V. THE RESURGENCE RECEDES, PART I

Money & Morals

The resurgence regime was both extraordinarily ambitious and, it appeared, quite successful. Richard Nixon himself wrote in 1990 that, "in view of all these restraints, the periodic talk about the 'imperial Presidency' is ludicrous." Some complained the "imperial" presidency was now "imperiled" (President Ford's claim), or "impossible," or, at best, "tethered."[1]

But in retrospect these claims were overblown. Some parts of the broad statutory framework put in place in the 1970s had holes from the outset that grew, and grew more obvious, over time. The War Powers Resolution (WPR) is a good example. Other parts were lacerated by third parties—as with the Supreme Court's *Buckley v. Valeo* decision regarding campaign finance. Ronald Reagan's aggressive use of executive tools, adopted by his successors as well, frayed yet other elements. And Congress itself backed away from using the tools it had created to challenge the president—or failed to make them work. By the mid-1990s, even in the face of a new Republican majority in both chambers of Congress, journalists could write angrily of an "out-of-control presidency." President Clinton might have had his troubles, Michael Lind suggested, but "the presidency is still on top. . . . Like a black hole, the presidency grows by absorbing ever more power and light."[2]

To be sure, not every piece of the regime crumbled at once or for all time. The Iran-contra scandal gave rise to endless investigation and calls for congressional action. The end of the cold war in the early 1990s emboldened some legislators to press for a "peace dividend" and to become more activist in foreign affairs—for if no external threat existed (or seemed to), then politics no longer needed to stop at the water's edge. And, most obviously, the impeachment and trial of Bill Clinton in 1998–99 were the first since 1868 and the first ever of an elected president. It seems strange to talk about congressional deference in that context.

Still, even this period in the late 1990s highlighted the presumed unilateral powers of the president and renewed legislative acquiescence to their use. "Clinton Perfects the Art of Go-Alone Governing" read one 1998 headline. That summer, cruise missiles were fired at the Sudan and Afghanistan at the president's order even as the House debated his fate. Clinton's success in achieving his preferred policy outcomes in this period by taking advantage of the congressional budget process and his veto power is also notable. Further, the fervent partisanship that motivated the impeachment—in spite of hostile public opinion and even hostile midterm election returns—helped to discredit it and undercut the independent counsel process.[3]

By the time George W. Bush took office in January 2001, the "resurgence regime" was on its last legs. Across the board, the laws passed to reshape executive-legislative relations in the 1970s had failed to channel those relations in the manner foreseen by their framers. Part of the problem was that legislation proved an inadequate substitute for concerted political will. Further, "efforts to check presidential power through legislative restrictions often have had the counterproductive effect of legitimizing the very powers that Congress has tried to limit."[4] That is, by providing a process, however constrained, for exercising power, legislators have formalized presidential authority, giving presidents a statutory foothold where they previously had inserted themselves mainly by force of will.

This chapter and the next trace this renewed expansion of presidential power, dividing between them the topic areas traced in earlier chapters. This chapter examines the ongoing battles of the budget and the developments in campaign finance and ethics laws. Chapter 6, in turn, looks at broader claims of executive authority in both war and peace. Claims spurred directly by the terrorist attacks of September 11, 2001, and the responses to those attacks receive separate treatment in chapter 7.

THE BATTLE OF THE BUDGET: THE RISE, FALL, & RISE OF THE "ROSY SCENARIO"

The Congressional Budget and Impoundment Control Acts provided a framework rather than guaranteed a result. Congress was as free to let presidents dominate the budget process after the acts as before them, but it had new resources—the Budget Committees, the Congressional Budget Office (CBO), the reconciliation process—that allowed it to drive that process in collectively beneficial ways.

In the 1970s, as noted earlier, Congress largely accepted the responsibility the new process implied. Such a development was rather impressive, given that both institutional and individual incentives frequently ran in the other direction, toward piecemeal strategies. Even after the Congressional Budget Act (CBA) was passed, there was no collective enforcement mechanism save moral suasion and party discipline to stick to budget resolution targets—and even that resolution could be overturned by a later one at any time in the fiscal year. Rather than wipe out the existing process, after all, the CBA "layered over" it with the new committees and deadlines, meaning that many different power centers within the legislature retained the ability to balk at fiscal demands. Further, members could easily vote for increased spending, then vote against the budget as a whole on the grounds of its fiscal profligacy, selling both votes to different groups of interested constituents. By consolidating a variety of decisions, the new process made any given vote more consequential and thus harder to build a majority around. Despite all this, Allen Schick could observe in 1980 that, "considering the temptation to 'cheap shot' the budget process, Members have engaged in remarkably little of this practice."[5]

A New Age of Deficit Politics: 1981–98

During the 1980s, though, events outpaced that assessment. Members would soon fail to resist temptation. They would be led there by new president Ronald Reagan. But they would stay there of their own volition.

Ronald Reagan took office in January 1981 after a surprisingly large victory over incumbent Jimmy Carter. Much of his appeal to voters centered around economic circumstance: "Are you better off than you were four years ago?" his campaign had asked. For many Americans, continuing inflation, unemployment, and high interest rates (thirty-year mortgages topped 15 percent in early 1980) meant the answer was "no." Further, in the face of the lengthy Iranian hostage crisis and the Soviet invasion of Afghanistan, Reagan urged that American military might and credibility abroad be restored. Domestically, he argued, "government is not the solution to our problem, government is the problem."

The Reagan platform was correspondingly concise: it promised tax cuts, increased defense spending (to achieve "peace through strength"), and big cuts in other programs. The Program for Economic Recovery, presented in February 1981, was to rein in deficit spending through some $50 billion in on- and off-budget savings, a renewed attack on "waste and fraud" to save $25 billion more, a 10 percent reduction in individual tax rates for each of the next three years, fewer regulations, and lowered taxes on investments. The approach assumed that lowered tax rates would lead to an increase in investment and productivity that would generate *increased* tax revenues.

