Memo

To: Commissioners

From: Wayne Barnett

Date: November 22, 2010

Re: Contribution limit

The Elections Code charges the Executive Director with reviewing "the costs of campaigning," and recommending whether or not the Elections Code's contribution limits should be adjusted. SMC 2.04.060.L.

I recommend that the Commission refrain from proposing an increase in the contribution limit. There is simply no evidence that the contribution limit is impeding candidates' efforts to effectively advocate for their election. While there is certainly some danger that independent spending will drown out the voices of candidates, that threat would not be significantly diminished by a $50 or even a $100 increase in the contribution limit.

This memorandum discusses the legal framework in which the City must operate when establishing contribution limits, and then moves on to discuss the costs of campaigning before laying out the choices available to the Commission.

Legal Framework

In the Federal Election Campaign Act of 1971, Congress established a $1,000 limit on contributions to candidates for federal office. In its defense of that limit in *Buckley v. Valeo*, 424 U.S. 1 (1976), the government and *amici* offered three justifications for the limits: stemming corruption or the appearance thereof, "mut[ing] the voices of affluent persons and groups in the election process and thereby…[ ]… equaliz[ing] the relative ability of all citizens to affect the outcome of elections," and putting "a brake on the skyrocketing cost of political campaigns and thereby… open[ing] the political system more widely to candidates without access to sources of large amounts of money." *Id.* at 25-26.

The Court relied solely on the first justification in upholding FECA's $1,000 limit. While it did not repudiate the other two justifications in its discussion of contribution limits, the Court in its later discussion of expenditure limitations, which it held unconstitutional, wrote that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 48-49. The Court also held unconstitutional Congress's effort to cap total campaign expenditures, finding no government interest in reducing the cost of political campaigns. *Id.* at 57. ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise.")

The Court in Buckley rejected the argument that the contribution limit was too low, writing that it had "no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 21. While indicating that it would defer to elected official's judgments on such matters, the Court did establish a floor, writing that "if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy," the Court would hold such limits unconstitutional.

To date, the Court has only found one contribution limit that violated this standard: the State of Vermont's. In 1997, Vermont voters had enacted a $400 contribution limit for candidates for statewide office. The Court in *Randall v. Sorrell*, 548 U.S. 230 (2006) found that limit unconstitutionally low, basing its ruling on five factors:

- Evidence that the limits would restrict the amount available for challengers to run competitive campaigns;
- The application of the limits to political parties as well as individuals;
- The fact that the Act counted volunteers' expenses as counting toward the contribution limit;
- The fact that the limits were not indexed to inflation; and
- The lack of evidence that corruption was a significantly more serious matter in Vermont than elsewhere.

Interestingly, the *Randall* Court focused its inquiry on whether the contribution limits were so low that they "magnif[ied] the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Id.* at ___. In other words, the Court viewed higher contribution limits as advantaging challengers, not incumbents.

Some factors to consider in determining the "cost of campaigning"

Seattle's contribution limit was indexed to inflation between 2001 and 2007, when the indexing provision sunset. In 2006, the contribution limit increased from $650 to $700 per election cycle. If the provision had not sunset, the contribution limit would have increased to $750 this year under the formula.

For other candidates for local office in Washington State, state law sets an $800 per election contribution limit. So a candidate who makes it through the primary to the general election can accept $1,600 from any person in an election cycle.

Per-seat spending for City Council campaigns was approximately $383,000 in 2007, when just under $1.914 million was spent on the five seats up for election that year. Six of the nine candidates on the general election ballot spent in excess of $200,000. In 2009, per-seat spending rose to $417,000, with just under $1.666 million spent on four City Council races. Interestingly, though, just two of the eight candidates on the general election ballot spent more than $200,000 on their campaigns.

Another factor that may be relevant to determining the cost of *effectively* campaigning is the fact that four of the six candidates elected in 2009 were outspent by their opponents. In 2007, not a single candidate who was outspent won their campaign, and in 2005 just one outspent candidate prevailed.

A final factor that may be relevant to determining the cost of *effectively* campaigning, especially in light of developments in the 2010 election cycle, is the increasing levels of independent spending. In Seattle, independent spending rose from $50,000 in 2005, to $100,000 in 2007, to $288,000 in 2009.

Choices

The City has three clear choices, the pros and cons of which I'll address in turn. The choices are:

- Leave the contribution limit untouched.
- Raise the contribution limit to $750 to reflect inflation.
- Raise the contribution limit to some other level.

1. Leave the contribution limit untouched

Pros: If it ain't broke, don't fix it. The current limit has proven effective at stemming corruption or the appearance thereof. And, as noted above, there is no evidence that the contribution limit posed a significant barrier to candidates for City office in 2009. The cost of running a competitive campaign in 2009 was arguably lower than it was in 2007, and even 2005, when the contribution limit was $650.

Cons: Independent spending increased six-fold between 2005 and 2009. If there is significant growth in independent spending between 2009 and 2011, candidates could have difficulties amassing the resources to effectively advocate for their candidacies in the face of such spending.

2. Raise the contribution limit to $750 to reflect inflation.

Pros: This option hedges against the danger that the contribution limit could deny candidates the opportunity to engage in effective advocacy, *if* independent spending plays a large role in the 2011 campaign cycle. It would also be consistent with the Court's decision in *Randall* to adjust the contribution limit for inflation.

Cons: There is no evidence that the $700 limit worked to any candidate's detriment in 2009.

3. Raise the contribution limit to some other level.

Pros: Even a $750 contribution limit would be insufficient to allow a candidate to effectively advocate for his or her election if independent spending on City races resembles independent spending at the local, state, and national level in 2010.

Cons: Increasing the contribution limit from $700 to $800 or more[1] could run the risk of creating the appearance of corruption.

[1] Increasing the contribution limit to more than $800 would require changing from an "election cycle" limit to an "election" limit, since the City's limit cannot exceed the State's limit.