1996).

We used to shrug off some of these conflicts. For example, one of Dean Hitchcock's colleagues on the law school faculty was a United States District Judge, Samuel Treat, as was typical of legal education in those days. It seems that members of the faculty would litigate cases before the judge *while he was their colleague*—and so did the Dean.² Apparently this situation elicited no insuperable objections at the time. Today, however, I'm sure it would raise some eyebrows, and it would probably lead to a disqualification motion alleging that, if nothing else, it created the "appearance of impropriety." It would be thought to look bad—even though, to judge from the reported cases, the faculty's record of success before Judge Treat wasn't all that great.³ (Some things about faculty collegiality don't change over time.)

This increased sensitivity about appearances is at the heart of the themes I will explore today. I will discuss it in the context of two very topical events: the recent presidential primary campaign and a recent Supreme Court case.

I

The presidential campaign event was a controversy involving Senator John McCain. The New York Times reported in January 2000 that Senator McCain had written letters to the Federal Communications Commission urging it to hurry up and decide a license application that had been pending for two years.⁴ The applicant turned out to be a person who had contributed more than \$20,000 to McCain's presidential campaign. The implication of the story was that the Senator, despite his fondness for presenting himself as the foe of special interest politics, was in fact misusing his position as chairman of the Senate Commerce Committee for the benefit of people who had bought his influence. It did not take Governor Bush

2. *Union Trust Co. v. St. Louis Ry.*, 24 F. Cas. 710 (C.C.E.D. Mo. 1878) (No. 14,403); *The Red Wing*, 14 F. 869 (E.D. Mo. 1882); *United States v. Wynn*, 9 F. 886 (E.D. Mo. 1882); *In re Bignall*, 9 F. 385 (E.D. Mo. 1881); *In re Morrison*, 17 F. Cas. 831 (E.D. Mo. 1873) (No. 9,839).

3. *E.g.*, *Union Trust*, 24 F. Cas. at 718 (Treat, J., dissenting); *Wynn*, 9 F. at 895.

4. Stephen Labaton, *McCain Urged F.C.C. Action on Issue Involving Suppporter*, N.Y. TIMES, Jan. 6, 2000, at A1.

long to pick up on this charge and use it against the Senator on the campaign trail.

The press was equally quick to realize that this story brought back memories of the Keating Five episode of a decade ago—and not merely because McCain had been one of the Keating Five himself. The Keating episode had involved a very similar sequence of facts. McCain had been one of five senators who had met with the chairman of one of the federal banking agencies to urge him to ease up on their friend Charles Keating, the president of an insolvent savings and loan association. Keating just happened to be a wealthy and influential campaign contributor and fundraiser. He had raised over \$100,000 for McCain, and even more for some of the other senators.⁵ The meeting between the senators and the banking chairman was an example, although an extreme example, of what members of Congress call “constituent service,” that is, going to bat with an administrative agency on behalf of an aggrieved citizen.

When I studied this practice and the congressional ethics controversy that had grown out of it, I came to understand that members of Congress themselves think of meetings and letters like Senator McCain’s as completely routine and part of their job.⁶ They would say that citizens whose cases are stuck in bureaucratic limbo *should* be able to enlist congressional help. After all, they would argue, the FCC does sometimes drag its feet when implementing various programs. When that happens, who else would you call to get the agency moving, if not someone like the chairman of the Senate Commerce Committee, Senator McCain? Furthermore, McCain had played by what members of Congress think of as the unwritten rules of this game. He had only asked for prompt resolution of the case, not for a favorable outcome.⁷

Still, outsiders frequently see these things differently: as pressure to throw the case, or at least interference with the deliberative process. Congress therefore has a public relations problem. During

5. SENATE COMM. ON ETHICS, INVESTIGATION OF SENATOR ALAN CRANSTON, S. REP. NO. 102-223, at 18-19, 21 (1991) [hereinafter ETHICS COMMITTEE REPORT].

6. See Levin, *supra* note 1, at 19.

7. *McCain’s Letter To F.C.C. and Excerpts from Replies*, N.Y. TIMES, Jan. 6, 2000, at A18 (text of the Senator’s letter).

the Keating Five controversy, the Senate Ethics Committee's special counsel suggested, as did others, that the five senators should be punished simply because they had created an "appearance of impropriety."⁸ The Ethics Committee ultimately did reprimand some of the senators for this reason,⁹ and it has criticized other senators since for other bad "appearances."¹⁰

The appearances theme returned during the McCain controversy. One newspaper column said that, although McCain had not actually done anything improper, he had "carelessly and unnecessarily damaged the reputation he has worked so hard to acquire," because a candidate who "complains about big money and politics is asking for trouble if he or she even *seems* to be doing favors for wealthy contributors."¹¹

I criticized this sort of emphasis on appearances in my article. I argued that it was unfair to punish a member of Congress just because his or her conduct had caused a bad press.¹² The appearance standard is vague and subjective, and it's also a copout. I said that the Ethics Committee should come to grips with the hard cases and display leadership by explaining to senators what they can and cannot do. The Committee would not fulfill this function if it were to find an ethics violations simply because some people (not themselves) disapproved of the accused's conduct.