Congress proved willing to buy that assumption, though it had doubters among Congress, the public (polls showed that adding to the deficit was a greater concern than tax rates), and even the White House (including OMB director David Stockman and, presumably, Vice President Bush, who had derided the plan as "voodoo economics" before being added to the ticket). An impassioned televised speech by Reagan in late July helped put pressure on Congress; members received hundreds of calls, telegrams, and letters supporting the plan. Reagan bargained aggressively with holdout legislators, promising not to campaign against Democrats who voted with him and offering substantive district-based concessions. He took full advantage of members' willingness to duck: House Ways and Means chair Dan Rostenkowski (D-IL) discovered that "liberal Democrats . . . preferred to let the president win and be held responsible." Ultimately, the Economic Recovery Tax Act (ERTA) of 1981 contained most of what Reagan had sought.[6]

On the spending side, Reagan showed how the presidency could take advantage of the 1974 budget process. Using a strategy developed by Stockman and the Senate Budget Committee, Reagan was able to force a single up-or-down vote on a wide array of cuts that probably could not have survived individual votes. The trick was to use the reconciliation process called for by the CBA not at the end of the budgeting cycle but at the start. Thus, instead of using it to force recalcitrant committees to come to terms after disagreement, the Reagan reconciliation proposal bound those committees from the beginning to making cuts they would otherwise have shirked. It required congressmen to take just one tough vote instead of dozens. And it had the further advantage of procedural protection: by rule, the reconciliation bill could only be debated for fifty hours in the Senate and could only be amended by proposals deemed germane to the budget.

As Stockman put it later, the budget was based on a "rosy scenario" of future revenues and present-day cuts. As such it represented a clear test of presidential power. "The Gramm-Latta [reconciliation bill] and the Reagan Revolution had all along required . . . one thing: surrender," Stockman recalled. "The Congress had to forfeit its independence and accept the role of a rubber-stamping parliament if the whole plan was to work." Majority Leader Jim Wright (D-TX) agreed: Reagan was trying to "dictate every last scintilla, every last phrase" of the budget. But members seemed happy enough to take dictation. Allowing the executive to take control was comforting and good politics to boot, especially after Reagan took to the airwaves that spring. Riding a wave of good feeling after his courageous response to an attempted assassination, Reagan made his budget not only an institutional referendum but a personal one. As the constituent calls and mail rolled in, minds changed; "they say they're voting for it because they're afraid," said Rep. Toby Moffett (D-CT). The House Rules Committee tried to break up the bill into several votes, but this effort was defeated on the floor. As Reagan correctly observed, the budget and tax wins together made up "the greatest political win in half a century."[7]

However impressive the political victory, the result of the 1981 votes was to rejoin deficit politics at a higher plane. Red ink was nothing new; it had underlain the impoundment debate, and between 1975 and 1980 annual shortfalls continued to range between $41 and $74 billion. Supply-side economics promised a new math that would cure structural imbalances. But the aftermath of ERTA proved that the old math still works: lower revenue plus higher spending equals bigger deficits. Much bigger deficits, in fact: from $79 billion in 1981 to $128 billion in 1982 to $208 billion in 1983. For the next decade deficits of at least $150 billion were standard fare, with the imbalance peaking (for the moment) at $290 billion in 1992, the last year of the first Bush administration. None of these figures included the IOUs written to the Social Security trust fund, which was in surplus pending the coming retirement of the baby boom generation but which had been spent to offset on-budget operating deficits.

At the same time, naturally, the aggregate of those annual deficits—the national debt—also grew rapidly. The gross debt doubled from $909 billion in 1980 to $1.8 trillion five years later to $3.2 trillion in 1990 to $5.4 trillion at the end of fiscal 1998. This meant that, in 1998 alone, $243 billion had to be put in the budget simply to pay interest on the debt.[8]

The debt figure gained special public salience, since it made for ready conversion to per capita figures and to conveniently shocking mathematical calculations. With a U.S. population of 260 million, for example, the debt in 1998 was about twenty thousand dollars per resident. A huge electronic billboard on New York's Avenue of the Americas informed passersby of the national debt at each moment, the figure's right-hand columns blurred from the rapidity of their additive motion—some ten thousand dollars per second.

Economists differ on whether an exactly balanced budget matters for economic performance. But the public had few such doubts, and elected officials took heed. "The deficit," wrote budgeting expert Aaron Wildavsky in the late 1980s, "has become both an obsession and a weapon." In the second presidential debate in 1992, that weapon was unsheathed; perhaps prompted by independent candidate H. Ross Perot's proselytizing on the deficit issue, an audience questioner used the national debt as a synonym for all economic woes. By April 1995 82 percent of respondents told the Gallup Poll that reducing the deficit was a "major concern," with just 3 percent indicating that it was of no concern. In House debate that year Rep. Gerald Solomon (R-NY) provided the appropriate rhetorical flourish. "Mr. Chairman," he cried, "this nation is at war!"[9]

During the 1980s Congress experimented with different ways to fight that war. The most direct method was to raise taxes; it is often forgotten that President Reagan signed tax increases in 1982, 1984, 1985, 1986, and 1987.[10] But all five together offset only about one-third of the cost to the Treasury of the 1981 tax cuts; while the 1986 law represented a major change in the tax code, it was designed to be largely revenue neutral. Further, effective in 1985 long-term revenues were additionally reduced by tying tax brackets to inflation and thus eliminating "bracket creep."

It was hardly surprising that Congress found raising taxes much harder than slashing them. A more attractive option was to implement mechanisms designed to force spending cuts. In 1985, for example, the Gramm-Rudman-Hollings legislation was passed. Gramm-Rudman (as it was usually called; Sen. Ernest Hollings [D-SC] good-naturedly accepted that everything had to be cut) made some changes to the budget process itself, but most attention focused on its deficit reduction procedures. It required that deficit targets be set each year, successively smaller until the budget was in balance. If the annual target was not met, the dollar figure needed to reach it would be set aside and cut, or "sequestered," from all programs not separately exempted from that process. A deficit of $171.9 billion was to be allowed for fiscal 1986, then $144 billion, and so on, until a zero deficit was achieved in 1991. Gramm-Rudman-Hollings II was passed in 1987 to delay the government's arrival in the black to fiscal 1993.[11]

This automatic process was supposed to deter political actors from avoiding hard choices over their collective priorities, since no one would see across-the-board cuts as a better solution. But the reaction instead was to come up with various accounting tricks that made the current year's deficit look better at the expense of future years, then annually repeating those tricks. If budget projections, however unrealistic, met the Gramm-Rudman targets, then the budget was in compliance, even if actual spending wildly outpaced the projections. The president still presented his budget first. So if he included fanciful assumptions about revenue or spending discipline, Congress had little incentive to come up with more honest ones, since it would appear that legislative action had increased the projected deficit and required painful cuts. Congressional autonomy was thus truncated, albeit by choice.[12]

Further limiting legislative power was the decision in Gramm-Rudman to give the power to make sequesters not to its own members but to OMB and the CBO—which were to determine when and where sequesters were required—and to the comptroller general at the GAO, who would certify those results and require the president to issue an order canceling the requisite spending. This authority was shifted out of the legislative branch altogether after the Supreme Court ruled in 1986 that a legislative employee (as at GAO) could not carry out the executive function of enforcing the laws.[13]

