COMMON CAUSE

Holding Power Accountable

Testimony of Derek Cressman

Government Watchdog Director of Common Cause

For the California Fair Political Practices Commission

February 14, 2008

I would like to thank the Commission for inviting me to testify today and in general for its interest in exploring this important topic of independent expenditures in California's political campaigns.

I will address some of the problems for democracy I see in large expenditures of money spent independent of campaigns for the purposes of influencing election outcomes in California. But, I want to also stress that some of these problems are less serious than they would be if large donors were allowed to give their money directly to candidates, as they were prior to the implementation of contribution limits in California. Finally, I will offer some proposed solutions, including steps that this Commission could undertake in the near future.

Problems with Big Money Independent Expenditures (IEs)

Big Money IEs Distort Who Runs for Office in the First Place
With one single act of depositing nearly a million dollars in an independent expenditure account to back Jack O'Connell should he run for Governor in 2010, one person—Reed Hastings—has singlehandedly make Mr. O'Connell a viable candidate. This does not mean that O'Connell will win, or even that he will necessarily even run, but it does get Mr. O'Connell over the first hurdle of fundraising credibility. It is conceivable that without this support from one individual, Mr. O'Connell would not even run in the first place. When we have a system that in-essence creates so strong a barrier to entry as to require the backing of wealthy interests to even get into the ring, we have a problem.

Big Money IEs Distort Who Wins Elections

Angelo Tsakopoulos and his daughter Eleni dumped nearly $9 million into an independent expenditure to support Phil Angelides in the 2006 Democratic primary contest for Governor. I doubt that there are many observers who would challenge the notion that this expenditure caused Angelides to defeat his opponent Steve Westly. Prior to the expenditure, Angelides was trailing about 13 points behind in the polls. Indeed, I would think that the Tsakopoulos family would agree that causing Angelides to win was the whole point of their action. That doesn't mean it was the only thing that contributed to the outcome of the race, or that it was illegal in any fashion. One could argue that they were simply buying the race back from Mr. Westly, who had used $35 million of his own funds to support his candidacy. Thus, while this expenditure is a reminder that current campaign finance rules allow a small group of people (in this case just two) to unduly influence who runs for office and who wins elections, it is also a reminder that independent expenditures cannot be dealt with in a vacuum and that in the end they are closely related to other campaign funding issues, not the least of which is the unlimited use of a candidate's own funds for their campaign.

Big Money IEs Yield Legislative Intimidation and Influence

Because big money independent expenditures unduly influence election outcomes, they also inevitably influence the legislative process because *quid pro quo* or not, legislators can determine whose support they owe their election to.

One example would be in the 2006 primary election, when a group funded by oil companies, HMOs, banks, tobacco companies, utilities, and pharmaceuticals dumped a half million dollars into an independent expenditure to smear the reputation of Ellen Corbett in her 2006 primary race for the state Senate. These interests did not like Corbett's track record in the Assembly of supporting environmental and consumer oriented bills. Meanwhile, Corbett was helped by independent expenditures from nurses, trial lawyers, and environmentalists.

Now, it doesn't take much of a stretch in the imagination to assume that these expenditures will weigh in the decision making of Ms. Corbett, and of other legislators, while they are in office. But, even if it does not, even if Ms. Corbett were to have the superhuman attributes of ignoring who ones friends and enemies are, these independent expenditures unduly influenced the outcome of the race that decides whether or not a pro-consumer or pro-business candidate won the election.

In another example from the 2006 primary, car dealers financed an independent expenditure campaign to promote Alex Padilla for the California Senate. Mr. Padilla was running against Cindy Montanez, who as an Assemblymember had sponsored a car buyers' bill of rights that gave consumers two days time to return used car. The car dealers thus identified Ms. Montanez as detrimental to their financial self-interest and spent at least $122,000 to promote her opponent.