On the other hand, I was not saying that ethics committees should condemn only those activities that are inherently corrupt and unethical. I drew upon a body of scholarship that had suggested that the committees should devise rules to ban conduct that *tends toward* corruption.¹³ So, for example, to apply this reasoning to the McCain

8. E.g., Phil Kuntz, *Senators Ponder How to Treat Appearance of Wrongdoing*, 49 CONG. Q. WKLY. REP. 228 (1991).

9. ETHICS COMMITTEE REPORT, *supra* note 5, at 17, 19.

10. Glenn R. Simpson, *Ethics Finds No Wrongdoing in Lautenberg Memos but Warns of 'Appearance' Created*, ROLL CALL, July 21, 1994, available in LEXIS, Legis Library, Rollic File.

11. Foster, *McCain Tars His Image Unnecessarily*, MILWAUKEE J. SENTINEL, Jan. 8, 2000, at 10 (emphasis added).

12. Levin, *supra* note 1, at 99-104.

13. See DENNIS F. THOMPSON, ETHICS IN CONGRESS 124-25 (1995); ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics and Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 297 (1993) (Cynthia Farina, Reporter) (arguing that ethics rules should address the "potential for . . . impropriety").

situation, the Senate now has a rule that says that a senator should not make a decision to intervene at an agency on the basis of political contributions.¹⁴ In other words, contributors should not receive more favorable treatment than similarly situated noncontributors. Such a rule protects against potential corruption, even where no illicit bargain between the politician and the contributor has occurred. However, the Senate has not completely banned intervention on contributors' behalf, and according to my article's thesis, the Senate should not condemn those interventions simply because some people say it looks suspicious.

In short, I argued that regulation to curb impropriety or tendencies toward impropriety was legitimate, but regulation to curb a mere "appearance" of impropriety was not.

II

Keep that thought in mind as I turn to my second topical point of reference, the case of *Nixon v. Shrink Missouri Government PAC*,¹⁵ which the Supreme Court decided in January 2000. This case upheld a Missouri law under which you or I may contribute no more than \$1075 per campaign to a candidate for governor or other statewide office. My colleague Bruce La Pierre litigated this case for the plaintiffs who challenged the limits. He may have won a moral victory, but he lost the actual vote, six to three.

Before the case came down, everyone understood that the Court would use *Shrink Missouri* to revisit the principles that it had set forth in 1976 in the famous case of *Buckley v. Valeo*.¹⁶ In *Buckley*, the Court had found various campaign finance restrictions unconstitutional as violations of the First Amendment, but it had upheld limits of \$1000 on individual contributions to candidates for Congress. The Court had said that people who made contributions were less entitled to First Amendment protection than other political speakers.¹⁷ One of the Court's reasons for this conclusion was that

14. Senate Rule XLIII(3), *reprinted in* SENATE CMTE. ON RULES AND ADMINISTRATION, SENATE ELECTION GUIDEBOOK, at 162 (2000).

15. 120 S. Ct. 897 (2000).

16. 424 U.S. 1 (1976).

17. *Id.* at 20-23.

the \$1000 limit would directly serve the government's interest in preventing "corruption and the appearance of corruption."¹⁸

In the years following *Buckley*, the Supreme Court had appeared increasingly skeptical about campaign finance laws. So most tea-leaf readers assumed that in *Shrink Missouri* the Court would find some way to limit *Buckley* and strike down Missouri's \$1075 limit. Various theories developed as to how the Court would accomplish this. Bruce's argument was that recent First Amendment law has required the government to prove a factual basis for its speech restrictions. The state had supplied very little evidence that its limits were needed to protect against "corruption and the appearance of corruption,"¹⁹ and so the limits should fail for lack of proof.

The predictions were wrong. The \$1075 limit survived. Justice Souter's opinion for the Court dismissed the argument that the state had not supplied enough proof of need for the limits.²⁰ What is most important to my argument today is that he particularly emphasized the evidence that people in the state *perceived* a need for limits. He relied on newspaper accounts and editorials claiming that big money was afflicting Missouri politics.²¹ Whether the newspaper clippings were accurate or inaccurate, well-balanced or cockeyed, apparently did not matter, because they at least showed what people *believed*. Justice Souter also pointed out that Missouri had previously adopted campaign finance limits through a ballot proposition that had received 74% approval from the voters.²² This vote likewise attested to a *perception* that contribution limits were needed.²³ Then, when Bruce relied on political science studies to attack the law, Justice Souter did not examine them at any length, in part because of "the absence of any reason to think that public perception has been influenced by the studies."²⁴

If we believe these passages from *Shrink Missouri*, then, in a way,

18. *Id.* at 24-29.