In 1990, as it became clear that Gramm-Rudman was not working and deficits were continuing to rise, President George H. W. Bush and legislative leaders agreed on the Budget Enforcement Act (BEA). The BEA cut spending but also raised taxes; Bush's gutsy acceptance of the latter in violation of a campaign pledge may have cost him reelection, a result that did not make members of Congress more willing to assume a real, rather than rhetorical, mantle of fiscal responsibility. More broadly, and crucial to longer-term budgeting, BEA set up new rules for dealing with the deficit. Replacing the Gramm-Rudman deficit targets would be spending caps, set well in advance in a number of different areas. Each area—generally, defense, nondefense, and entitlement spending—had to stay within its specified bounds or face sequesters on all accounts in that area. This discipline was backed up by another principle, "pay as you go" (PAYGO). Any new proposal or expansion of an old law was examined for its fiscal impact. If the proposal would cost money, its sponsor needed to identify a source of revenue or an offsetting reduction in spending. The massive 1993 Omnibus Budget Reconciliation Act in the first year of the Clinton administration renewed caps and PAYGO.

Some members scorned these types of procedures as "government by automatic pilot," as Rep. Henry Waxman (D-CA) put it in debate on Gramm-Rudman. "We are establishing a financial doomsday machine that will make our choices for us," he went on. "We are betraying [the public] trust by handing our jobs over to bureaucrats, triggers, and automatic decisions." The PAYGO rules also led to constrained choices over policy alternatives, since what one CBO staffer called "the balkanization of the budget" meant that discretionary and mandatory spending were walled off from each other during debate. Further, myopic obsession with how spending was "scored" by CBO replaced long-term thinking about what would actually constitute good public policy. On the whole, the various spending ceiling laws indicated a certain lack of confidence in Congress's ability to make good budget choices generally.[14]

Be that as it may, the automation of the process was no accident. The idea was to bind Congress to prevent it from action, as Odysseus bound himself to the mast in order to resist the Sirens' lovely song ("spend more, spend more"). As one member later put it: "Let us face it. . . . we in Congress cannot help ourselves." Another added, "the Congress as an institution has proven itself to be incapable of fiscal restraint when it polices itself."[15]

And, for all this, the fact that the "war" cited by Representative Solomon was ongoing as late as 1995 highlights the fact that the budget was still well out of balance. The actual deficit figure for fiscal 1986 was $221 billion; for fiscal 1993, $255 billion; and for fiscal 1995, down a bit, but still $164 billion.

One result was to seek other binding mechanisms. In 1995 the House passed a Balanced Budget Amendment to the Constitution, with the Senate falling just one vote short of the two-thirds majority needed to send it to the states for ratification. Meanwhile, legislators revisited the impoundment issue. Article I of the Constitution requires that the president sign or veto legislative measures in their entirety; but in his 1986 State of the Union address Reagan had renewed the old presidential call for a line-item veto. "I'll make the cuts, I'll take the heat," he boasted. As deficits continued to rise, lawmakers began to find this approach rather attractive, given its potential for shifting blame for the deficit onto the executive branch.

Much gnashing of legislative teeth ensued. As Sen. William Cohen (R-ME) argued, "We have reached the point of 'Stop us before we spend again!' The power of the purse . . . is a power we have abused too often, and too often, I might add, to the applause of our constituents. For too long, we have been rewarded for bringing home the bacon while condemning the presence and prevalence of trichinosis in Congress. We cannot continue to have it both ways." Only an item veto, he argued, would impose the needed discipline. House Minority Leader Bob Michel (R-IL) put it this way: if asked, "'Bob, why would you give up your legislative authority to an all-powerful chief executive?'" he suggested his response would be simple: "Because we have loused it up here in the Congress. That is why."[16]

Some members of Congress urged Presidents Reagan, Bush, and Clinton to claim an item veto even without legislative action; they argued that vetoing individual appropriations items might be inherent in the veto power. In 1993, for example, Sen. Arlen Specter (R-PA) said he believed "there is constitutional authority" for an item veto "without a constitutional amendment or without any other statutory authorization."[17] Successive attorneys general, however, advised their presidents that such authority was doubtful. And thus long debate ensued as to how to transfer it to the president. The extant rescission process, as chapter 4 noted, was simple enough: presidents proposed spending cuts, and if Congress voted to pass them they went into effect. A number of different approaches—ranging from simply requiring that Congress actually vote up or down the president's rescission requests to a procedure that would break up budget bills into thousands of "bill-ettes" that could be signed or vetoed—gained growing support during the first half of the 1990s.[18]

Passing item veto authority had been part of the 1994 Republican campaign platform, the "Contract with America," and the House passed it in February 1995—on Ronald Reagan's birthday. The Line-Item Veto Act of 1996 ultimately negotiated with the Senate provided the president with an "enhanced rescission" power that reversed the burden of action between the branches. That is, the president's proposed vetoes of specific spending or revenue items would go into effect unless Congress took affirmative action to stop them by passing a bill that reinstated the spending. That bill would, of course, itself be subject to presidential veto, requiring the constitutional two-thirds majority of each chamber to override. As a result, the president could make his rescissions contingent on the support of just one-third plus one member of either the House or the Senate.

President Clinton thus became the first president with legal item veto power—"the most significant delegation of authority by the Congress to the President since the Constitution was ratified," as Senate Appropriations chair Ted Stevens (R-AK), who supported the law, put it. After the law survived an initial court challenge, Clinton used the item veto to propose cancellation of some forty tax and budget items in August and October 1997. However, in June 1998 the Supreme Court ruled on a lawsuit brought by New York City, which had lost health-care funding through one of the Clinton vetoes. The Court held, in a vote of 6 to 3, that the item veto procedure was unconstitutional. The majority observed that the new law, as altered by the president, might well be a better law than the one first passed by Congress. But it was not the one passed by following the constitutional procedure dictating how a bill becomes a law.

Richard Nixon commented in 1990 that the item veto was "a surefire cheer line before conservative audiences" but felt sure "it will never happen. Congress will jump at the chance to curb the power of the executive but it will never limit its own power." Yet just the opposite proved true. The power of the purse was retained by Congress, but only because of the Court's decision—"not," as congressional scholar Louis Fisher sardonically commented, "because legislators were willing to defend their own institution."[19]

Surplus Politics: A Short Story

By fiscal 1998 the tax increases of 1990 and 1993 on the highest-income Americans had converged with an economic boom and stock market surge that brought those same Americans more income than ever. Revenues leaped, even as the PAYGO and cap rules kept spending increases relatively low. The result was a return to surplus in the year ending September 30, 1998—the first surplus in twenty-nine years.