Legislators are smart enough, I submit, to figure out that if they too stand up to the car dealers that they might fall victim to a large independent expenditure in a future election. Interestingly enough, as the 2006 legislative session ended Senator Torlakson gutted a bill that had previously dealt with air quality issues and replaced it with a last minute increase in vehicle document preparation fee that car dealers charge customers. Would the car dealers have won this favorable treatment had they not spent their money to punish a legislator who had previously defied them? If not, why did these shrewd businessmen waste their cash?

We are now even seeing the mere threat of independent expenditures being used as a means of influencing the actions of our elected officials. In the summer of 2006, the California prison guards union boasted in the media that they had a fund of $10 million dollars that they were prepared to spend independently to influence the governor's race. Not coincidentally, they made this threat at the same time that they were negotiating a new salary package with Governor Schwarzenegger. The only point of raising such a possibility would be to influence those negotiations. While in this instance, the approach does not appear to have been successful, it is a clear example of how special interests can use independent expenditures as one of their avenues for gaining power and influence in Sacramento.

Big Money IEs Elevate One Voice above Others

It is simply wrong to think of big money independent expenditures as free speech. They are paid speech. Free speech, by definition, is to ensure that every citizen has the opportunity to voice their opinion. But, free speech does not ensure the freedom to be heard. With 36 million people in California, it would be impossible for a voter to hear from every other citizen. Rather, voters use the marketplace of ideas to determine which voices they want to trust: neighbors, family, newspapers, endorsements from other political leaders or organizations, debates, blogs, what have you. Most people now-a-days can even make a 30-second video of their ideas and post it on YouTube or other websites for free—making their message widely available for those who wish to hear it. In making large independent expenditures, a handful of fat cats attempt to bypass this marketplace of ideas and "get their message out" by interrupting information or entertainment that citizens have sought out with their 30-second – presuming that their message is more important or worthwhile than the message of any other California voter. That is an effective way for getting what you want by using bullying to shout your ideas over the voices of others, but it is not the same thing as free speech.

And, it's not just every Californian that we now hear from. We are seeing independent expenditures funded from out-of-state interests, and in many legislative races independent expenditures funded primarily from interests outside of the district. We are seeing concern about voting by illegal immigrants, even though there is little evidence so far to indicate this is going on. Yet we have legalized huge independent expenditures from entities that can't vote, like corporations, whose avowed purpose is not to balance all the pros and cons of any policy decision and seek the overall public interest but quite the opposite to seek only the policy outcomes which will maximize their profits.

The U.S. Constitution's guarantee of a republican form of government erodes when elected representatives are accountable to a relatively small number of narrow interests instead of voters who they are supposed to represent. If a handful of people have a louder voice than the rest of us, then the electorate does not have the balanced information from all perspectives that it needs to make an informed decision and the goals of the First Amendment are undermined.

Not All IE's Are Created Equal

You will note that my comments above all relate to Big Money Independent Expenditures. There is a big difference between one person spending a million dollars to influence an election outcome, and one million people each contributing one dollar to arrive at the same sum. The first is undue influence. The latter gives people the voice that they are due. Charts that list the larges independent expenditures by total spending, without regard to how many people contributed to each, can conflate this difference. We need to be somewhat sophisticated in how we examine this issue.

IEs are Not as Bad as They Could Be

For all of these problems, I submit that even big money independent expenditures are not as corrosive to the process of democratic self-government as big contributions that go directly to candidates. At least independent expenditures are about political speech, even if it is paid speech that is forced upon voters as opposed to free speech that listeners may choose to tune into.

It is far better to have someone spend $1 million on a TV ad about a candidate than to:

A) hand the candidate $1 million in unmarked bills that is used to hire crooks to break into the Watergate hotel to spy on their opponents, or as walking around money to buy votes on the street,

B) give an officeholder a luxury boat called the Dukester, a multi-million dollar house, or other items or cash for personal use in a form of outright bribery,

C) give on officeholder a $1 million campaign contribution that the candidate uses to finance trips to France, purchase a $2701 belt buckle to give as a gift to the Governor, or other questionable uses of candidate campaign funds that have surfaced recently,

D) give a legislator $1 million that they use to give to other candidates as a way of building support for a committee chair position or leadership post,

E) give to a candidate who simply sits on it as a war chest to scare off future challengers or to run for another office altogether.