19. *See Shrink Missouri Gov't PAC v. Nixon*, 161 F.3d 519, 521-22 (8th Cir. 1999), *rev'd*, 120 S. Ct. 897 (2000).

20. *Shrink Missouri Gov't PAC v. Nixon*, 120 S. Ct. 897, 906-09 (2000).

21. *Id.* at 907.

22. *Id.* at 908.

23. *Id.*

24. *Id.*

the evidentiary question that Bruce raised has become entirely beside the point. If limits on contributions are permissible only in times and places where wide segments of the public believe that special interests exert too much influence over politics, then they are permissible in all times and places. The public always believes this, and it always will. Unless the Court modifies its language, the requirement of proof of need for restrictions might as well be rescinded entirely.

As you probably have guessed, I think the Court made a mistake in continuing to rely on public perceptions as a justification for regulation. As a matter of First Amendment law, it is surprising enough, but I want to focus on some problems the rationale causes in the broader policy debate. As a premise for legislative action, I think the appearances rationale is troublesome for several reasons.

First, it invites regulation on too indiscriminate a basis. In our scandal-oriented political environment, accusations of wrongdoing can be, and are, leveled at virtually every political candidate in sight. What fundraising effort is *not* accused of being unsavory and making the candidate too beholden to special interests? We have to strike a balance between the restrictions we need to keep the system honest and the latitude we need if political discussion is to go forward. So, if we want to regulate any particular aspect of the system, we should ask whether it is a point in the system where restriction will do the most good and the least harm. The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed.

For example, the voter initiative that Justice Souter mentioned as having passed with 74% voter approval had imposed even stricter contribution limits than the ones at issue in *Shrink Missouri*.²⁵ Contribution limits of \$300 per election for statewide races, and even lower limits for more localized races, had "appeared" necessary to the electorate. Yet receiving contributions that are low, but not quite so low as that, would seem to be among the most innocuous ways in which a politician could possibly finance a campaign. In short, a

25. See *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (holding initiative unconstitutional).

focus on appearances creates a strong temptation to engage in superficial analysis of what kind of campaign finance reform is most needed.

Second, the appearances rationale invites circular reasoning. In effect, it means that the most zealous and aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation. Political combat can create its own appearances.

Third, the appearances rationale is self-defeating, because with restrictions will always come more occasions for accusations of noncompliance. Rules will always force campaign staffs to make judgment calls on debatable issues, and politicians and other partisans will always have incentives to accuse their opponents of fudging on the rules. The current campaign season amply furnishes us with examples of these charges. Sometimes the charges will be right and sometimes not, but in the heat of a political campaign, who can pause to find out for sure? I'm not saying that we should not have restrictions—only that if you believe that the *reason* to have them is to rid the process of negative ads, journalistic innuendos, and outrage on the talk shows concerning campaign contributions, you are guaranteed to be disappointed. The only way to prevent suspected evasions of the rules would be to eliminate all the rules. So, strict rules are not only a cure for the appearance of corruption, but also a leading cause of it.

Now, I don't have time today to explain how to solve all the problems of campaign finance regulation—my twenty minutes are about up. (If they'd given me thirty, I could have done it.) So I will focus on what to do about the appearances rationale. My suggestion grows out of what I said earlier. In *Shrink Missouri* the Court should have said that its language from *Buckley* needs adjustment. The central issue should be: what kinds of restrictions are needed to prevent corruption or a significant *tendency toward* corruption? By revising its test this way, the Court could improve its First Amendment analysis. This test wouldn't keep the legislature from regulating the election process in the interest of fair and honest campaigns, but it would bring the constitutional and policy debate back into touch with reality.

Now, despite everything I've said, we all know that there is at least one sphere of public life in which appearances always matter—namely, electoral politics. Legislators who aspire to higher office, or even re-election, can ill afford to ignore what Senator Bob Dole once called the “front-page test.” He said that “if we are not willing to read about an intervention on the front page of the newspapers, then we ought to think twice about making that phone call or writing that letter.”²⁶ For Senator McCain, that test hit home in a most literal manner.

However, we don't have to concede a similar role for appearances in constitutional discourse or even in serious public policy debate—especially when the debate occurs here in the university community. After all, if anyone is in a good position to analyze dispassionately how campaign finance regulation can fit into a healthy electoral system *and* our legal traditions of free speech, it ought to be us in the academy. A professional commitment to detached pursuit of the truth would seem to be among the aspirations that the Henry Hitchcock chair is designed to encourage. Those aspirations challenge us to remember that, if all we ask of reform is that it must address the appearance of corruption, we may ultimately find that we have given ourselves only the appearance of reform.

26. 137 CONG. REC. 12,316 (1991).