The brief era of surplus politics proved little more responsible than that of deficit politics. President Clinton tried to seize the high ground by arguing that Social Security should be the first priority into which the new black ink should flow. Instead, in 1998 and 1999, the budget caps were broken by nearly $60 billion as legislators identified various "emergency spending" priorities as a way to evade spending limits. These "emergencies" ranged from provisions preventing Haitian refugees from attaining American citizenship to the authorization of new roads in Alaskan wildlife sanctuaries. Even the 2000 census, which one might understandably identify as a predictable cost, was deemed an emergency requiring uncapped funds. This charade ended when the caps themselves were allowed to expire in 2002.

The 2000 election was in part a referendum on how to spend the surplus—on the Social Security "lockbox" endorsed by Vice President Al Gore or on the tax cuts promised by Texas governor George W. Bush. With Bush's narrow victory, tax cuts became the first priority of 2001. A massive package estimated at $1.35 trillion but in fact certain to cost much more, given the accounting sleight of hand used in that calculation, was signed into law on June 7. Economic conditions rapidly worsened, and other tax revenues sank too with the end of the "dot-com" boom and the impact of the September 11 attacks. At the same time, spending rose, both for reasons related to 9/11 (such as homeland security and the war in Afghanistan) and not (such as the $250 billion farm bill passed in 2002). After a $313 billion projected surplus in fiscal 2001 withered to $127 billion, the fiscal 2002 deficit stood at $158 billion—a $285 billion turnaround in one year.

"Our Due": Deficit Spending, 2002–?

Two years later the federal deficit and national debt had reached record levels. The fiscal 2004 deficit was $412 billion, the largest federal deficit in history in nominal terms—and giving the inflation-adjusted record set at the height of World War II a run for its money, so to speak. Eight percent of the federal budget was already dedicated to the interest on the national debt, which leapfrogged the $7.5 trillion mark in 2004, requiring the statutory debt limit to be raised three times in three years. The $160 billion needed for annual debt service exceeded the amount spent by the federal government on education, homeland security, and law enforcement combined.[20]

In the face of these developments legislators nonetheless expressed little interest in exercising serious control over the power of the purse. President Bush's proposed fiscal 2005 budget was by the administration's own admission at least $360 billion out of balance. That proposal omitted spending for continuing military operations in Iraq or Afghanistan, then running at some $5 billion per month; by January 2005 the projected deficit topped $425 billion. Further, additional large costs loomed on the horizon. Needed reform of the Alternative Minimum Tax would add another half trillion dollars to the bottom line over the next decade. Entitlement reforms ensuring the solvency of Medicare and Social Security would cost tens of billions more. And wrangling over reauthorization of the nation's transportation programs was already under way. The new bill was expected to cost at least $250 billion over six years, funding thousands of loyal partisans' pet projects.[21]

By July 2003 more than three-quarters of those polled by Gallup rated the deficit as a "crisis" or "major problem" for the United States. As the salience of the deficit grew, the president repeatedly requested a return to the 1990s in the form of a new line-item veto that "passed Constitutional muster."[22] Some in Congress sought instead to reinstate that decade's PAYGO rules and budgetary caps. The idea, as then, was to require offsets or supermajority approval for legislation that increased the deficit, whether it added spending or subtracted revenue.

While the Senate temporarily approved such rules—targeting, most immediately, the extension of the tax cuts passed in 2001—the House, with strong presidential backing, refused to do so. Its version, though entitled the "Spending Control Act," placed caps only on new spending initiatives and not on new tax reductions. Since, as House Majority Leader Tom DeLay (R-TX) claimed, sufficient legislators still believed "as a matter of philosophy" that cutting taxes would create sufficient economic growth to make "revenues to the government grow," tax cuts should not be considered as foregone revenue and thus as a net cost to the budget. As a result, administration assertions that the deficit would be halved within five years—a projection that curtailed the usual ten-year projection so as to avoid including rapidly increasing entitlement costs and the likely costs of extending the 2001 tax cuts past 2010—were left largely unchallenged. Even the revelation that a $400 billion expansion of Medicare's prescription drug program, passed only after immense pressure from the president and House leadership, would actually cost hundreds of billions more aroused more sputtering than substantive response. As the 2004 election approached, the Senate gave up its argument for the PAYGO rules in order to pass a $146 billion extension of the most popular elements of the 2001 tax package, adding it directly to the deficit. Legislators also approved another law spreading $137 billion in corporate tax breaks to industries ranging from Chinese ceiling-fan producers (at a time of record trade deficits) to energy companies (at a time of record oil prices). The presidential campaign, while paying verbal homage to fiscal discipline and PAYGO rules, nonetheless spurred calls for new spending on the military, education, health care, border protection, and Social Security.[23]

All this could be justified, politically if not substantively. For those whose math skills were not dulled by DeLay's supply-side elixir, Vice

President Dick Cheney provided the more pragmatic medicine. "Reagan proved deficits don't matter," he told the cabinet in pressing for the 2003 round of tax cuts. "This is our due."[24] Congress was happy to ask future generations to pay the tab.

Budget Endgames & Presidential Power: Is the Budget Process "Dead"?

Deficits do not themselves represent evidence of a shift in the balance of power between the branches; after all, Congress might want to run a deficit over presidential objections, or the two might agree that a deficit is necessary. But as the item veto debate indicates, Congress has been eager to shift power, and thus blame, down Pennsylvania Avenue. Nor did the rest of the budgetary portion of the resurgence regime fare much better. The litmus test is simple—and disturbing: Congress failed most years to pass a budget on time. And after 1999 it never kept spending below the level mandated by its own budget resolution, when it could pass such a resolution at all.