IEs Can Raise New Issues in a Campaign

It is even preferable to have the money go for an IE than for other expenses of a candidate that are currently deemed legitimate campaign expenses such as polling, consultants, staff, fundraising, and even communications such as mailings and ads. These candidate-controlled expenses will inevitably focus on the issues and traits that a candidate has chosen to emphasize, whereas at least sometimes independent expenditures raise issues in a campaign that otherwise all candidates would intentionally ignore. For instance, the Club for Growth typically runs ads that raise issues of limited government, lower taxation, and other items that are consistent with the group's ideology. These may or may not be the issues a candidate would choose to raise, even one supported by the Club for Growth.

It's OK for Candidates to Lose Control of the Debate
Some observers argue that it is wrong for a candidate not to be able to decide what issues will be discussed during their campaign. I disagree. In a free society, nobody should be able to control what issues voters think about when making their decisions.

When I was in college, I was elected as chair of a statewide non-partisan student organization that had 28 different chapters. My campaign consisted of a speech that I gave at the board of directors meeting. Afterwards, I left the room along with my opponent, and other directors got to say whatever they wanted about us. While this was uncomfortable for us two candidates, I suspect that the other directors found what our peers had to say about us even more useful than what we had to say on our own behalf.

Complaining that independent expenditures are overwhelming candidate campaigns is like complaining that word-of-mouth advertising by moviegoers is drowning out the paid ads for movies, or that people are relying too heavily upon *Consumer Reports* and *Car & Driver* instead of 30-second spots produced by car manufacturers that often contain few facts but instead play upon emotions of the power of the road, self-image, sex appeal, or other forms of marketing propaganda.

IE's Provide Greater Disclosure
Further, there can be greater disclosure about who is truly bankrolling efforts to support a candidate when the money flows through an independent expenditure. With candidates, unless we take the time to pour through the hundreds of contributions a candidate has received at the Secretary of State's website, all we learn from an ad itself is that it was paid for by the candidate. Whereas, with an independent expenditure, we at least learn who the top two contributors are – bringing them much more into the light than if they funneled their money to the candidate first.

For example, Club for Growth, The California Correctional and Peace Officers Association, the Pechanga Band of Indians, the Swift Boat Veterans for Truth, and MoveOn.org are all entities that have engaged in enough independent advertising so that many citizens are beginning to know who they are and can consider their advertisement in light of whether or not they generally tend to agree with and trust the organization or not. For example, in 2002, a *Sacramento Bee* editorial dissected an independent expenditure by the CCPOA attacking Senate candidate Lois Wolk. The *Bee* opined out that the CCPOA's independent attacks on Wolk for accepting "big money" contributions that were within the Prop 34 contribution limits were like the "sewer calling the Camembert smelly."[i] Voters who agreed with the *Bee's* assessment could begin to build a lasting impression of the CCPOA and the reliability of advertisements that they pay for.

Likewise, voters who tend to disagree with the *Bee* and have grown to trust the CCPOA can take their own experiences and beliefs into account. Far from driving these donors underground, forcing them to spend independently and disclose their funding in the ads themselves actually shed's far more light on them than if they could give directly to a candidate and hide behind the candidate's name for disclosure purposes.

It is the case that electioneering ads that fall short independent expenditures that expressly advocate election or defeat of a candidate do not have adequate disclosure under current law. We are now seeing huge expenditures on campaigns that fail the current definition of an IE but clearly involve electioneering efforts that are intended to promote, support, attack, or oppose a candidate and influence the outcome of an election, the outcome of public policy, or both. California is ahead of most states in that it at least requires that persons running these ads identify themselves and report total cost of the ads if they run within 45 days of an election and cost more than $50,000. But the solution here is simple: improve the disclosure requirements to match those of independent expenditure campaigns.