Beginning in fiscal 1990 and continuing through fiscal 2005, Congress managed only twice to enact all the appropriations bills used to fund the federal government by the start of the new fiscal year on October 1. More common is the example of fiscal 1999, when just one of the requisite thirteen bills was passed on schedule and six "continuing resolutions" carrying over government funding into the new year had to be passed in order to buy time to finalize the budget on November 21. In fiscal 2001 it took twenty-one continuing resolutions. In fiscal 2003 the last appropriations bill was not passed until February 3, 2003—a full third of the way into the fiscal year. The delays and, to a lesser extent, the size of the deficit were blamed largely on partisan gridlock between the Republican House and the Democratic Senate. But in fiscal 2004—despite the return of unified government to Capitol Hill after the 2002 midterm elections—only three of thirteen appropriations measures were passed on time, and continuing resolutions once again carried government spending well into January 2004. In fiscal 2005 no budget resolution was ever passed to guide spending, and just one appropriations bill was approved by October 1. The lame-duck session this necessitated meant, as *Congressional Quarterly* dispassionately reported, that "Decisions on spending for all but two Cabinet departments, dozens of agencies, scores of policy initiatives and literally thousands of projects for lawmakers' states and districts were made behind closed doors. The public was not invited, nor were rank-and-file lawmakers." Indeed, most members of Congress never even read the thirty-three hundred page final budget bill.[25]

"Government by continuing resolution" hampers long-term planning and the efficient allocation of resources. Most crucially for this narrative, late budgets—and the continuing resolutions they make necessary—increase presidential bargaining leverage. When the president's veto can not only threaten spending priorities but force the government to shut down, legislative negotiators have reason to give him more of what he wants. This point was cemented in congressional memory in 1995–96, when President Clinton vetoed a series of spending bills: for six days in November and for twenty-two days over Christmas, much of the government closed. Clinton won the battle of the blame, successfully tagging majority Republicans as extremist and obstructionist, aided by pictures of forlorn tourists turned away from museums and passport offices. Fourteen continuing resolutions were eventually negotiated, and the final budget was not in place until April 1996. That Clinton won by standing firm was not lost on either presidents or legislators.[26]

Delayed appropriations bills generally wind up aggregating into massive omnibus bills. This usually means higher spending, as coalitions are built by incorporating various members' items of local interest into the final budget. Indeed, as the Clinton years ended, Congress found itself unable to hold to the discipline of the budget resolution: in fiscal 1999 the final amount appropriated was some $36 billion above the resolution ceiling—in 2000 it was $40 billion. That these final figures were quite close to Clinton's own spending recommendations suggests another area of presidential advantage: with late, omnibus legislation, astute veto bargaining can gain a great deal of ground.[27] Clinton used his to extract additional funding for education, health care, child care, the International Monetary Fund, and other priorities. As one journalist observed, the Republicans grew "tired of losing endgame battles with Clinton. . . . He has again and again proved adroit at using his veto pen as a weapon to dominate the final act." Indeed, Clinton was so successful that even item veto fan Arlen Specter was driven to complain in 2000 of "a dictatorial system of the president saying what is acceptable, and the Congress being held hostage in effect, concerned about being blamed for shutting down the government."[28]

If Clinton is a good example of what a president can do in a case of divided government, George W. Bush shows how much power a president overseeing a disciplined government of his own party can have. In 2001, for example, Congress replicated the early reconciliation of the Reagan years by agreeing to vote on the Bush tax plan even before that year's budget resolution, with its spending and revenue guidelines, had been adopted. Additional tax cuts followed in 2002, 2003, and 2004, even as the deficit swelled. Bush's mastery of Congress was such that the administration managed to dictate its priorities into the final conference committee report for the fiscal 2004 budget—deleting sections limiting administrative discretion regarding rules on overtime compensation and media ownership (though each measure had been passed by both House and Senate), while including a school voucher program and an anti–gun control provision (which had not). In fiscal 2005, likewise, Bush was able to pressure Congress to drop a number of policy provisions from the $388 billion omnibus budget report encompassing what should have been nine separate appropriations bills. With the bill so late and stakes so high, legislators lost their bargaining leverage and their power over the purse. "[I]f there's veto-bait, we've got to make sure that the administration is happy," said one GOP aide. In the end, Congress chose to cut that bait: Bush became the first president since John Quincy Adams not to issue a single veto during a full term in office. He didn't have to. As he asked the press corps, "How could you veto a series of appropriations bills if the Congress has done what you've asked them to do?"[29]

As early as November 2002 outgoing CBO director Dan Crippen summed up the situation bluntly: "the Congressional budget process is dead." The beneficiary, he argued, was the president, for "without this kind of process . . . the Congress is going to be dominated by any President." Unless legislators had the discipline to pass and enforce a budget resolution, it would be "very difficult to forward any particular appropriations bill contrary to what the President wants," given the importance of the president's veto threat in the absence of a plausible congressional alternative. Further, Crippen suggested, the budget process had attenuated authorizing committees' relationship with the programs they oversaw by giving more power to the appropriating committees and the overall budget overseers. This led to reduced legislative oversight of the departments—which also enhanced presidential power over policy implementation.

As a result, "the President's budget is the only game in town [and] the President's veto is the only power in town when it comes to budgetary decisions," Crippen concluded. Congress needed "again to grab back some of that budgetary power." But until it did, "the Congress has given up, I think, a large measure of what it had grabbed back from President Nixon."[30]

ETHICS

In the fall of 1997, 59 percent of those polled by the Pew Research Center said their view of the federal government was mostly or very unfavorable. Asked whether they "basically trusted" Washington, 57 percent said "no." A grand total of 2 percent—a figure statistically indistinguishable from zero—said they trusted the federal government to "do what is right . . . just about all of the time"; 62 percent preferred the choices "only sometimes" or "never."

Despite the emphasis placed in the resurgence regime on restoring legitimacy to government and enhancing public trust in its workings, these numbers were typical. Indeed, they were marginally better than other such polls taken throughout the 1990s. In 1964, 62 percent said they trusted the federal government to do the right thing "most of the time"—in 1994, that figure was just 19 percent. The change in administrations didn't change these attitudes much: in July 2001 just 25 percent answered "most of the time" to the same question, with the "only sometimes" or "never" respondents making up 70 percent of the total.[31]

If these figures seemed bleak, well, "Welcome to American politics after Watergate," as Suzanne Garment put it in her 1992 book, *Scandal.* Garment mapped a governance landscape shaped by "the unprecedented numbers of public scandals that have erupted in national politics over the past 15 years."[32] Even if—as seems likely—the actual scale of dubious behavior by political actors had not increased over that time, its salience was vastly enhanced. This was thanks in part to a fragmented and aggressively competitive media industry. But the changes to the ethics legal regime after Watergate, criminalizing once-routine behavior and adding immensely to the public scrutiny paid elected officials, also made scandal and investigation a routine part of national politics. Trying to elevate ethics above the political plane, ironically, ensured that they would be increasingly politicized.

Though a vast array of ethics laws and regulations was put in place after Watergate, including expansions of the EGA,[33] the discussion here will center on the aspects most noteworthy for presidential behavior: the independent counsel and campaign finance laws detailed in chapter 4.