But, the notion that non-transparency in independent electioneering is somehow caused by candidate contribution limits is ludicrous simply because nothing prohibits this money from going underground even in the absence of contribution limits. If donors or candidates feel that a direct contribution to a candidate, or a contribution to an independent expenditure campaign, would be harmful if disclosed, they can always resort to underground electioneering campaigns. For example, there are no contribution limits in ballot measure campaigns. Yet, the subprime mortgage company Ameriquest and its owners Roland and Dawn Arnall, went to great lengths to funnel $1.7 million dollars it spent to qualify and promote four ballot measures as part of the 2005 special election through a series of six intermediary committees that effectively masked Ameriquest's role as principle funder of the special election. The did this to avoid disclosure, not to avoid contribution limits.

IE's Can be Less Helpful to a Candidate than Coordinated Contributions

IE's don't always help a candidate. Note the recent attempts of Barack Obama to denounce and distance himself from big money independent expenditures aimed at supporting his candidacy for president. Obama worries that the association with big money interests could undermine one of his central campaign themes of independence from lobbyists and big money interests. It seems fairly clear that the campaign restrictions that forbid these donors from making huge contributions directly to Mr. Obama's campaign have forced the donors to an alternative that is less preferred by the candidate. Sometimes independent expenditures might duplicate efforts being made by a candidate campaign, mailing to the same list or targeting the same ad demographic, whereas if a candidate could control everything there would be a more efficient use of the funds. By making huge contributions less influential, candidate contribution limits are having a positive effect, even if not a 100% effective one.

So, while I join the chorus of concern about the role of large independent expenditures, I do so with a tempered voice that recognizes that they do represent some progress. Our current campaign finance regime has to some degree forced money out of the backrooms, out of the personal coffers and controlled campaign accounts of politicians and into the public spotlight with at least a modest degree of disclosure. The very fact that donors never went to the lengths they now go to to establish independent committees prior to the enactment of contribution limits in California is in itself evidence that the donors preferred to give large donations straight to the candidates and that when able to do so that is precisely what they did.

Solutions

There are things we can do to reduce the corrosive effect of big money independent expenditures. But I caution against expectations that any solution will be 100% effective. Just as we will never completely eradicate crime, eliminate all greenhouse gas emissions, or prevent every single person from cheating on their taxes, we will never eliminate the ability of wealthy interests to unduly influence our government. However, we can and should take steps to curtail and prosecute crime, reduce greenhouse gas emissions, and ensure that the vast majority of Californians pay their fair share in taxes. Likewise, we can and should take steps to improve our democracy by reducing the influence of big money through independent campaign expenditures.

Here are some ideas:

1) **The FPPC should require that when an IE campaign discloses its top two donors it its ads, it do so in the order of largest to smallest –** much in the way a cereal box lists its ingredients in the order of the largest amounts first. Section 84506 of the California Political Reform Act requires independent expenditure campaigns to list the top two donors greater than $50,000 in any ads they pay for. This allows campaigns to list many more than two donors and to list smaller donors first in the list—ones that may be very popular such as firefighters, small businessmen, or teachers—while burying a donor who may have funded 90% of the ad last on the list. I believe the FPPC would have the authority to change its regulation 18450.4 to further the purpose of current law by requiring that the largest donor be listed first.

2) Further, independent committees often choose names for themselves that tend to bury the information about who the major donor is, usually through the tell-all phrase "coalition." For instance, "Californians for a Better Government, A Coalition of Firefighters, Police, Deputy Sheriffs, Teachers, Home Builders, and Developers" received $8,752,000 of its $9,855,582 total expenditure (that's 89%) from just two people, both in the same family and both developers. I would suggest that **if more than 50% of an expenditure's funds come from a single person, family, labor union, business enterprise, or political committee, the ad disclosure should list that there has been "major funding by" that source before listing the next largest source and then the name of the committee**.

3) **It would be helpful for voters to know what the average contribution to an independent expenditure is.** I am not sure that the FPPC has the authority to require this disclosure in ads themselves, but I would encourage you to explore this option. However, I am not aware of anything in current law that would prohibit either the FPPC or the Secretary of State from calculating this figure for every independent expenditure committee and at least making it available on the Internet for voters and news reporters.