The End of the Independent Counsel

By the late 1980s the earlier consensus around the utility and impartial nature of independent counsel investigations threatened to crumble. The immense Iran-contra investigation led by independent counsel Lawrence Walsh cost nearly $50 million over seven years; produced a three-volume, twenty-four-hundred-page final report; and brought charges against fourteen defendants reaching into the upper ranks of the cabinet.

The context of the policy choices that spawned the Iran-contra operations is reserved for the next chapter. But the crux of the investigation revolved around the complex deal constructed by NSC staffers to sell American antiaircraft missiles to Iran in order to facilitate the release of American hostages held by terrorist groups in the Middle East. The profits from the arms sale were then diverted to Central America to support the contra rebels seeking to overthrow the left-wing Sandinista government of Nicaragua.

Almost all of this was either explicitly illegal or counter to stated American policy, or both. Iran, which had held American diplomats hostage for over a year starting in 1979, was specifically barred from receiving American weaponry by State Department embargo and perhaps (interpretations varied) the Arms Export Control Act. Indeed, the United States largely supported Iraq and its new dictator, Saddam Hussein, in the brutal Iran-Iraq war of the 1980s. The Reagan administration, starting with the president himself, repeatedly argued that "America will never make concessions to terrorists—to do so would only invite more terrorism." Reagan was right: by the end of the arms transfers, the three American hostages in the region released had been replaced by three others and another hostage had been murdered.[34]

The other side of the scandal violated specific congressional prohibitions on aid to the contra rebels. Further, in channeling some $18 million from the Iran arms sales away from the Treasury and direct to Nicaragua, and in soliciting millions more in private donations for contra support, NSC and CIA staff violated the clear constitutional demand that all money spent by the government be appropriated by Congress. Nor (as discussed in chapter 6) was Congress notified of the covert action, despite the strictures of the Intelligence Oversight Act.

No criminal charges were brought against President Reagan himself. Nor did Congress seriously consider direct disciplinary action against him. However, six Reagan staffers, CIA officers, and professional fund-raisers pled guilty to charges such as fraud and perjury. Five others, including national security adviser John Poindexter and NSC staffer Oliver North, were convicted of conspiracy, obstruction, and theft of government property. The Poindexter and North convictions were overturned when higher courts found the verdicts had been tainted by the defendants' congressional testimony, for which they had been granted immunity; three other trials were preempted by presidential pardon or the administration's refusal to release classified information. But most Americans shared Walsh's view that the president's men "skirted the law, some of them broke the law, and almost all of them tried to cover up the President's willful activities."[35]

Still, as the investigation spiraled up and around the executive branch, Republicans soured on Walsh and the Independent Counsel Act (ICA). The first President Bush blamed his reelection defeat partly on the continuing investigation, which periodically raised suspicions that the then vice president had been "in the loop" as the contra plans were hatched. Most notably, diary notes long concealed by Caspar Weinberger and released by Walsh in October 1992 suggested that Bush had participated in a key 1986 meeting concerning the arms-for-hostages exchange. As a bitter parting shot at Walsh, Bush pardoned Weinberger and five others on Christmas Eve in 1992. In the pardons' wake, Senate Minority Leader Bob Dole (R-KS) accused Walsh of a "partisan crusade" and attacked him as a "persecutor, not a prosecutor." Reagan attorney general Edwin Meese said Walsh's final report was "an unconscionable act of deception intended to cover up Walsh's own unethical and illegal conduct, divert attention from Walsh's years of prosecutorial incompetence, and abuse and smear the Reagan Administration." Even more neutral observers gently suggested that, "by the time it concluded, Walsh's probe offered a primer on the ills of the law—undue length, unwise prosecutions, excessive zeal on the part of the prosecutors."[36]

Up to that point, Republicans had been the overwhelming targets of independent counsel investigations, for the simple reason that the GOP had controlled the presidency for all but four years since Watergate. Still, it was hard to argue that Iran-contra had not involved serious crimes or that no investigation had been needed. Nor was Walsh himself, as a retired Nixon appointee and lifelong Republican, a noncredible accuser. Nonetheless, the ICA was allowed to expire for a time in 1992 as Republicans angry at Walsh refused to support its extension. Documents in the George H. W. Bush Library suggest that the president was prepared to veto any renewal act that came to his desk. "Independent counsels under the act are, for all practical purposes, completely unaccountable in their exercise of prosecutorial power," the Justice Department concluded in a draft veto message circulated at the White House. Fiscal controls, the department argued, were likewise lacking. And, in any case, "history demonstrates that the Department of Justice is fully capable of performing this function."[37]

But soon the GOP changed its mind, as accusations arose concerning Commerce Secretary Ron Brown's financial dealings and, more tantalizingly, President Clinton himself. Clinton and his wife, Hillary, had invested some $70,000 in an Ozark real estate development called Whitewater starting in the late 1970s, winding up $40,000 in the red on the deal. Their partner in this venture, James McDougal, ran a savings and loan institution that failed in the 1980s S&L collapse, at a cost to taxpayers of some $49 million. Media organizations queried whether the bank had been sufficiently regulated, with attention focusing on the Resolution Trust Corporation (which looked at bankrupt savings and loans), on Hillary Clinton's legal work for the bank (the records for which vanished but then oddly reappeared in the White House residence), and on a loan to McDougal's wife, Susan. With vague but persistent Whitewater allegations making constant headlines in the fall of

1993, President Clinton was pressured to announce support for renewing the ICA. And even before the act was reauthorized in June 1994, Attorney General Janet Reno appointed a special prosecutor to begin moving forward.[38]

An array of independent counsels would soon litter the 1990s political landscape. Five Clinton cabinet officials, among others, were investigated. Brown was killed in a plane crash in Croatia, short-circuiting the probe into his business dealings; but the inquiry into allegations that Agriculture Secretary Mike Espy took bribes from Tyson Foods dragged on for four years and cost $23 million before he was acquitted on thirty counts by a federal jury in late 1998. Housing and Urban Development Secretary Henry Cisneros was investigated on charges that he lied to the FBI in his background check about payments to a former mistress. More than four years after independent counsel David Barrett took the case in May 1995, Cisneros pled guilty to a misdemeanor and paid a fine. No charges were brought after additional investigations of Interior Secretary Bruce Babbitt or Labor Secretary Alexis Herman. The huge expenditure of resource and reputation these probes represented led many Democrats to turn against the independent counsel process.

But it was the Whitewater investigation that eventually swelled into the biggest political scandal since Watergate, threatening to swallow up the president and succeeding in swallowing up the ICA. With the reauthorization of the act in 1994, Attorney General Reno had requested the Special Division to appoint a counsel. Rather than keep Reno's original appointee, Robert Fiske, on the job, the panel chose former solicitor general Kenneth Starr. White House counsel Bernard Nussbaum proved prescient in predicting that the new ICA would be "a roving searchlight,"[39] for Starr's investigation would encompass not just Whitewater but "Fostergate," "Travelgate," "Filegate," and eventually "Monicagate." That is, it included exploration of the conspiracy theory holding that White House staffer Vince Foster's suicide was a cover for his murder by the Clintons; of the firing of White House Travel Office employees in 1993; and of the acquisition by White House staffers of confidential FBI files concerning prominent Republicans, raising shades of the Nixon "enemies list." In each of these, the president was cleared of personal wrongdoing; but not so in the intensely personal case of Monica Lewinsky. Clinton's affair with Lewinsky beginning in late 1995 became tangled in his defense against a sexual harassment civil suit brought by former Arkansas state employee Paula Jones. In a deposition Clinton denied any relationship with Lewinsky. Later he allegedly sought to have Lewinsky lie about their affair. These actions ultimately led to his impeachment by the House on near-perfect party lines. Clinton's ordeal ended only when he was acquitted in the Senate, which did not muster even a majority on either article of impeachment.

The path to that point requires more explication than space here allows.[40] But along the way, the Starr investigation became nearly as reviled as Clinton's behavior. As a Reagan judicial appointee, Starr had solidly partisan credentials. During his investigations he continued to work for outside clients (some clearly linked to anti-Clinton organizations), earning over $1 million in 1997 from his private law firm. Pre-Lewinsky, he even offered professional advice to Paula Jones's legal team.[41] The decision of the House to pursue impeachment despite clear public opinion against that course—the votes were taken in lame duck session, after the extraordinarily rare gain of seats by the president's party in the 1998 midterm election—led to still further charges of rabid partisanship against Clinton's pursuers.

Clearly the ICA had not ended executive corruption; but nor had it done a particularly good job in investigating it. Many became newly sympathetic to Justice Scalia's dissent in *Morrison v. Olson* suggesting that the structure of the statute made it a better tool for political vitriol than for impartial, accountable law enforcement. The ICA was faulted for its cost, its scope, and its zeal. The Clinton administration investigations alone cost some $100 million, more than half of it for the Whitewater (et al.) investigation, which ran through four independent counsels before finally closing down in March 2004. At the same time, nearly five years after the expiration of the ICA, the long-defunct Cisneros case was still costing taxpayers $1.6 million per year. It was clear that independent counsels had few constraints against digging deep into even unpromising prosecutorial seams. Indeed, their incentives ran the other way. As *Morrison v. Olson*'s Ted Olson put it, "If you are given a fishing license which has the name of the fish on it, and you don't come back with that fish, you've failed."[42]

In a long letter to the House Judiciary subcommittee considering reauthorization of the ICA, the Justice Department concluded in April 1999 that "public confidence has not been materially enhanced by the process set out in the Independent Counsel Act. . . . The decisions of whether and when to turn to an outside Special Counsel to handle a matter is one that is best left to the discretion of the Attorney General."[43] These outcomes were in plain contradiction to the expectations of the statute's framers. And later that year, the statute was allowed to expire. The circle had come full.

The Best President Money Can Buy?

"The [campaign finance reform] system we created in the 1970s essentially collapsed" in 1996, concluded the political scientist Anthony Corrado after that year's election. Five years later, Sen. Zell Miller (D-GA) came to the same conclusion, albeit more colorfully. After a day of fund-raising calls, he wrote, "I always left that room feeling like a cheap prostitute who'd had a busy day."[44]

How had the hopes of campaign finance reform slid so far so fast?

The first push came quickly. The 1974 Federal Election Campaign Act (FECA) amendments were immediately challenged in court, and by January 1976 the Supreme Court's landmark ruling in *Buckley v. Valeo* had reshaped the regulatory landscape. To attack corruption was a legitimate goal, the Court held, and thus some constraints could be placed on campaigns and campaigners. Most notably, contributions could be limited (unless they were to one's own campaign, since presumably that sort of donation could not make one more corrupt than one already was). Spending on presidential campaigns could also be limited—so long as candidates for the presidency opted into the new system of federal financing. However, most of the other spending limits were declared to be unconstitutional. To limit spending was to violate candidates' right to free speech, since the Court held that money used in campaigning was tantamount to speech. The majority opinion argued:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution, it is not

> the government but the people, individually as citizens and candidates and collectively as associations and political committees, who must retain control over the quantity and range of debate on public issues in a political campaign.[45]

Truncating spending would truncate that debate.

Since in the wake of *Buckley* spending continued to rise but individual contributions remained limited to one thousand dollars per election, funding from PACs became more appealing. An individual could give five thousand dollars to a PAC, which could give that much to a candidate, five times the limit otherwise. Thus the PAC population exploded, doubling by 1977 and expanding sixfold, to over four thousand, by 1990. In 1974 labor accounted for half of PAC spending; by 1984, with corporate interests catching on, labor's share had fallen below 20 percent. PAC influence was enhanced all the more by the rapidly increasing costs of campaigning, as television advertising became the communication of choice for candidates and as computer technology, pollsters, and consultants became standard features of professional campaigns. In 1960 federal candidates spent $14 million on advertising—thirty years later the figure was close to $1 billion.[46] Fund-raising took increasing amounts of candidates' time and energy.

Independent expenditures, supposedly unaffiliated with campaigns, also skyrocketed during this time. *Buckley v. Valeo* had held that so long as organizations pressing a cause did not use the so-called magic words (e.g., "vote for" or "vote against") advocating a candidate's election or defeat, they could spend whatever they wanted on political advertising. The famous "Willie Horton" ad from 1988 attacking Democratic candidate Michael Dukakis was run not by the Bush campaign but by the National Security Political Action Committee. The "Harry and Louise" ads opposing Clinton's 1993 health-care plan were run not by the RNC but by the Health Insurance Association of America. In 1996 the AFL-CIO spent $35 million on ads attacking the labor stands of Republican candidates.[47]

Perhaps unintentionally, the FEC soon opened up another source of funding. In 1978 it approved regulations that allowed donations to state political parties for "party building" expenditures to be regulated by state law, not by the federal government. Since most states had far looser limits on contributions than FECA did, hugely increased amounts of money could suddenly be given in the name of voter registration drives or for the purchase of buttons and bumper stickers. Building on this, new amendments to FECA in 1979 allowed state parties to support the campaign activities of federal candidates. Thus was born the "soft money" loophole. Money given to the state parties under state rules could now be spent in those states to promote presidential candidates, outside the federal "hard" caps on contributions. Until 1991 such "soft" donations did not even have to be disclosed.[48]