4) California currently requires electioneering ads that fall short of the definition of independent expenditure because they do not expressly advocate election or defeat of a clearly identified candidate to file electronic reports listing the name of the person making the contribution and the amount if the communication costs more than $50,000 and runs within 45 days of an election. These ads are often indistinguishable from independent expenditures, yet they are playing by a different set of rules. Ideally, the legislature should change the law to require that contributions that helped pay for the expenditure also be disclosed, as with independent expenditures. But, until then, **perhaps the FPPC could require that electioneering ads that meet this definition (described in section 85310 of the Political Reform Act) disclose at the end of their ads that "this communication does not expressly advocate election or defeat of a candidate and therefore is not required to reveal the source of its funding."** This would at least signal to voters that the person running the ads is playing under a different set of rules and would allow voters to determine for themselves whether or not the ad is intended to influence the outcome of an election even if it falls short of express advocacy.

Beyond these steps that may be within the scope of what the FPPC can do immediately, there are other steps California should take to reduce the undue influence of big money independent expenditures:

5) **Ban corporations from paying for independent expenditures out of their corporate treasuries** and instead require them to fund them from a political committee that is funded from voluntary contributions from shareholders, executives and employees. Michigan has done this and the Supreme Court of the United States has upheld the law. Independent expenditures from unions should require approval by political committees elected from the union membership for this purpose and members who disagree with the union's political agenda should be allowed to avoid funding these independent expenditures.

6) **California should consider contribution limits for IEs.** Current federal law requires an independent expenditure that is funded by two or more people to be done through a PAC, and applies contribution limits of $5000 to that PAC. Senators McCain and Feingold have previously introduced legislation that would apply this limit to so-called 527 committees as well. Some localities in California have attempted to limit contributions to independent expenditure committees and seen those laws rejected by the courts. I believe San Francisco is currently

appealing a court decision regarding its contribution limits on independent expenditures. While the California legislature and this commission should do whatever they see as consistent with upholding the values of the U.S. and California constitutions, it is worth noting that the current U.S. Supreme Court has five of nine members who appear to be interested in dismantling existing campaign finance regulations, so this may not be the best political environment on the court for California to attempt new limitations on IEs.

7) **California should consider providing public funds to candidates who are targeted by independent expenditures** in amounts that would equally match the amount spent against them or to benefit their opponent. Nebraska has a similar model that applies to candidates who face opponents that violate the state's voluntary spending limits and there is no reason this approach couldn't be applied to independent expenditures.

8) **California should consider full public financing of candidate campaigns** that not only provides matching funds to counteract independent expenditures but also provide candidates who chose to forgo all private fundraising with limited amounts of public funds that would be increased should a candidate face independent expenditures. Arizona, Connecticut, Maine, New Jersey, New Mexico, and North Carolina have all passed versions of these clean money systems and independent expenditures appear to be having a smaller impact in those states than in California.

9) **California should provide candidates with other means to respond to IEs besides public funds.** For instance, our voter's guide, which is among the best voters' guides in the country, could be put into an electronic version that would be posted on the Secretary of State's website. The guide could include links to candidates own campaign sites and to debates that are posted on-line. This would allow voters to quickly find candidate sites just prior to an election and check them for responses to any attacks that have been run at the last minute through independent expenditures. Perhaps an electronic voter's guide could also link to the electronic disclosure reports of all independent expenditure campaigns that have targeted any given race. It is possible that the Secretary of State could pursue this reform without further legislative action if funding could be found to convert the existing voters' guides to electronic versions.

10) **California should encourage true grassroots independent expenditures.** Technology is closing the gap between what wealthy citizens can do and what the rest of us can do to promote our political opinions. Increasingly, citizens can make their individual voices heard through creating their own leaflets, buttons, bumper stickers, blogs, websites, YouTube videos, personal networking sites, etc. The FPPC should take care that its regulations do not ensnare or unduly burden regular citizens who are attempting to raise their voice and neither spending large amounts of their own funds nor receiving large amounts from others. These activities fuel the marketplace of ideas rather than seek to distort or bypass it.

[i] *Sacramento Bee* editorial, March 2, 2002.