In 1988 the Dukakis campaign raised over $40 million in this manner, outpacing George H. W. Bush's Team 100 effort (named for those raising more than one hundred thousand dollars) more than two to one. By the 1996 election both parties had effectively co-opted this money for their national candidates. State parties funded "issue advocacy" advertisements, which were supposed to build the party by, coincidentally, promoting its presidential candidate. Bill Clinton, who had promised during the 1992 campaign to end soft money, proposed a new campaign finance law in 1993 that would have imposed voluntary spending caps in congressional races in return for free television time; this went nowhere. After the 1994 election proved disastrous for Democrats, Clinton instead became extraordinarily aggressive in raising soft money, hosting a series of White House coffees, movies, and overnight stays for big donors. A DNC pamphlet offered various options for those seeking presidential access: one hundred thousand dollars, for example, was worth a dinner invitation.[49]

Clinton was the beneficiary of $40 million worth of soft money ads starting in the fall of 1995 as he sought both to bolster his cause during the budget shutdown and to link his likely opponent, Sen. Bob Dole, to increasingly unpopular House Speaker Newt Gingrich. ("The Dole-Gingrich budget tried to cut Medicare $270 billion," intoned one ad, complete with grainy black-and-white footage of the two Republicans looking appropriately disdainful of senior citizens.) Given that they were scripted in the White House, it was hard to claim the ads constituted bottom-up party building by the state parties. "For all intents and purposes," wrote the *Washington Post,* "the DNC became an extension of the Clinton-Gore campaign, . . . effectively obliterating the spending cap." The White House itself proved an effective tool in the reelection campaign. Nor did the RNC follow a much different strategy, even though without the trappings of the presidency it was ultimately less successful. The parties between them spent $260 million in soft money in 1996.[50]

By 2000 that figure had nearly doubled to $495 million. And the overall amount of hard money spent on campaigns also spiraled ever upward: in 2000 and 2004 presidential candidate George W. Bush opted out of public financing and its spending limits altogether during his primary runs. This enabled him to spend over $90 million in the prenomination period of 2000. Just four years later he compiled an astonishing $263 million war chest for the primaries in 2004—primaries in which he was unopposed. This allowed ads attacking the presumptive Democratic nominee, Sen. John Kerry (D-MA), to begin running eight months before the general election. Indeed, Bush spent approximately $50 million on his campaign in March 2004 alone, more than $40 million of it on advertising. But Kerry also opted out of public financing in 2004 (as did Democratic rival Howard Dean), compounding the blow to the FECA regime in the name of staying competitive with the president's reelection effort. Kerry himself raised $236 million—by far a new Democratic record—in the preconvention period. Thus the candidates combined collected nearly half a billion dollars, not including party spending or factoring in another $150 million in public financing for the general election. Recall that in 1972 the figure that so shocked observers was a combined total of $90 million.

The FEC, evenly divided between Democratic and Republican commissioners, usually stalemated, unable to take action when charges of campaign malfeasance arose. Sen. Mitch McConnell (R-KY), a strong opponent of campaign finance regulation, charged that FECA had, quite simply, created a "regulatory disaster—where grassroots volunteers have been replaced by lawyers and accountants, candidates break the law with impunity, and wealthy contributors feed millions of dollars through innumerable backdoor accounts."[51]

One response was the Bipartisan Campaign Reform Act (BCRA) of 2002, more popularly known as the McCain-Feingold Act, after its Senate sponsors. BCRA marked a major shift in the post-Watergate campaign finance regime. It banned soft money, or sought to. National parties and federal candidates could not solicit or spend funds that did not comply with federal contribution limits and source prohibitions; state parties could spend only hard money on activities that affected federal elections. Further, contribution caps were adjusted upward: these were doubled to two thousand dollars per candidate per election and thereafter tied to inflation. Under the so-called millionaire's amendment, if a candidate faced an opponent financing his or her own campaign and spending over a certain amount, contribution caps could be dramatically higher.

Controversially, BCRA also cracked down on independent expenditures. All ads aired within a month of a primary election or two months of a general election that mentioned a federal candidate were deemed to be devoted not to issues but to getting that candidate into or out of office. Only hard money could be used to pay for such ads: this meant that issue advocacy groups could not run them unless their funding was disclosed and from sources allowed by federal law (i.e., not union or corporate treasuries).

Unimpressed by these changes, Senator McConnell was among the first to sue. But when the Supreme Court ruled on the matter in December 2003, it surprised many by largely upholding the law, including the First Amendment implications of the issue ad ban (the "magic words" test, held the Court, "is functionally meaningless," finding that the ads in question were clearly designed to influence election outcomes). By a 5–4 vote, the Court held that soft money indebted officeholders even if no obvious trade of money for policy—à la the "milk money" scandal—was enacted. A visible quid pro quo standard, the majority held, was a "crabbed view of corruption, and particularly of the appearance of corruption" that ignored "common sense, and the realities of political fundraising. . . . The best means of prevention is to identify and to remove the temptation."[52]

Yet, even before the ink was dry on the Court's opinion, candidates had devised ways of undercutting the soft money ban. The political parties—long shorn of their monopoly over nominations, now seemingly denied much of their ability to fund campaigns—found themselves handicapped, unable to sanction or reward candidates aligned with their collective philosophy and thus unable to plausibly bridge the chasm between Congress and White House. They sought, with some success, to raise new hard money, using Internet appeals and sophisticated market research technology. But important new players arose too—most notably the so-called 527 committees, named after their designation in the Internal Revenue Code. Independent of parties and candidates and not subject to rules of transparency or disclosure, 527 groups sprang up during 2003 and began collecting soft money in large amounts to be used for voter registration and "education" drives as well as for advertisements. The FEC declined to regulate these groups, at least for 2004, angering proponents of the new law and laying the groundwork for what the RNC chair called a "free-for-all."[53]

Further, while the 1972 ITT scandal helped prompt public financing of the national party conventions, by 2000 the DNC had raised more than $35 million in private donations to support its convention activities in Los Angeles. In 2004 the Republican party raised more than double that. In both cases funds came largely from corporate interests that could not otherwise have legally made sizable contributions to the parties.

In 2000, scholars concluded, "the financing of the 2000 elections bore a greater resemblance to campaign funding prior to the passage of the FECA than to the patterns that were supposed to prevail after it." The same could be said for the 2004 campaign. As the Court itself admitted in *McConnell:* "We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet."[54] By the time the Court wrote, it already had.